STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 1000,	)	
Charging Party,	)	Case No. SA-CE-824-S
v.	)	PERB Decision No. 1279-S
STATE OF CALIFORNIA (DEPARTMENTS OF PERSONNEL ADMINISTRATION, BANKING, TRANSPORTATION, WATER RESOURCES AND BOARD OF EQUALIZATION),	)	August 21, 1998
Respondent.	)	

Appearances: Howard Schwartz, Attorney, for California State Employees Association, SEIU Local 1000; State of California (Department of Personnel Administration) by Paul M. Starkey and Wendi L. Ross, Labor Relations Counsel, for State of California (Departments of Personnel Administration, Banking, Transportation, Water Resources and Board of Equalization).

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

AMADOR, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by the State of California (Departments of Personnel Administration, Banking, Transportation and Water Resources) (State) to an administrative law judge's (ALJ) proposed decision (attached). In the proposed decision, the ALJ found that the State violated section 3519(a) and (b) of the Ralph C. Dills Act (Dills Act)[1] when the

[1]The Dills Act is codified at Government Code section 3512 et seq. Section 3519 states, in pertinent part:

> It shall be unlawful for the state to do any of the following:
>
> (a) Impose or threaten to impose reprisals

Department of Transportation (Caltrans) adopted a policy that allows employees to use the State's electronic mail system for minimal amounts of personal communication so long as the subject of the communication does not pertain to employee organization matters. He also found that Caltrans, the Department of Banking and the Department of Water Resources violated the Dills Act by discriminatorily applying other policies. The ALJ dismissed all other allegations.

The Board has reviewed the entire record, including the proposed decision, the State's exceptions and the California State Employees Association, SEIU Local 1000's response. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Board finds that the State of California (Departments of Personnel Administration, Banking, Transportation and Water Resources) (State) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(a)

> on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

and (b). We, find that the Department of Transportation (Caltrans) violated the Dills Act when it adopted a policy that allows employees to use the State's electronic mail system for minimal amounts of personal communication but prohibits such use when the subject of the communication pertains to employee organization matters. We further find that Caltrans, the Department of Banking (Banking) and Department of Water Resources (DWR) violated the Dills Act by discriminatorily applying neutral policies in a way that prohibits communication about employee organization business while permitting other personal communication. These discriminatory actions interfered with the rights of employees to participate in the activities of employee organizations and the right of the California State Employees Association, SEIU Local 1000 to communicate with its members.

All other allegations of the complaint are hereby DISMISSED.

Pursuant to Dills Act section 3514.5(c), it is hereby ORDERED that the State and its representatives shall:

A. CEASE AND DESIST FROM:

1. Discriminatorily prohibiting Unit 1 members employed by Caltrans, Banking and DWR from such incidental and minimal use of the State's electronic mail system for communication about employee organization activities as those departments permit for other non-business purposes.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE DILLS ACT:

1. Within ten (10) days following the date this Decision is no longer subject to appeal, post at all work

locations where notices to persons employed in Unit 1 customarily are posted, copies of the Notice attached as an Appendix hereto. The Notice must be signed by an authorized agent of the State, indicating the State will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that this Notice is not reduced in size, altered, defaced or covered by any other material.

2. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

Chairman Caffrey and Member Dyer joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SA-CE-824-S, California State Employees Association. SEIU Local 1000 v. State of California (Departments of Personnel Administration, Banking. Transportation. Water Resources and Board of Equalization). in which all parties had the right to participate, it has been found that the State of California (Departments of Personnel Administration, Banking, Transportation and Water Resources) (State) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(a) and (b). The State violated the Dills Act when the Department of Transportation (Caltrans) adopted a policy that allows employees to use the State's electronic mail system for minimal amounts of personal communication so long as the subject of the communication does not pertain to employee organization matters.

It has also been found that Caltrans, the Department of Banking (Banking) and Department of Water Resources (DWR) violated the Dills Act by discriminatorily applying other neutral policies in a way that prohibits communication about employee organization business while permitting other personal communication. These discriminatory actions interfered with the rights of employees to participate in the activities of employee organizations and the right of California State Employees Association, SEIU Local 1000 to communicate with its members.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Discriminatorily prohibiting Unit 1 members employed in Caltrans, Banking and DWR from such incidental and minimal use of the State's electronic mail system for communication about employee organization activities as those departments permit for other non-business purposes.

