

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA DEPARTMENT OF FORESTRY
FIREFIGHTERS,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENT OF
FORESTRY & FIRE PROTECTION),

Respondent.

Case No. SA-CE-1735-S

PERB Decision No. 2162-S

February 10, 2011

Appearances: Carroll, Burdick & McDonough by Gary M. Messing and Jason H. Jasmine, Attorneys, for California Department of Forestry Firefighters; State of California (Department of Personnel Administration) by Will M. Yamada and Jenny L. Esquivel, Labor Relations Counsel, for State of California (Department of Forestry & Fire Protection).

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

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the State of California (Department of Forestry & Fire Protection) (State or Cal Fire) of a proposed decision by an administrative law judge (ALJ). The charge alleged that the State violated the Ralph C. Dills Act (Dills Act or Act)¹ when it failed to withhold fair share fees for retired annuitants employed in the bargaining unit represented by California Department of Forestry Firefighters (CDFF). CDFF alleged this conduct constituted a violation of Dills Act section 3519(a), (b) and (c).

The ALJ held that retired annuitants were included in bargaining unit 8 (BU 8) by operation of *Unit Determination for the State of California* (1979) PERB Decision No. 110-S

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

(*State Unit Determination*), the Board's original bargaining unit determination for State employees. Accordingly, the ALJ concluded that the State committed an unlawful unilateral change on a matter within scope when it refused to withhold fair share fee deductions from the paychecks of retired annuitants. The ALJ ordered the State to cease and desist from refusing to allow fair share fee deductions from the paychecks of retired annuitants and to make CDFP whole for fair share fees that should have been deducted from the paychecks of retired annuitants since October 2008.

We have reviewed the entire record in this case and find retired annuitants performing work associated with BU 8 were not automatically placed in BU 8 by operation of the *State Unit Determination* case. We further find that since retired annuitants are not in BU 8, the State did not have a duty to collect fair share fees on behalf of CDFP from retired annuitants performing work as firefighters. Accordingly, the Board reverses the ALJ's proposed decision and dismisses the complaint and underlying unfair practice charge.

FINDINGS OF FACT

Cal Fire is a state employer within the meaning of Dills Act section 3513(j). CDFP is the recognized employee organization within the meaning of Section 3513(b) and the exclusive representative for state BU 8.

Section 3513(h) of the Dills Act grants the Board the power to determine appropriate bargaining units for State employees. Section 3521 sets forth the criteria for such unit determinations. Pursuant to this power, the Board, in 1978, initiated a series of hearings to determine the bargaining units for State employees. (*State Unit Determination.*) Over 27,000 pages of testimony was elicited from various parties during these hearings. (*Ibid.*) Based on these hearings, the Board established 20 bargaining units for State employees. One such unit was BU 8, the firefighters unit. (*Ibid.*)

A. Union Security Provisions

The Dills Act grants a union that has been recognized as an exclusive representative for a State bargaining unit to negotiate with the State for union security provisions in the form of fair share fees or maintenance of membership. Relevant to this discussion, the 2001-2008 memorandum of understanding (MOU) between the parties states,²

3.2 Fair Share

3.2.1 . . . the State Employer agrees to deduct and transmit to CDF FIREFIGHTERS all deductions authorized on a form provided by CDF FIREFIGHTERS and, pursuant to Government Code Section 3513.7, to deduct and transmit to CDF FIREFIGHTERS all Fair Share fees from State employees in Unit 8 who do not elect to become members of CDF FIREFIGHTERS. Such authorized dues deductions and Fair Share fees shall be remitted monthly to CDF FIREFIGHTERS along with an adequate itemized record of deductions. CDF FIREFIGHTERS shall pay any reasonable costs incurred by the State Controller. The State employer shall not be liable in any action brought by a State employee seeking recovery of, or damages for improper use or calculation of Fair Share fees and CDF FIREFIGHTERS agrees to hold the State employer harmless for any such action.

B. Retired Annuitants

Danielle Kelsch has been the membership coordinator for CDFF since June 2008. She receives a monthly list from the State Controller's Office (SCO) of employees in BU 8 that are paying dues or fair share fees. The list, however, does not provide information on people who are not paying dues or a fair share fee. Prior to this controversy, she was unaware that fair share fees for retired annuitants were not being deducted from their paychecks.

