STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CDF FIREFIGHTERS, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF FORESTRY & FIRE PROTECTION, STATE PERSONNEL BOARD), Respondent.	Case No. SA-CE-1896-S Remand from Court PERB Decision No. 2317a-S December 19, 2014

Appearances: Carroll, Burdick & McDonough by Gary M. Messing, Attorney, for CDF Firefighters; State of California Department of Personnel Administration by David M. Villalba, Legal Relations Counsel, for State of California (Department of Forestry & Fire Protection, State Personnel Board).

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on remand by the Superior Court of California (Court) in and for Sacramento County after the CDF Firefighters (CDFF) filed a petition for writ of mandate requesting that *State of California (Department of Forestry & Fire Protection, State Personnel Board)* (2013) PERB Decision No. 2317-S (*State of California*) be vacated and that PERB be directed to issue a complaint against the State Personnel Board (SPB) for refusing to meet and confer with CDFF over proposed amendments to regulations concerning disciplinary hearing and appeal procedures. In *State of California,* PERB upheld the dismissal of an unfair practice charge alleging that the SPB violated the Ralph C. Dills Act (Dills Act)[1] by unilaterally changing

[1] The Dills Act is codified at Government Code section 3512 et seq.

disciplinary hearing and appeal procedures applicable to all state civil service employees without meeting and conferring with CDFF.

Pursuant to the Court's order, *State of California, supra*, PERB Decision No. 2317-S is hereby vacated and set aside and replaced with this decision.

PROCEDURAL HISTORY

Summary of Allegations[2]

CDFF alleged that on August 18, 2010, the SPB unilaterally implemented changes in the California Code of Regulations governing disciplinary hearings and appeals by state employees. Despite the fact that CDFF had submitted demands to meet and confer and offered suggested changes in the regulations that were initially proposed by SPB, SPB refused to meet and confer with CDFF. SPB asserted that it had no duty to meet and confer with CDFF or any other employee organization representing state employees because changes to the civil service system were "not part of the collective bargaining process."

The adopted changes to the regulations touched on such matters as the authority of SPB to bypass appellate procedures, pre-trial disclosures of witnesses and testimony summary, a time limit for bringing cases to hearing, and time limits on propounding discovery requests.

CDFF filed a timely unfair practice charge on February 11, 2011.

Dismissal of the Unfair Practice Charge by the PERB Office of the General Counsel

The Office of the General Counsel dismissed the unfair practice charge based on its reading of *State Personnel Bd. v. Department of Personnel Admin.* (2005) 37 Cal.4th 512 (*DPA*), which invalidated provisions in the memoranda of understanding that established review boards to adjudicate certain disciplinary actions. These provisions violated Article VII,

[2] At this stage of the proceedings, we assume that the essential facts alleged in the unfair practice charge are true. (*Temple City Unified School District* (1990) PERB Decision No. 843; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755.)

Section 3 of the California Constitution, which grants SPB the authority to enforce the civil service statutes and "review disciplinary actions." The Court concluded: "Because employee discipline is an integral part of the civil service system, the State Personnel Board's *exclusive* authority to review disciplinary decisions is a critical component of the civil service system." (*DPA*, p. 527; emphasis in original.)

The Office of the General Counsel reasoned that since Article VII, Section 3(a) of the Constitution also grants SPB authority to adopt and administer rules necessary to enforce the civil service statutes, revision of SPB regulations governing disciplinary hearing and appeal procedures was "an act pursuant to its Constitutional mandate, and, as such, is not within the scope of bargaining under the Dills Act."

CDFF timely appealed this dismissal to the Board itself.

Positions of the Parties on Appeal to the Board Itself

CDFF contends on appeal that even though SPB is not the appointing authority for the bargaining unit employees represented by CDFF, it nevertheless is obligated to negotiate over mandatory terms and conditions of employment, citing *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55 (*Los Angeles County*). SPB's constitutional authority over administration of the civil service system is not mutually exclusive of the obligation to negotiate over mandatory subjects of bargaining, according to CDFF. CDFF invited us to harmonize the potential conflict between the Dills Act and the Constitution, relying on *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168.

According to CDFF, this case differs from *DPA*, *supra*, 37 Cal.App.4th 512, because here, the obligation to bargain over procedural regulations governing discipline does not divest SPB of its authority to review disciplinary actions or to establish rules relevant to those

actions. It would simply have to negotiate with the "impacted representatives" before making such changes.

In opposing the appeal, the State of California (State) asserted four reasons supporting the dismissal of the charge. First, requiring SPB to negotiate over disciplinary hearing and appeal procedures would interfere with its constitutional authority because the regulations are part of how disciplinary hearings and appeals are managed. *Los Angeles County*, *supra*, 23 Cal.3d 55 is distinguishable from this case because it did not involve an entity with the same unique level of constitutional authority as SPB, according to the State. Second, SPB does not have a duty to bargain because it is not the governor's designated representative in negotiations with state employee organizations. Third, disciplinary hearing and appeal procedures in general are governed by statutes, rather than by a collective bargaining agreement or memorandum of understanding. Therefore, according to the State, changes to disciplinary regulations are outside the scope of bargaining because disciplinary procedures are "extra-contractual," citing *Carmichael Recreation & Park District* (2008) PERB Decision No. 1953-M. Lastly, the State urged that the appeal be dismissed because the unfair practice charge was untimely. It asserted that CDFF knew on January 8, 2010, of these proposed regulatory changes. According to the State, "CDFF was fully aware of SPB's intent to alter its regulations a full thirteen months before CDFF filed its charge on February 17, 2011."