Dated: _____ STATE OF CALIFORNIA

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED, OR COVERED BY ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 1000,	)	
Charging Party,	)	Unfair Practice Case No. SA-CE-824-S
V.	)	
STATE OF CALIFORNIA (DEPARTMENTS OF PERSONNEL ADMINISTRATION, BANKING, TRANSPORTATION, WATER RESOURCES AND BOARD OF EQUALIZATION),	)	PROPOSED DECISION (2/5/98)
Respondent.	)	

Appearances: Howard Schwartz, Attorney, for California State Employees Association, SEIU Local 1000; Paul M. Starkey and Wendi L. Ross, Labor Relations Counsel, for State of California (Departments of Personnel Administration, Banking, Transportation and Water Resources and Board of Equalization).

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

A union that represents employees of the State of California (State) here mounts a broad attack on the State's restrictions on employee use of State communication equipment for union business. In particular, the union challenges State policies that prohibit union officers from using State electronic mail systems and facsimile machines for union business. The union contends that by imposing the restrictions, the State made a unilateral change in a past practice, interfered with union and employee rights and discriminated against the union.

The State denies all allegations, asserting both procedural and substantive defenses. The State asserts that the restrictions it imposed marked no change from a uniform past

practice prohibiting any use of State equipment for other than State business. The State points to evidence of numerous actions it has taken against employees who misuse State equipment and argues that it has treated use for union purposes no differently from other personal use.

The California State Employees Association, SEIU Local 1000 (CSEA or Union), filed the unfair practice charge at issue on April 3, 1996. CSEA filed a first amended charge on December 11, 1996. The Office of the General Counsel of the Public Employment Relations Board (PERB or Board) followed on January 7, 1997, with a complaint against the State. The State answered the complaint on February 3, 1997, denying allegations and setting out various affirmative defenses.

The complaint was amended on the record to remove an allegation that the State retaliated against CSEA activist Cathy Hackett because of her participation in protected activities.[1] As amended, the complaint alleges that the State:

(1) On or about October 30, 1995, changed its past policy on the use of electronic mail, personal computers and telefax machines by denying four CSEA stewards the right to use those machines to relay information to CSEA members;

(2) On or about November 2, 1995, interfered with the protected rights of Ms. Hackett by warning her that further use of her computer for CSEA business would result in adverse action;

[1]See Reporter's Transcript, Vol. 1, pp. 8-9.

(3) On or about February 16, 1996, interfered with the protected rights of Salome Ontiveros by restricting her right to use telefax equipment for the purpose of conducting CSEA business;

(4) On or about October 30, 1995, interfered with the protected rights of Claudia Nordendahl by instructing her not to use electronic mail for the purpose of conducting CSEA business;

(5) On or about December 7, 1995, interfered with the protected rights of Ron Landingham by warning him that his electronic mail would be monitored and that he would be subject to adverse action if he used his electronic mail for the purpose of conducting CSEA business.

By these acts, the complaint alleges, the State violated Ralph C. Dills Act (Dills Act) section 3519(a), (b) and (c).[2]

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[2]Unless otherwise indicated, all statutory references are to the Government Code. The Dills Act is codified at section 3512 et seq. In relevant part, section 3519 provides as follows:

> It shall be unlawful for the state to do any of the following:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and confer in good faith with a recognized employee organization.

A hearing was conducted in Sacramento over nine non-consecutive days beginning April 29, *1991,* and concluding September 22, 1997. With the filing of briefs, the matter was submitted for decision on January 21, 1998.

FINDINGS OF FACT

The Department of Personnel Administration is the representative of the Governor for the purposes of meeting and conferring and is the State employer within the meaning of the Dills Act. The other four departments named in the complaint, Banking,[3] Transportation, Water Resources and Board of Equalization are the branches of State government that employ the individuals whose rights allegedly were violated.

At all times relevant CSEA has been the exclusive representative of nine State employee bargaining units, including State Bargaining Unit 1 (Administrative, Financial and Staff Services) where the events at issue took place. The collective bargaining agreement covering Unit 1 expired on June 30, 1995. Although the parties have been in negotiations continuously since that date, they had not entered a successor agreement as of the completion of the hearing.

