STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS & REHABILITATION, CORCORAN STATE PRISON), Respondent.	Case No. SA-CE-1783-S PERB Decision No. 2156-S January 19, 2011

Appearances: Suzanne L. Branine, Staff Counsel, for California Correctional Peace Officers Association; State of California (Department of Personnel Administration) by Heather N. Bendinelli, Labor Relations Counsel, for State of California (Department of Corrections & Rehabilitation, Corcoran State Prison).

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Correctional Peace Officers Association (CCPOA) of a Board agent's partial dismissal (attached) of its unfair practice charge. The charge, as amended, alleged in relevant part that the State of California (Department of Corrections & Rehabilitation, Corcoran State Prison) (CDCR) violated the Ralph C. Dills Act (Dills Act)[1] by holding a meeting on December 8, 2008 at Corcoran State Prison during which the bidding status of certain newly created positions was decided. The charge further alleged that CDCR did not notify CCPOA Chapter President E. Chris Brady (Brady) of the meeting but acknowledged that other members of the chapter did attend the meeting. The Board agent

[1] The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

dismissed the allegation for failure to state a prima facie case that CDCR bypassed the exclusive representative.[2]

The Board has reviewed the partial dismissal and the record in light of CCPOA's appeal, CDCR's response, and the relevant law. Based on this review, the Board finds the Board agent's partial warning and partial dismissal letters to be a correct statement of the law and well-reasoned, and therefore adopts them as the decision of the Board itself, as supplemented by the discussion below.

DISCUSSION

On appeal, CCPOA does not challenge the Board agent's dismissal of the bypass allegation. Instead, CCPOA contends that the Board agent erred by not addressing the amended charge's interference and unilateral change allegations based on the December 8, 2008 meeting. For the following reasons, we find that these allegations, even when considered and treated as true, do not cure CCPOA's failure to state a prima facie case. (*Chula Vista Elementary School District* (2003) PERB Decision No. 1557.)

1. Interference with Brady's Rights

The amended charge alleged that CDCR interfered with Brady's rights as chapter president by failing to notify him of the December 8, 2008 meeting.[3] In order to establish a prima facie case of unlawful interference under Dills Act section 3519, subdivision (a), the

[2] On the same date, PERB's Office of the General Counsel issued a complaint that alleged interference, retaliation, refusal to bargain, and unlawful unilateral change by CDCR based on other events alleged in the amended charge.

[3] At various points in its appeal, CCPOA characterizes this allegation as "discrimination/retaliation." To establish a prima facie case of retaliation in violation of Dills Act section 3519, subdivision (a), CCPOA must show that CDCR took an adverse employment action against Brady. (*Newark Unified School District* (1991) PERB Decision No. 864; *Novato Unified School District* (1982) PERB Decision No. 210.) The amended charge alleged no facts to establish that Brady's lack of prior notice of the December 8, 2008 meeting had an adverse impact on his employment.

charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under the Dills Act. (*State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S, citing *Carlsbad Unified School District* (1979) PERB Decision No. 89.) The amended charge established that officers of the Corcoran CCPOA chapter attended the December 8, 2008 meeting. Thus, although CDCR may not have notified Brady directly, CDCR obviously notified the chapter of the meeting. The failure of other chapter officers or members to inform Brady of the meeting does not establish that CDCR's conduct tended to or did interfere with Brady's rights. (See *City & County of San Francisco* (2009) PERB Decision No. 2075-M [no prima facie case of an unfair practice by the employer when a union organizer failed to inform local union officials of the closure of an employee's grievance].) Accordingly, this allegation fails to establish a prima facie case of unlawful interference.