PERB Decision No. 2317-S

On June 17, 2013, the Board issued its initial decision in this case, upholding the dismissal, but for different reasons than those relied on by the Office of the General Counsel, namely on statutory, rather than constitutional grounds. After a review of various provisions of the Dills Act, the Board concluded that "the Legislature did not intend to impose on SPB a

duty to bargain with exclusive representatives of employees other than those of SPB." (*State of California, supra,* PERB Decision No. 2317-S, p. 7.)

CDFF filed a petition for writ of mandate in superior court, contending that PERB's decision was clearly erroneous within the meaning of *International Assn. of Fire Fighters, Local 188, AFL-CIO v. Public Employment Relations Board, City of Richmond* (2011) 51 Cal.4th 259. The CDFF urged the court to vacate PERB's decision and to direct PERB to issue a complaint that the SPB had committed an unfair practice by changing its disciplinary regulations without meeting and conferring with the CDFF.

Decision of the Superior Court

The Court determined that although PERB's conclusion that the SPB could not be liable for failing to bargain with the CDFF over its disciplinary regulations was not clearly erroneous, PERB's reasoning was in error. The Court noted: "Had PERB followed the reasoning of its prior decision in *Gonzales-Coke*, that conclusion [that the SPB was not acting as "the state" when it promulgated the regulations in question] would not be clearly erroneous."

The Court remanded the case to PERB to issue a new decision in light of the Court's judgment. CDFF's request that PERB be directed to find that the SPB committed an unfair practice when it failed to bargain with CDFF before promulgating its amended regulations was denied.

DISCUSSION

The issue before us is whether the SPB is obliged to meet and confer with an employee organization prior to amending or promulgating regulations pertaining to civil service employees of the State of California. For reasons explained below, we conclude that the SPB is not required to bargain with any employee organization over the regulations at issue in this

case. Because we uphold the dismissal of this charge on the ground that the SPB does not have a duty to meet and confer over its proposed rules concerning disciplinary hearings and appeals, we do not address the other arguments raised by the State.

The SPB is a constitutionally created agency charged with administering the state civil service system. Article VII, Section 3 of the California Constitution grants to the SPB authority to enforce the civil service statutes, "prescribe probationary periods and classifications, and adopt other rules authorized by statute, and review disciplinary actions." The California Supreme Court has noted that the Dills Act was fashioned "specifically to avoid any conflict with [the] constitutional mandate in [Article VII.]" (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 174.)[3] Later, in *DPA, supra*, 37 Cal.4th 512, 526-527, the state Supreme Court underscored the role of the SPB:

> [A] state civil service based on the merit principle can be achieved only by developing and consistently applying uniform standards for employee hiring, promotion, and discipline. By vesting in the nonpartisan State Personnel Board the *sole* authority to administer the state civil service system [cite omitted], our state Constitution recognizes that this task must be entrusted to a *single* agency, the constitutionally created State Personnel Board. Because employee discipline is an integral part of the civil service system, the State Personnel Board's *exclusive* authority to review disciplinary decisions is a critical component of the civil service system.

(Emphasis in original.)

Although the SPB is vested with regulatory authority to administer the civil service system and adopt rules related to its enforcement and oversight of the civil service statutes,

[3] The relevant section of the Dills Act section 3512 reads, in pertinent part:

> Nothing in this chapter shall be construed to contravene the spirit or intent of the merit principle in state employment, not to limit the entitlements of state civil service employees, . . . provided by Article VII of the California Constitution or by laws or rules enacted thereto.

PERB has held that SPB may be subjected to unfair practice charges in certain circumstances. (*State of California (State Personnel Board)* (2006) PERB Decision No. 1864-S (*SPB*), p. 23 ["SPB, as a State agency, is subject to the Dills Act section 3519"].)[4] In *SPB*, the SPB was charged with interfering with protected rights of employees and their organizations in violation of Dills Act section 3519(a) and (b).

Where it is alleged that SPB has violated Dills Act section 3519(c) by refusing to bargain or by unilaterally changing terms and conditions of employment allegedly within the scope of bargaining, we must determine if SPB has a duty to negotiate in the circumstances alleged on a case-by-case basis. For the reasons below, we hold that the SPB does not have such a duty in this instance.