Unit 1 is a large bargaining unit containing 36,000 State employees who work for 126 separate agencies, boards or

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[3]On July 1, 1997, the name of the Department of Banking was changed to the Department of Financial Institutions. (See Reporter's Transcript, Vol. 6, p. 5.) By agreement of the parties, the department was referred to as the Department of Banking in the record, a practice that will be followed in this proposed decision.

commissions. These departments conduct their functions through a heavy usage of computers, telephones and facsimile machines. Nearly all members of the unit have on their desks either a personal computer or a less versatile computer programmed to perform only specific agency functions. Substantial numbers of Unit 1 members have access to electronic-mail (e-mail) systems. Some of the e-mail systems are capable only of circulating messages within a particular department. Other systems, however, provide the ability to communicate with employees throughout State government or elsewhere.

The State has long-standing policies that prohibit employee use of State equipment for purposes other than State business. The record establishes that most State employees are informed about these restrictions on the use of State equipment through incompatible activities statements they sign shortly after employment. Several versions of incompatible activities statements were placed into the record which, although slightly different, set out the same basic prohibition. One version, issued by the State Board of Equalization (BOE), reads as follows:

> IMPROPER USE OF STATE FACILITIES, EQUIPMENT OR SUPPLIES. Any use of state facilities, equipment, or supplies which is not directly related to an employee's work function, is improper and prohibited, including but not limited to use of: photocopying equipment, data processing equipment including programs and data, word processing equipment, telephones, and automobiles. [4]

[4]Respondent's exhibit 7.

Some department policies also warn of the potential for disciplinary action because of improper use of State equipment. The Employee Administrative Manual of the Department of Banking sets out various causes for disciplinary action, one of which is misuse of State property. Regarding the use of State equipment, the Department of Banking policy reads:

> All State property, including but not limited to telephones; cars; typewriters; copiers; and miscellaneous supplies, are to be used only for official state business. Misuse of State property is cause of disciplinary action. [5]

In addition to the broad prohibitions against misuse of State equipment, the various departments also have adopted policies against misuse of particular types of equipment. These include policies concerning misuse of e-mail and computers.

The Department of Water Resources (DWR) has a comprehensive policy on "Responsible Network Computing and E-Mail Privacy."[6] Regarding personal use of e-mail the DWR policy reads:

> The State's computing resources (including e-mail) are to be used for State business only. The personal use of e-mail or Internet services . . . should be treated much the same as personal telephone use. SAM [State Administrative Manual] Section 4525.8 states that personal phone calls should be held to a minimum and must not interfere with the conduct of State business. Likewise, personal use of the Department's e-mail system or Internet connection must be held to a minimum and must not interfere with State operations, adversely affect performance, incur cost to the State, or violate

[5]Respondent's exhibit 22.

[6]Respondent's exhibits 19 and 32.

government laws, rules, or Department policy.

The Department of Transportation (Caltrans) since at least 1980 has had in effect a policy specifically prohibiting the use of computer equipment for any purpose other than State business. The policy in relevant part reads as follows:

> A. Employees' use of computer equipment, programs and data shall be directly related to their work function. Use of State controlled computer resources for non-state work will be cause for immediate disciplinary action.
>
> B. Specifically prohibited are non-state work computer games, and the preparation of biorhythms and calendars using EDP equipment.[7]

In a policy distributed in 1996, Caltrans set out these guidelines regarding the use of electronic mail:

> Caltrans encourages the responsible use of electronic mail as a communication tool available to employees. Users will not engage in any activities via electronic mail that will in any way discredit the Department or state service.
>
> Caltrans computers, workstations and the networks that interconnect them are the property of the State of California. Use of this equipment and network connectivity is limited to 'business purposes' only.[8]

At a meeting with CSEA representatives on February 5, 1996, Caltrans Labor Relations Chief Dave Brubaker provided the Union with copies of all Caltrans polices on e-mail. One of the

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[7]Respondent's exhibit 62.

[8]Respondent's exhibit 62.

documents, entitled "Caltrans Computer/E-Mail Policy," in relevant part amplified the 1980 policy as follows:

> Employees' use of computer equipment, programs and data shall be directly related to their work function. Use of State controlled computer resources for non-State work will be cause for immediate disciplinary action. However, use of e-Mail systems for incidental employee social functions or public service activities not related to union business or union organization purposes is permitted. Employees must receive prior management approval for such use. [9]

The BOE policy on voice mail and e-mail similarly restricts use of that department's equipment to State business. The policy reads, in relevant part, as follows:

> It is the policy of the Board of Equalization (BOE) to provide voice mail and e-mail systems for the use of its employees in the conduct of the BOE's business. The voice mail and electronic mail systems may not be used for the conduct of personal business. (Government Code Section 8314) . [10] All

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[9]Respondent's exhibit 27.