Larry Menth (Menth) has been the Cal Fire assistant deputy director of labor and human resources for two and a half years. Menth testified that although retired annuitants

² Although the MOU between the parties expired on June 30, 2008, it continues in effect unless changed through negotiations or the implementation of the employer's "last, best, and final offer" after impasse is reached in negotiations. (Dills Act § 3517.8.)

perform the work of BU 8 employees, he believes they are not represented by CDFP. He noted that the MOU between the parties provides compensatory time off, vacation accrual, sick leave and other benefits for permanent and seasonal employees that are not available to retired annuitants. During his four years at Cal Fire, Menth could not recall a prior CDFP request to bargain over retired annuitants.

Ken Hale (Hale) has served as a firefighter with Cal Fire for 30 years. In 2006, Hale was promoted to battalion chief. Hale also serves as the rank-and-file director for CDFP. In that capacity, Hale is the lead negotiator on the bargaining team and the union's representative at the third level of the MOU grievance procedure.

Hale testified that retired annuitants perform the same duties as permanent employee bargaining unit members, and generally work the same schedule. Their pay is based on the salary of the bargaining unit positions they fill. Until learning otherwise in Fall 2008, Hale believed that non-CDFP member retired annuitants were paying fair share fees. The union's accounting system does not provide notice that the fees are missing.

Dana Manning (Manning) is a labor relations manager II with the Department of Personnel Administration (DPA) assigned to BU 8. On November 20, 2008, he provided a list of retired annuitants to CDFP, stating, "the number of retired annuitants who have been performing temporary work in Bargaining Unit 8 [over the last 24 months] is one hundred and twenty-one (121)." Manning testified that he did not consider retired annuitants as members of bargaining unit 8.

C. Administrative Treatment of Retired Annuitants

Henry Epling (Epling) retired as a fire captain in 2004 after 30 years at Cal Fire. During the 20 years prior to his retirement, Epling served CDFP in various leadership and employee representation capacities. He is currently the CDFP deputy district vice president for

the North Coast. Since retiring, Epling worked as a retired annuitant in adjunct instructor, investigator, and relief fire captain positions. He performed the same duties as permanent employees and at times had a different work schedule.

On May 18, 2007, Epling was issued a Notice of Personnel Action, Report of Appointment (NOPA), from the Cal Fire personnel services division as a retired annuitant fire captain. In relevant part, the document states, “[f]or collective bargaining purposes, you have been designated as rank and file in bargaining unit 8.” He was issued similar personnel notices on May 30 and July 3, 2007.

Arle Simon (Simon) is a staff services manager at SCO, and has worked on state employee union dues and fair share deductions for 28 years. The SCO withholds fair share fees from the paychecks of those bargaining unit employees represented by a union who do not wish to become dues-paying members. Simon testified that the SCO does not determine which employees are in a bargaining unit.

According to Simon, the SCO built a system in 1994 that automated the deduction of fair share fees. The automated system, however, did not incorporate retired annuitants. As a result of these changes, notwithstanding the bargaining unit designation on a retired annuitant’s NOPA, the SCO does not automatically collect dues and/or fair share fees for retired annuitants. Instead, the exclusive representatives for each respective unit is first required to file a CD-88 form and request the collection of fees from retired annuitants.

Simon testified that the SCO informed all the State’s exclusive representatives in 1994 that it would not collect fair share fees from retired annuitants unless they submitted a completed form. Some exclusive representatives, like the exclusive representative for bargaining unit 7, submitted such a form and now receive either dues or fair share fees from retired annuitants performing work associated with their respective bargaining units. To date,

however, CDFF has neither submitted an CD-88 form nor requested the SCO to collect fair share fees from retired annuitants.

D. Menth's Salary and Overtime Memorandum

In May 2008, Menth issued a memorandum to Cal Fire region chiefs and deputy directors regarding salary and overtime for retired annuitants. Although he was not positive that a copy of the memorandum was sent to CDFF, Menth testified that was his usual practice.

In September 2008, Epling discovered what he considered a discrepancy in his paycheck. While researching the issue on the Cal Fire website, Epling saw the memo from Menth to Cal Fire managers regarding salary and overtime for retired annuitants. Epling printed a copy of the memo and gave it to Hale.