2. Interference with CCPOA's Rights

The amended charge alleged that CDCR interfered with CCPOA's right to choose its own representatives when Captain R. C. Garcia (Garcia) chose which CCPOA representatives would attend the December 8, 2008 meeting. The standard for establishing interference with an employee organization's rights under Dills Act section 3519, subdivision (b) is the same as that for establishing interference with an employee's rights under subdivision (a) of that same section. (*State of California (Department of Corrections)* (1995) PERB Decision No. 1104-S.) To establish a prima facie case, the charging party must allege facts that establish an unfair practice. (PERB Regulation 32615(a)(5);[4] *State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S.) The amended charge alleged that the CCPOA representatives who attended the meeting "were selected by management and

[4] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

summoned to attend the meeting by Captain Garcia." However, the charge alleged no facts showing that Garcia or any other member of CDCR management chose which CCPOA representatives attended the meeting. CCPOA's allegation appears to be based on conjecture that, because the representatives who attended were alleged political opponents of Brady, they were selected by Garcia, also a political rival of Brady's. CCPOA's speculation is insufficient to establish a prima facie case of unlawful interference. (*United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.)

3. Unilateral Change

The amended charge alleged that CDCR made an unlawful unilateral change when, at the December 8, 2008 meeting, it established the bidding status of certain newly created positions without first negotiating the matter with Brady. An employer's unilateral change in terms and conditions of employment is considered a per se violation of Dills Act section 3519, subdivision (c) if: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

In its amended charge, CCPOA alleged that "[t]here was a long standing past practice of local negotiations at CSP-Corcoran between management and the local CCPOA chapter president and his designated representatives to determine which positions are in the 70% biddable portion and which are in the 30% non-biddable management portion of total positions

available." However, the charge alleged no facts to establish that Brady or any other CCPOA chapter representative, at Corcoran or any other institution, had ever negotiated a 70/30 split with institution management. Thus, even if the December 8, 2008 meeting did result in a final determination of the 70/30 split, the charge failed to show a change in past practice by CDCR. Accordingly, CCPOA has failed to establish a prima facie case of an unlawful unilateral change.

ORDER

The partial dismissal of the unfair practice charge in Case No. SA-CE-1783-S is hereby AFFIRMED.

Members McKeag and Wesley joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
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September 23, 2010

Suzanne L. Branine, Staff Legal Counsel
California Correctional Peace Officers Association
755 Riverpoint Drive, Suite 200
West Sacramento, CA 95605-1634

Re: *California Correctional Peace Officers Association v. State of California (Department of Corrections & Rehabilitation, Corcoran State Prison)*
Unfair Practice Charge No. SA-CE-1783-S
PARTIAL DISMISSAL

Dear Ms. Branine:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 1, 2009. The California Correctional Peace Officers Association (CCPOA or Charging Party) alleges that the State of California (Department of Corrections & Rehabilitation, Corcoran State Prison) (CDCR or Respondent) violated the Ralph C. Dills Act (Dills Act or Act)[1] by interfering with employees' and CCPOA's rights, discriminating against a CCPOA officer, refusing to bargain with CCPOA, bypassing CCPOA, and implementing unilateral changes at California State Prison Corcoran (CSP-Corcoran).

Charging Party was informed in the attached Partial Warning Letter dated July 30, 2010 (Warning Letter), that certain allegations contained in the charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended these allegations to state a prima facie case or withdrew them on or before August 12, 2010, the allegations would be dismissed.

On August 10, 2010, CCPOA filed a First Amended Charge with PERB.

Discussion

In relevant part, the Warning Letter informed you that the allegations with respect to a December 8, 2008 meeting held by Captain Garcia, concerning new and soon-to-be-activated

[1] The Dills Act is codified at Government Code section 3512 et seq. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the Dills Act and PERB Regulations may be found at www.perb.ca.gov.

Health Care Access positions, did not state a prima facie violation under a bypass theory.[2] Citing applicable case law, the Warning Letter concluded that CCPOA had not established that Captain Garcia or CDCR attempted to undermine or derogate CCPOA's exclusive authority to represent unit members. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Muroc Unified School District* (1978) PERB Decision No. 80.)

The First Amended Charge alleges that CSP-Corcoran Personnel Assignment Lieutenant Pearson was briefly present at the December 8, 2008 meeting in question. Pearson was there long enough to ascertain that the discussion concerned the "70/30" split of the Health Care Access positions, but he did not actually witness or hear the discussion. Later in the day, Pearson was informed of the decision that had been made as to which positions were "biddable" and which were management, and he was given a list showing the designation of the positions. Pearson hand-wrote the words, "This is what they did," on the list, based on his understanding that the split was based on discussions at the earlier meeting.[3]

The First Amended Charge does not allege, however, that anyone present at the meeting told Pearson that the list derived from any discussions or decisions occurring at the meeting earlier in the day on December 8, 2008.[4] CCPOA also states in the First Amended Charge that the CCPOA chapter president at CSP-Corcoran has been unable to learn from any participant whether the CCPOA representatives present for the meeting were simply informed of a decision or whether negotiations took place.