[10]Section 8314 concerns the use of State resources for unauthorized purposes. It reads in relevant part as follows:

> (a) It shall be unlawful for any elected state officer, appointee, employee, or consultant, to use or permit others to use state resources for a campaign activity, or personal or other purposes which are not authorized by law.
>
> (b) For purposes of this section:
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> (1) "Personal purpose" means those activities the purpose of which is for personal enjoyment, private gain or advantage, or an outside endeavor not related to state business. "Personal purpose" does not include an occasional telephone call, or an incidental and minimal use of state

> telephone lines and computers and the data stored on them are, and remain at all times, the property of the BOE. As such, the voice mail and e-mail systems remain at all times the property of the BOE. [11]

In addition to the standing policies, some departments have a practice of periodically sending memoranda to employees, reminding them about the restrictions on the use of State equipment. The BOE regularly sends out such memoranda, two examples of which were placed into the record. On January 12, 1995, BOE Executive Director Burton Oliver sent a memo to all employees, warning about the possibility of corrective action for inappropriate use of State equipment. The memo reads as follows:

> This memo serves as a reminder to all employees that personal use of state equipment is inappropriate and could result in a corrective action being taken. Government Code Section 19990 [12] prohibits

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> resources, such as equipment or office space, for personal purposes.
>
> (3) "State resources" means any state property or asset, including, but not limited to, state land, buildings, facilities, funds, equipment, supplies, telephones, computers, vehicles, travel, and state compensated time.
>
> (4) "Use" means a use of state resources which is substantial enough to result in a gain or advantage to the user or a loss to the state for which a monetary value may be estimated.

[11]Respondent's exhibit 6.

[12]Section 19990 pertains to conflicting employment, activities or enterprises. It provides in relevant part:

> A state officer or employee shall not engage in any employment, activity, or enterprise which is clearly inconsistent, incompatible,

> the use of state time, facilities, equipment, or supplies for private gain or advantage. Examples of equipment include, but are not limited to: photocopying equipment, data processing equipment including programs and data, word processing equipment, telephones and automobiles.
>
> State equipment is provided at the taxpayer's [sic] expense with the sole intent that it is used only in an official manner. Any use other than for official state business is considered inappropriate use of state resources and the taxpayers' money.
>
> Please ensure all state equipment and supplies in your work area are used only for official state business. Thank you for your cooperation. [13]

On May 22, 1995, Mr. Oliver sent a memo to BOE managers and supervisors instructing them that they were to monitor employee computer files for indications of improper use. In relevant part, his memo reads as follows:

> Board equipment will not be used for non-work related activities. Managers and supervisors should exercise reasonable discretion to control the use of state equipment for personal use by employees under their supervision. Supervisors will make random examinations of personal computers, related equipment and files to ensure that improper use and activity is discouraged and to ensure that Board policies are being followed. Examinations of all personal computers in

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> in conflict with, or inimical to his or her duties as a state officer or employee.
>
> . . . Activities and enterprises deemed to fall in these categories shall include, but
>
> (b) Using state time, facilities, equipment, or supplies for private gain or advantage.

[13]Respondent's exhibit 8.

> each office should be completed at least once a year; more frequently if a problem is suspected.
>
> This review will include checking the contents of the computer hard disk for non-work related files and programs. . .

At the Department of Banking, managers sent memoranda to employees warning about personal use of State telephones. One such memo was issued to all employees on July 12, 1993, that they were not to make or receive lengthy calls during work hours. The memo directed further that personal calls should be made during breaks and should result in no toll charges to the State. The DWR distributed a memo to employees warning of improper use of the internet. The memo warned against "conducting outside commercial activities; sending or accessing sexually explicit material; or sending messages or postings that could be seen as insulting, harassing, or offensive by others." The memo also warned of "surfing" the internet "or sending electronic correspondence so frequently that work performance suffers."[15] The memo warned that objectional internet sites would be monitored for employee usage and that employees should have no expectation of privacy in their use of e-mail.

The expired memorandum of understanding (MOU) between the parties is silent regarding employee use of e-mail for Union business. The only related provision in the MOU pertains to the

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[14]Respondent's exhibit 64.