The Dills Act uses three different terms to refer to state management entities. Section 3513(j) defines "'[s]tate employer,' or 'employer,' for the purposes of bargaining or meeting and conferring in good faith, [as] the Governor or his or her designated representatives." (Emphasis added.) As the Board noted in *SPB*, *supra*, PERB Decision No. 1864-S, p. 22, this definition is for the limited purpose of designating the state representative for the purpose of bargaining or meeting and conferring in good faith. Section 3519, which defines unfair practices under the Dills Act, uses the broader term "state." As *SPB* concluded, these two sections 3519 and 3513(j) address separate subjects and "state" as it is used in section 3519 is not synonymous with the more narrowly-defined "[s]tate employer" in section 3513(j).

Even though the governor or his designee is the state's representative for purposes of meeting and conferring, it is well established that the appointing authority will be liable for violations of Dills Act section 3519(c) when the appointing authority makes a unilateral

[4] Dills Act section 3519 sets forth and defines unfair practices by "the state."

change in terms and conditions of employment of its own employees. (*State of California (Department of Mental Health)* (1990) PERB Decision No. 840-S [Department of Mental Health liable for violating section 3519(c) when it unilaterally changed employees scheduling system]; *State of California (Department of Youth Authority)* (2000) PERB Decision No. 1374-S [Department of Youth Authority found liable for unilateral change in released time policy]; *State of California (Department of Corrections)* (2000) PERB Decision No. 1381-S [Department of Corrections found liable for failing to negotiate over safety effects of staff reduction in prison library].)[5]

Although Dills Act section 3519(a), proscribing unfair practices, declares that it will be unlawful "for the state to do any of the following: . . . (c) [r]efuse or fail to meet and confer in good faith," (emphasis added) we do not believe that the Legislature intended by this wording to impose on SPB a duty to negotiate with employee organizations when it is exercising its regulatory function, as opposed to acting as an employer or appointing authority of its own employees.[6]

PERB has recognized that an agency must be acting in its role as an "employer" or "appointing authority" in order to be subject to the Dills Act. In *California State Employees*

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[5] PERB has also exercised jurisdiction over allegations that individual state agencies have violated section 3519(a) or (b). (*State of California (Department of Corrections)* (2001) PERB Decision No. 1435-S; *State of California (Department of Developmental Services)* (1982) PERB Decision No. 228-S; *State of California (Departments of Personnel Administration, Banking, Transportation, Water Resources and Board of Equalization)* (1998) PERB Decision No. 1279-S [various departments liable for violations of section 3519(a) and (b) for discriminatory application of internal e-mail policy].)

[6] "State," as opposed to "state employer," is not defined in the Dills Act. But "state" is defined in Dills Act section 3527(a), (Excluded Employees Bill of Rights) as including "those state agencies, boards, and commissions as may be designated by law that employ civil service employees." California Code of Civil Procedure, section 341.5 also defines "State of California" as the state itself, "or any of its agencies, departments, commissions, boards, or public officials."

Association (Gonzales-Coke, et al.) (2000) PERB Decision No. 1411-S (*Gonzales-Coke)*, PERB held the Board itself does not fall within the definition of the "state" as that term is used in the Dills Act. As the Board explained: "Section 3512 shows that the 'state,' for purposes of application of the Dills Act, pertains to the state as an employer.[7] It does not pertain to all agencies of the state, such as PERB, which may jurisdictionally interface with either the state as an employer or with state employee organizations." (*Gonzales-Coke*, pp. 17-18.)

Certain state agencies, such as the SPB, act as both employers and as regulators of various aspects of state employment. But as *Gonzales-Coke* teaches, when the agency acts in its regulatory role, it is not acting as a state employer within the meaning of the Dills Act, section 3513(j), and it therefore cannot violate section 3519 when performing its duties as regulator.

According to the facts alleged in this case, when SPB adopted regulations regarding disciplinary procedures for civil service employees, it was acting in its regulatory role to administer the civil service system, specifically regarding discipline hearings and appeal procedures. The SPB's rules adopted in this case applied to all state civil service employees, not only to its own or to the employees represented by the CDFF. Because discipline is "an integral part of the civil service system," regulatory uniformity is required. The need for

[7] Section 3512 states, in relevant part:

> It is the purpose of this chapter to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours and other terms and conditions of employment between the state and public employee organizations.

uniformity is simply not compatible with a duty to negotiate with the 21 separate bargaining units currently recognized under the Dills Act.[8]

For these reasons, and based on *Gonzales-Coke, supra,* PERB Decision No. 1411-S, we conclude that the SPB has no duty to bargain over its proposed amendments to its rules regarding disciplinary procedures for civil service employees because by adopting those rules, the SPB was acting in its capacity as regulator of state employment, and not as a "state employer."

ORDER

The Public Employment Relations Board hereby VACATES AND SETS ASIDE *State of California (Department of Forestry & Fire Protection, State Personnel Board)* (2013) PERB Decision No. 2317-S. The unfair practice charge in Case No. SA-CE-1896-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Huguenin joined in this Decision.

[8] We hereby take official notice of PERB's Dills Act representation files. (*San Ysidro School District* (1997) PERB Decision No. 1198, p. 3 [it is well-settled that the Board may take official notice of its own records].)