The employer violates the duty to bargain in good faith when it bypasses the exclusive representative to negotiate directly with employees over matters within the scope of representation. (*Walnut Valley Unified School District*, *supra*, PERB Decision No. 160.) However, once a policy has been established by lawful means, an employer has the right to take necessary actions, including consulting with employees, to implement the policy. (*Ibid.*) To establish that an employer has unlawfully bypassed the union, the charging party must demonstrate that the employer dealt directly with its employees (1) to create a new policy of general application, or (2) to obtain a waiver or modification of existing policies applicable to those employees. (*Ibid.*) Under *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2078-S, no violation will be found where a charge fails to establish that the employer asked employees to bargain over or accept proposals; or threatened

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[2] The First Amended Charge no longer alleges a violation of Government Code section 3519(d), and no longer names "Does 1-100" as Respondents in this matter. Thus, those allegations are deemed withdrawn and are not addressed by this letter.

[3] A copy of the list, including Pearson's hand-written notation, is provided with the First Amended Charge.

[4] CCPOA acknowledges that the State's position is the December 8, 2008 meeting was "informational" only.

employees with force or reprisal or promised them a benefit; or otherwise undermined the exclusive representative in the eyes of bargaining unit members.

Here, viewed most favorably, CCPOA has established only that a representative of CDCR met with certain CCPOA representatives to discuss a matter within the scope of representation. There is no evidence, however, that in or by this meeting the State bargained with employees, made threats or promises of benefit, or undermined the role of the exclusive representative. Thus, no bypass violation is established. (*State of California (Department of Personnel Administration)*, *supra*, PERB Decision No. 2078-S.)[5]

Conclusion

Therefore, the allegations which fail to state a prima facie case are hereby dismissed based on the facts and reasons set forth above as well as in the July 30, 2010 Partial Warning Letter.

Right to Appeal

Pursuant to PERB Regulations, Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (PERB Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (PERB Regulations 32135(a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (PERB Regulation 32135(b), (c) and (d); see also PERB Regulations 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

[5] The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.)

If Charging Party files a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (PERB Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See PERB Regulation 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (PERB Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (PERB Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Les Chisholm
Division Chief

Attachment

cc: Ronald Pearson

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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July 30, 2010

Suzanne L. Branine, Staff Legal Counsel
California Correctional Peace Officers Association
755 Riverpoint Drive, Suite 200
West Sacramento, CA 95605-1634

Re: *California Correctional Peace Officers Association v. State of California (Department of Corrections & Rehabilitation, Corcoran State Prison)*
Unfair Practice Charge No. SA-CE-1783-S
PARTIAL WARNING LETTER

Dear Ms. Branine:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 1, 2009. The California Correctional Peace Officers Association (CCPOA or Charging Party) alleges that the State of California (Department of Corrections & Rehabilitation, Corcoran State Prison) (CDCR or Respondent) and Department of Personnel Administration (DPA) and Does 1-100 violated section 3519(a), (b), (c) and (d) of the Ralph C. Dills Act (Dills Act or Act)[1] by engaging in illegal conduct at California State Prison Corcoran.

The charge names "Does 1-100" and DPA as Respondents. A charging party may not name Does as respondents to an unfair practice charge. (*State Employee Caucus for a Democratic Union, et al.* (2000) PERB Decision No. 1399-S.) Dills Act section 3513(j) states that "'State employer' or 'employer' for the purposes of bargaining or meeting and conferring in good faith, means the Governor or his or her designated representatives." Therefore CCPOA's allegation that "Does 1-100" violated the Dills Act must be dismissed.