[15]Respondent's exhibit 34.

use of State telephones. Section 2.3 of the expired MOU reads as follows:

> Union stewards shall be permitted reasonable use of State phones to make calls for Union representation purposes; provided, however, that such use of State phones shall not incur additional charges to the State or interfere with the operation of the State. [16]

Beginning in mid-1995, the various respondent departments in this case took steps to halt use of e-mail and facsimile machines by the four CSEA activists identified in the complaint. In each instance, State managers discovered the use of State communications equipment for Union business through a transmission that came to their attention.

Ron Landingham was the first of the CSEA activists to be barred from use of the e-mail for CSEA business. He is employed as a program specialist at the DWR where he conducts

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[16]A steward's use of the telephone is limited to use within that steward's area of responsibility. The limitation is set out in section 2.1 of the expired MOU which reads as follows:

> b. A written list of Union stewards, broken down by units within each individual department and designated area of primary responsibility, shall be furnished to each department and a copy sent to the State immediately after their designation, and the Union shall notify the State promptly of any changes of such stewards. Union stewards shall not be recognized by the State until such lists or changes thereto are received. A Union steward's "area of primary responsibility" is meant to mean institution, office or building. However, the parties recognize that it may be necessary for the Union to assign a steward an area of primary responsibility for several small offices or buildings within close proximity.

economic research. Mr. Landingham has a personal computer, with access to e-mail, on his desk. He uses the computer continuously throughout his workday.

Mr. Landingham is a member of Unit 1 and a long-time activist in CSEA. He is a job steward for CSEA and is vice chair of the Unit 1 bargaining council for CSEA. In this position, he relays information between Unit 1 members and the bargaining council. He has served on the negotiating team for CSEA. In addition to his role in CSEA, Mr. Landingham is the statewide coordinator of the Caucus for a Democratic Union (CDU), an activist group of CSEA members pressing for changes within CSEA.

Prior to the events at issue, Mr. Landingham regularly used the DWR e-mail system for CSEA and CDU business. He would send about four e-mail messages a day to CSEA and CDU activists. This included information regarding various proposals under consideration in negotiations. He also sent organizing messages intended to get people to attend events designed to pressure the State into negotiating concessions. He testified that during this period he also would receive about four or five e-mail messages from other CSEA and CDU activists.

Mr. Landingham testified that he used the State e-mail system because it was a highly effective means of communication. Since he works on a computer, the e-mail system was readily available to him. He said by using e-mail he could send the same message to several persons at once, simultaneously. He said it

was much easier and less time-consuming to use e-mail than to make a series of telephone calls.

On July 13, 1995, Mr. Landingham sent an e-mail message concerning CSEA business to 23 State employees in various departments. The subject of the message was listed as "CPAC vs CSEA." Twenty-two of the e-mail addresses were valid and the message was transmitted to them without incident. However, one address, for an employee at the BOE was invalid. The invalid address caused the message header, which included the subject of the message and the full list of addressees, to return to the computer system administrator. The system administrator, alerted by the subject of the message, advised the DWR labor relations office about the apparent use of the computer for Union business.

At the request of Robert Highhill, DWR labor relations manager, DWR computer system administrators commenced the monitoring of Mr. Landingham's use of e-mail. Over several weeks, the subjects and addressees of all Mr. Landingham's e-mail were examined for evidence of non-State use. The monitoring revealed a number of Landingham messages pertaining, apparently, to Union activities.

On or about August 9, 1995, Mr. Landingham was called to a meeting with his supervisor regarding his use of the e-mail. He brought with him two representatives of CSEA, one whom was Joan Bryant, CSEA manager of bargaining services. At the meeting, Emil Calzascia, DWR acting district chief, gave Mr. Landingham a memo warning him that his e-mail messages had been and would

continue to be monitored.[17] He also advised Mr. Landingham that the initial monitoring of his e-mail revealed "an extensive number of messages" sent to persons outside the DWR regarding matters apparently unrelated to DWR business. Mr. Calzascia advised Mr. Landingham that he was subject to potential adverse action for misuse of e-mail.

During the meeting, the CSEA representatives took the position that DWR could not deny Mr. Landingham the right to use e-mail for CSEA business. Because DWR permits employees to use e-mail for personal business, CSEA argued, the department cannot prohibit use for Union business. Banning use of e-mail for Union business, the CSEA representatives asserted, would be a unilateral change and a discrimination toward Union activities. DWR representatives rejected this assertion and stated they would monitor Mr. Landingham's use of e-mail despite CSEA objections.