Hale received a copy of Menth's memo to managers regarding salary and overtime for retired annuitants in September 2008. He did not recall receiving a copy from Menth earlier.

E. CDFF's Grievance Regarding Retired Annuitants

In September 2008, Menth was contacted by CDFF's attorney, Gary Messing (Messing). Messing told him there were items in the memo that CDFF wished to negotiate, and asked whether fair share fees were being deducted from retired annuitants. Menth denied the request to bargain and was unsure whether retired annuitants were paying fair share fees.

On October 6, 2008, Messing sent Menth a letter grieving the denial of negotiations and again asked if retired annuitants were paying fair share fees. Menth responded that the letter did not state a grievance. Messing asked Menth to resolve the matter by collecting fair share fees from retired annuitants. Menth responded that the issue would be decided by DPA.

DISCUSSION

The threshold issue in this case is whether retired annuitants performing work as firefighters are in BU 8 by operation of the 1979 *State Unit Determination* case. In that case,

the Board determined that all state employees working as firefighters would be in a single bargaining unit. (*State Unit Determination*.) Consequently, CDFF argues that since the retired annuitants are performing bargaining unit work, CDFF should be entitled to collect fair share fees from the annuitants. The State, on the other hand, argues that retired annuitants were not included in BU 8 pursuant to *State Unit Determination* and, therefore, the State did not have a duty to collect fair share fees on behalf of CDFF.

In *State Unit Determination*, the Board established 20 bargaining units for State employees. In determining the appropriate bargaining units for the State's workforce, the Board conducted extensive hearings and developed a record in excess of 27,000 pages. Using facts from this record, the Board applied the unit determination criteria set forth in Dills Act section 3521. According to the Board:

We have sought to place employees with an internal and occupational community of interest in appropriate units; we have considered the effect such units will have on the meet and confer relationships and on the efficient operations of the employer; we have weighed the effect of a particular configuration of employees on the operations of the employer, on the objective of providing the employees the right to effective representation, and on the meet and confer relationship itself; and we have paid particular attention to the impact on the meet and confer relationship created by the fragmentation of employees and the proliferation of units.

Based on this review, the Board concluded, among other things, that State employees working as firefighters would be in a single unit, BU 8.

The Board recently addressed the issue of the unit placement of retired annuitants in *State of California (Department of Corrections & Rehabilitation)* (2010) PERB Decision No. 2154-S (*Corrections*). In that case, the Board ruled that retired annuitants performing work as correctional officers were not automatically in bargaining unit 6 (BU 6) by operation of the Board's initial unit determination in *State Unit Determination*. Accordingly, the Board

ruled that the State did not have a duty to collect fair share fees from retired annuitants performing work as correctional officers.

A. The *Corrections* Case

In reaching its decision, the Board in *Corrections* found noteworthy the fact that retired annuitants, as a class of employees, were not considered by the Board when it formulated its decision. According to the Board:

This [factor] is significant because retired annuitants do not enjoy the same benefits or rights as those held by full-time employees. For example, retired annuitants are at-will employees who may only work 960 hours per fiscal year. They do not accrue vacation or sick leave. They are hired to perform a specific job on a temporary basis and are not eligible to either promote or laterally transfer. Moreover, the use of retired annuitants limits hiring, promotions and overtime for full-time employees. Consequently, the use of retired annuitants potentially poses a direct conflict with the interests of full-time employees. In light of the substantial distinctions between retired annuitants and full-time employees, we find that an analysis of the unit determination criteria set forth in Dills Act section 3521 regarding these distinctions is a necessary prerequisite to the inclusion of retired annuitants in BU 6. Accordingly, since such an analysis was not performed by the Board, we find retired annuitants were not included in BU 6 by operation of the *State Unit Determination* case.

In this case, the retired annuitants performing work associated with BU 8 possess these same distinctions with full-time and seasonal employees working in BU 8. In particular, unlike the full-time and seasonal employees working in BU 8, the instant retired annuitants do not accrue vacation, annual leave, sick leave or compensatory time off. Moreover, they do not receive healthcare insurance, accrue retirement benefits, or receive promotional opportunities.