As to the specific allegations in the charge, CCPOA alleges in part that CDCR bypassed the exclusive representative and attempted to dominate the Charging Party by selecting who participated in a meeting on December 8, 2008.[2] The charge contends that contrary to normal practice, on December 8, 2008, management at Corcoran conducted a meeting with correctional officers to discuss the implementation of a 70/30 split of new Health Care Access positions that were going to be activated. The 70/30 split is significant because Unit 6 members would be bidding on 70% of the new positions coming on line based on their respective seniority.

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

[2] The interference, discrimination, refusal to bargain, and unilateral change allegations contained in the charge are not addressed by this Partial Warning Letter.

CCPOA asserts that CDCR management has known since activation of the prison in 1988, that the only CCPOA representative at the Chapter level who has authority to speak on behalf of the members at large or to execute agreements, is the elected Chapter President. Chris Brady, the current Chapter President, was not informed of the December 8, 2008 meeting. He was present at work on that day, and following the meeting, one of the invited Unit 6 members informed him of what was discussed.

CCPOA asserts that Captain R. C. Garcia who was responsible for conducting the meeting on December 8, 2008 and who had an unsuccessful run for Statewide CCPOA President in September 2008, was exercising revenge on Brady because Brady did not support Garcia in the election. Garcia allegedly invited only those CCPOA members who supported his candidacy for Statewide President to the December 8 meeting.

Bypassing CCPOA

An employer may not communicate directly with employees to undermine or derogate the representative's exclusive authority to represent unit members. (*Muroc Unified School District*, (1978) PERB Decision No. 80.) Similarly, the employer violates the duty to bargain in good faith when it bypasses the exclusive representative to negotiate directly with employees over matters within the scope of representation. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160.) However, once a policy has been established by lawful means, an employer has the right to take necessary actions, including consulting with employees, to implement the policy. (*Ibid.*) To establish that an employer has unlawfully bypassed the union, the charging party must demonstrate that the employer dealt directly with its employees (1) to create a new policy of general application, or (2) to obtain a waiver or modification of existing policies applicable to those employees. (*Ibid.*)

Whether Captain Garcia's conduct was a result of lingering intra-union politics or not, it is not clear that there were negotiations conducted at the December 8 meeting or if the meeting was simply informational. There is no information provided that demonstrates CDCR attempted to undermine or derogate the representative's exclusive authority to represent unit members

Without additional information stating what transpired at the meeting, CCPOA has not established that CDCR, through Captain Garcia's meeting, violated the employer's duty to meet and confer with delegated representatives of the exclusive representative when discussing negotiable subjects. (*Walnut Valley Unified School District*, *supra*, PERB Decision No. 160.)

Domination

To state a prima facie violation of Dills Act section 3519(d), a charging party must allege facts demonstrating that the employer's conduct tends to interfere with the internal activities of an employee organization or tends to influence the choice between employee organizations. (*Santa Monica Community College District* (1979) PERB Decision No. 103; *Redwoods Community College District* (1987) PERB Decision No. 650.) Proof that an employer intended

to unlawfully dominate, assist or influence employees' free choice is not required. Nor is it necessary to prove that employees actually changed membership as a result of the employer's act. (*Santa Monica CCD*, *supra*, PERB Decision No. 103; *Redwoods CCD, supra*, PERB Decision No. 650.) The threshold test is "whether the employer's conduct tends to influence [free] choice or provide stimulus in one direction or the other." (*Santa Monica CCD*, p. 22.)

Captain Garcia's decision not to inform the chapter president of the December 8 meeting fails to demonstrate an effort to influence unit members. Again, without specifically stating what happened at the meeting, it is not clear how Captain Garcia's conduct tends to interfere with the internal activities of CCPOA. You have not established how CDCR's conduct tends to interfere with employee choice or provide stimulus for employees to decide they may not need CCPOA. This allegation does not demonstrate a prima facie case of attempted domination.

For these reasons, the allegations that "Does 1-100" are co-Respondents, and that CDCR bypassed CCPOA and attempted to dominate the exclusive representative, as presently written, do not state a prima facie case.[3] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before August 12, 2010,[4] PERB will dismiss the above-described allegations from your charge. If you have any questions, please call me at the telephone number listed above.

Sincerely,

Roger Smith
Labor Relations Specialist

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[3] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

[4] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)