By letter of August 24, 1995, Ms. Bryant again protested to Mr. Calzascia.[18] She asserted that the restriction on Mr. Landingham's use of e-mail was a unilateral change and a failure to negotiate in good faith. Ms. Bryant argued that under the DWR policy on "Responsible Network Computing" personal use of e-mail is to be treated much the same as personal use of a State telephone. Under the expired contract, Ms. Bryant continued, Union stewards are entitled to use State telephones for representational purposes. Therefore, she argued, it was the

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[17]Charging party's exhibit 6.

[18]Respondent's exhibit 36.

practice that stewards could use e-mail for CSEA representational purposes.

In a November 1, 1995, response, DWR labor relations chief Highhill rejected the argument that the expired agreement could be read to permit use of DWR e-mail for Union business. The contract, he wrote, permitted only limited use of State telephones and does not apply to e-mail. "The State's computer system and E-mail are for State business only, absent an express contract provision permitting other specified usage," he wrote. Because of Mr. Landingham's admitted use of e-mail for non-State business, he wrote, DWR would continue to monitor his e-mail communications. As of the date of the hearing, the restriction on Ms. Landingham's use of the e-mail remained in effect.

Mr. Landingham's e-mail messages, DWR managers soon discovered, revealed substantial correspondence with Cathy Hackett, a budget analyst at Caltrans. Mr. Highhill testified that he subsequently contacted the labor relations office at Caltrans and reported the apparent, non-business communication that was taking place between Mr. Landingham and Ms. Hackett. He said he contacted Caltrans labor relations representatives because he works closely with that department. He testified that Mr. Landingham's correspondence revealed a potential statewide problem with improper use of e-mail.

Ms. Hackett is a long-time CSEA activist who has held numerous positions within CSEA ranging from steward to deputy division director of finance. She has been active in CSEA since

1983, serving for a time as the chair of the Unit 1 negotiating committee. She also is a member of CDU since it was formed in 1990 and is one of the principal activists in that organization.

Ms. Hackett testified that she used the Caltrans e-mail system to send messages to Union members whenever it was necessary, usually on a daily basis. She said the messages concerned different issues that the Union was dealing with, including information about demonstrations or picketing or meetings, "any kind of information that you want to get out quickly to as many people as possible."

Ms. Hackett testified that she had several e-mail distribution lists. She said the largest list contained the names of 30 to 40 CSEA activists. She said she had another distribution list containing the names of about 10 to 15 Caltrans stewards. She had a list of 20 to 25 CDU activists. She said that on an average day she would send messages to about 20 persons.

Ms. Hackett testified that she used e-mail because it was a particularly efficient means of communication. She said she could send a single message to a number of persons at the same time. She said the recipients can read the message and respond at the same time. She described e-mail as a major means of communication among State employees.

Beginning in October of 1995, at the request of the Caltrans employee relations office, Caltrans computer system operators commenced monitoring all of Ms. Hackett's e-mail messages. Each

day, all of her messages were retrieved and copies were printed for the labor relations office. The labor relations office forwarded these messages to the Caltrans personnel office which, on October 27, 1995, took adverse action against Ms. Hackett for improper use of the State's e-mail system.[19]

Several days after receiving the adverse action, Ms. Hackett sent an e-mail message to Caltrans labor relations manager David Cabrera asking for an extension to file a grievance on behalf of an employee. Mr. Cabrera replied by memo of November 2, 1995, advising Ms. Hackett to make the request to another Caltrans administrator. His memo continued with a warning:

> Additionally, it is a violation of State and Caltrans policy to use computers or e-mail systems for personal, union business, or representation communications. Such use is not authorized by the Unit I Memorandum of Understanding. You have just received Adverse Action for this misuse so you should clearly understand these rules. I am advising you that any further use of computers or electronic mail systems for other than official state business could be cause for further adverse action. Please use the telephone or respond in writing to request an extension . . . of the time line to respond to [the] grievance. [20]

As of the date of the hearing, the restriction set out in the memo remained in effect.

Claudia Nordendahl was the third Unit 1 member warned to cease using State e-mail for Union business. Ms. Nordendahl is

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[19]An allegation regarding the adverse action was amended out of the complaint on the first day of hearing. See footnote no. 1, infra.