Consistent with the *Corrections* case, in light of the substantial distinctions between retired annuitants and full-time and seasonal employees working in BU 8, we find that an analysis of the unit determination criteria set forth in Dills Act section 3521 regarding these distinctions is a necessary prerequisite to the inclusion of retired annuitants in BU 8. Since

such an analysis was not performed by the Board, we find retired annuitants were not included in BU 8 by operation of the *State Unit Determination* case.

B. Retired Annuitants Are Not Automatically Placed In Bargaining Units

In the *Corrections* case, the Board clarified that its decisions in *Unit Determination for Technical, Skilled Crafts, Service and Professional Employees of the University of California (Lawrence Livermore National Laboratory Casual Employees)* (1983) PERB Decision No. 290-H (*Lawrence Livermore I*) and *Unit Determination for Technical, Skilled Crafts, Service and Professional Employees of the University of California (Lawrence Livermore National Laboratory Casual Employees)* (1983) PERB Decision No. 290a-H (*Lawrence Livermore II*) stand for the proposition that retired annuitants are not automatically placed in units containing full-time employees performing similar tasks. Rather, retired annuitants will be placed in such units if they are included in a unit determination or modification petition and if, following a full unit hearing, the Board determines they are appropriately placed in that unit.

Here, there is nothing in the record to suggest that the initial unit petitions for correctional officers sought to include retired annuitant into BU 8. Ironically, in addition to full-time employees, the Board in *State Unit Determination* did, in fact, consider the placement of another class of employees in BU 8; namely, seasonal firefighters. Based on its analysis, the Board concluded that seasonal firefighters were appropriately placed in BU 8. In this case, however, the Board did not conduct an analysis regarding the appropriate placement of retired annuitants or, alternatively, any analysis of the employment distinctions unique to retired annuitants. Accordingly, consistent with *Lawrence Livermore I*, we find retired annuitants in this case were not automatically placed in BU 8 by operation of the *State Unit Determination* case. Therefore, the State did not breach its duty to collect agency fees on behalf of CDFP for retired annuitants performing work as firefighters.

C. A Petition For Unit Modification Is Necessary To Determine The Appropriate Unit Placement For The Retired Annuitants

The Board has held that parties may not utilize the unfair practice procedure to circumvent the unit modification process. (*Berkeley Unified School District* (2005) PERB Decision No. 1744 (*Berkeley*)). Here, the instant charge seeks the addition of retired annuitants to BU 8 without reference to the unit modification process. Therefore, pursuant to *Berkeley*, CDFP's charge is invalid and is properly dismissed.

In reaching this decision, we do not express an opinion regarding the appropriate unit placement for retired annuitants. That determination is properly made pursuant to the unit modification process. (*Berkeley*.) Consequently, if CDFP desires the inclusion of retired annuitants in BU 8, they must file a petition for unit modification in accordance with PERB Regulation 32781.³

The dissent argues that since the Board in *Lawrence Livermore II* determined that retired annuitants were properly included in units containing full-time employees performing similar tasks, retired annuitants working in the classifications included in BU 8 are properly placed in BU 8. For the reasons set forth below, we respectfully disagree.

In *Lawrence Livermore II*, the University of California sought reconsideration of the *Lawrence Livermore I* decision on the basis that it did not agree to the constructive deletion of retired annuitants from the unit determination petition. Based on this statement, the Board reversed its determination that retired annuitants were not included in the unit determination petition and applied its prior analysis regarding the appropriate unit placement of retired annuitants. (*Lawrence Livermore II*.)

³ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

In reaching its decision, the Board did not reverse the portion of *Lawrence Livermore I* that concluded retired annuitants were not in the bargaining unit because they were not included in the initial unit determination petition. Instead, the Board merely applied its prior analysis regarding the appropriate unit placement of retired annuitants. Consequently, *Lawrence Livermore I* and *II* continue to stand for the proposition that retired annuitants are not automatically placed in units containing full-time employees performing similar tasks.

With regard to the Board's analysis in *Lawrence Livermore II*, the Board held:

The single difference that all of the retirees receive pension and/or social security benefits, so that their work eligibility is limited to 90 days of employment in any one year at the risk of losing retirement benefits, is not sufficient to distinguish the two types of indeterminate-time employees and exclude the retirees from the unit.