[20]Charging party's exhibit 8.

a staff services analyst for the Department of Banking in San Francisco. She has a computer with e-mail capability on her desk at work. Ms. Nordendahl is a long-time activist in CSEA. She is a job steward and is president of the CSEA District labor council at her work site. She also is an active member of CDU.

An e-mail system was installed on Ms. Nordendahl's computer in the spring of 1995. For about six months, she used it regularly to communicate about Union business with Unit 1 members employed in the Department of Banking. She responded to questions about proposed contract changes and job problems.

In the fall of 1995, employees in the Department of Banking faced the prospect of layoffs. In response to numerous inquiries, Ms. Nordendahl on October 30, 1995, sent an e-mail message advising employees that CSEA would meet with management about the layoffs. She also pledged to assist employees in every possible way and provided a listing of CSEA stewards. Ms. Nordendahl used a Department of Banking address list to send the message which resulted in its delivery to every employee, including the top managers.

That same day, Ms. Nordendahl received a reply message from Phyllis Garrett, administrative officer for the Department of Banking, directing her to cease using e-mail for Union business. Ms. Garrett's directive reads as follows:

> You are not to use the Department's E-Mail or any part of the computer system for union

> business. Please do not send E-Mail to any employee regarding union matters. [21]

Ms. Nordendahl testified that she was "shocked" when she received the instruction from Ms. Garrett because it was the first time anyone had told her she could not use e-mail for Union communications.

The fourth employee facing a ban on the use of State equipment is Salome Ontiveros. Ms. Ontiveros is employed by the BOE in Oakland as a business tax representative. She is a long-time CSEA activist and has served in a number of positions within the organization, ranging from steward to alternate deputy division director. At the time of the hearing, she was responsible for coordinating the efforts of nine CSEA negotiating teams and she oversaw the CSEA budget for bargaining.

For the three or four years prior to the events at issue, Ms. Ontiveros has had access to a State facsimile machine. She had used the machine both to receive and transmit documents pertaining to CSEA business. She had used the machine to send to other CSEA activists and staff members copies of negotiating proposals, memoranda and information related to statewide CSEA offices. From others she had received faxes concerning grievances and other Union matters.

Ms. Ontiveros testified that she used the fax machine because it was a fast way to send information, much quicker than the several days required for mailed documents. On some days she

[21]Respondent's exhibit 21.

would send two or three documents, on other days, none. She said she would receive about three or four documents per week. She usually transmitted her faxes during her lunch period but, sometimes, would send Union-related faxes during work time.

The fax machine used by Ms. Ontiveros was located near the offices of her supervisors, a considerable distance from her work site. On February 14, 1996, Ms. Ontiveros received a 29-page fax, a copy of a grievance, from a State employee in San Diego. The fax was delivered to Ms. Ontiveros by her supervisor, Rick Murphy.

The next day, Ms. Ontiveros was called to a meeting with Mr. Murphy and Joe N. Cowan, the administrator of the BOE office in Oakland. The meeting was terminated quickly because Ms. Ontiveros asked for the assistance of a Union representative who was not immediately available. On February 16, 1996, Mr. Cowan gave Ms. Ontiveros a memo instructing her to cease use of State telephones and telefax equipment to conduct Union business, unless she had prior supervisory approval. After she received this warning, Ms. Ontiveros asked other Union activists to cease sending faxes to the machine at her office.

The telefax machine at the BOE office in Oakland is heavily used for State business. Accountants and lawyers representing taxpayers frequently send documents pertaining to audits, tax collections and escrows. Approximately 100 documents pass through the machine each day. Because of this heavy use for

State business, BOE administrators do not want the machine used for non-State business.

CSEA presented evidence to show that, despite the warnings given to the four employees here, the State in fact has tolerated both Union and personal use of its telecommunications equipment. J. J. Jelincic, an investment officer at the Public Employees' Retirement System, described his extensive use of State e-mail, facsimile machines and telephones for CSEA and CDU business. He testified that he regularly corresponds by e-mail with 80 to 90 members of Unit 1 regarding CSEA and CDU business. He said his typical message is eight to 10 lines long and he estimated that he spends 30 minutes a day, sending e-mail messages. Mr. Jelincic testified to a belief that the State has the capacity to monitor employee use of e-mail and that it has monitored his messages.[22]