We find the Board's cursory analysis in *Lawrence Livermore II* is not dispositive in this case. In addition, we find further analysis pursuant to a petition for unit modification is necessary in order to determine the appropriate placement for the retired annuitants.

D. CDFP's Failure To Submit A CD-88 Form To The SCO

Even if the Board was to find that retired annuitants are members of BU 8 by virtue of the *State Unit Determination* decision, we would nonetheless conclude that Cal Fire's failure to deduct fair share fees from retired annuitants in BU 8 did not violate the Dills Act. A unilateral change in terms and conditions of employment constitutes a "per se" violation of Dills Act section 3519(c)⁴ if: (1) the State 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

⁴ Dills Act section 3519(c) makes it unlawful for the State to "[r]efuse or fail to meet and confer in good faith with a recognized employee organization."

impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1296-S; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

As explained by the Board in the *Corrections* case, the SCO does not automatically deduct fair share fees from the paychecks of retired annuitants.⁵ Instead, since 1994, a union has been required to submit a CD-88 form to the SCO in order for fair share fees to be collected from retired annuitants. In the instant case, it is undisputed that CDFP has never submitted a CD-88 form. Because CDFP failed to follow this procedure, neither Cal Fire nor SCO has ever been obligated to deduct fair share fees from retired annuitants in BU 8. Accordingly, the State's failure to deduct the fees was not a violation of the Dills Act.

CONCLUSION

The Board finds retired annuitants were never included in BU 8 and, therefore, were not unlawfully removed from BU 8 by Cal Fire. In addition, since retired annuitants are not in BU 8, the Board finds the State did not breach its duty to collect agency fees on behalf of CDFP from retired annuitants performing work as firefighters. However, even if retired annuitants are in BU 8 by virtue of the *State Unit Determination* case, since CDFP failed to request the collection of fees by the SCO, there was no breach of the duty to bargain because the State was never obligated to collect fair share fees from retired annuitants in BU 8.

⁵ It is the SCO, not Cal Fire, that deducts fair share fees and remits them to the appropriate union.

ORDER

The complaint and underlying unfair practice charge in Case No. SA-CE-1735-S are hereby DISMISSED.

Chair Dowdin Calvillo joined in this Decision.

Member Wesley's concurrence and dissent begins on page 14.

WESLEY, Member, dissenting and concurring. I respectfully dissent from the majority's determination that retired annuitants are not included in State Bargaining Unit 8 (BU 8).

As I concluded in my dissent in *State of California (Department of Corrections & Rehabilitation)* (2010) PERB Decision No. 2154-S, I find that the Public Employment Relations Board (PERB or Board) has long held that employees in less than permanent, full-time positions, such as retired annuitant employees, are included in State bargaining units.

In *Unit Determination for the State of California* (1979) PERB Decision No. 110-S, the Board applied the criteria set forth in Dills Act section 3521 to initially establish 20 State bargaining units comprised of appropriate job classifications. In *Unit Determination for the State of California* (1980) PERB Decision No. 110c-S, the Board found that “the essence of [the statute] is to extend SEERA^[1] rights to all State employees except those proven to be managerial, confidential, or supervisory.” (Emphasis in original; fn. omitted.) Since that decision, the Board has affirmed that less than permanent, full-time positions are in the State bargaining units. (*State of California (Department of Personnel Administration)* (1985) PERB Decision No. 532-S [permanent-intermittent and temporary-intermittent employees]; *State of California (Department of Personnel Administration)* (1990) PERB Decision No. 787-S [seasonal lifeguards]; *State of California, Department of Personnel Administration* (1991) PERB Decision No. 871-S [seasonal and limited term cooks]; *Unit Determination for Technical, Skilled Crafts, Service and Professional Employees of the University of California (Lawrence Livermore National Laboratory Casual Employees)* (1983) PERB Decision

¹ SEERA was later renamed the Ralph C. Dills Act.

No. 290a-H [retired annuitants].) Accordingly, I find that the retired annuitants working in the classifications included in BU 8 are in the bargaining unit.

I concur in the majority's determination, however, that because the California Department of Forestry Firefighters failed to utilize the State Controller's procedure to initiate the collection of fair share fees, the State of California (Department of Forestry and Fire Protection) did not breach a duty to collect fair share fees from retired annuitants in BU 8.