CSEA witnesses described a variety of non-business messages they have seen transmitted over the State e-mail and facsimile machines. The subjects of such transmissions described by CSEA witnesses include: announcements of office parties for retirements, birthdays, new babies, Christmas; announcements of bake sales, nacho sales, spaghetti lunch for flood victims; announcements of potluck lunches for halloween, Thanksgiving and St. Patrick's day, ice cream socials; sales of Girl Scout cookies, poinsettias, Sees' Candy; announcements of marriages,

[22]Mr. Jelincic offered double hearsay as evidence that the State has monitored his e-mail messages. (See Reporter's Transcript, Vol. 1, pp. 46-47.)

new babies, deaths, persons in the hospital; meetings of golf clubs, birthday clubs, bicycle clubs, games and practices of softball teams; the circulation of vacation pictures; blood bank drives; solicitations for the United Way and the sale of savings bonds; pools for betting on college and professional basketball tournaments; announcements that the office refrigerator would be cleaned out; jokes. CSEA witnesses put the frequency of such e-mail transmissions as ranging from several times a day to several times a week.

State managers and supervisors who were called as witnesses asserted that some of the messages described by CSEA witnesses were work-related and thus permissible. As to messages that were indisputably not related to work, State witnesses professed no knowledge.

Mr. Highhill testified that he had received messages related to the United Way campaign but characterized such messages as being work-related. He said he did not remember seeing any personal messages sent by e-mail. He said he does not send and has not received social messages.

Ms. Garrett testified that she has seen e-mail messages about office gatherings with cake for departing employees. She said such messages are work related in her view and are permissible. She said she has seen no messages regarding the sale of personal items or candy or cookies for employees' children. Ms. Garrett said that personal messages are discouraged in the Department of Banking. She said when a

manager sent a message regarding a super bowl game between San Francisco and San Diego he was reminded by several other managers that such a message was an improper use of e-mail. She acknowledged, however, that she had received messages from co-workers inviting her to go for a walk at lunch.

Marylyn Hammer, labor relations officer at Caltrans, testified that she might have seen e-mail messages regarding employee birthday celebrations, retirement parties and gatherings in honor of departing employees. She said she also may have seen messages regarding Christmas and Thanksgiving parties. She said she once was sent a joke by e-mail and she advised the employee that sending jokes was not a proper use of the e-mail system.

Mr. Cowan testified that he was not aware of any employee use of the fax machine for transmission of information about football pools or the sale of candy. He said he once had permitted an employee to use the fax machine on an emergency basis to transmit a document.

The State presented a substantial quantity of evidence demonstrating that the departments involved here regularly take action against employees who misuse State equipment. The improper activities have ranged from accessing sexually explicit sites on the internet to use of State computers for outside businesses. Following is a summary of the disciplinary actions placed into the record.

DWR employees have been given counseling memoranda and/or adverse actions for: using state computers to access sexually

explicit sites on the World Wide Web, sending sexually explicit e-mail to another employee, sending vulgar and sexually oriented jokes by e-mail to another employee, sending racially and religiously offensive messages by e-mail to another employee, creating a computer sub-directory 2,000 layers deep and thereby damaging State computer programs, storage of sexually explicit files on a State computer.

Caltrans employees have been given counseling memoranda and/or adverse actions for: using State computers and programs to draft and develop documents and engineering plans for private, non-State projects, storage of non-State engineering work and documents on State computers, using State computers and programs to print plans for improvements to an employee's personal home, using State computers to design renovations for the home of an employee's relative, storage of sexually explicit files on a State computer, use of a State computer for preparation of personal correspondence and other personal documents, use of a State computer for preparation and storage of documents used in the operation of a private business, use of a State computer to type personal letters and perform a job search.

At the Department of Banking an employee was given a counseling memo for installing and playing a computer golf game on her State computer. Another employee was required to reimburse the State for the cost of his personal use of a State facsimile machine. He also was charged for personal use of State envelopes. There was no evidence any employee at the Department

of Banking had been counseled or reprimanded for misuse of the State e-mail system.

Despite the discipline of employees for improper use of State equipment, State managers and supervisors have tolerated use of State e-mail systems for purposes other than State business. CSEA witnesses testified that supervisors and managers regularly have been included as addressees in the distribution of e-mail messages involving matters that were not State business. One CSEA witness, David Hart, testified that he sometimes receives e-mail messages intended for Ray Hart, the deputy director of DWR. He said that on one occasion he received a personal e-mail message from Ray Hart's mother, intended for her son. On another occasion, he received a message intended for Ray Hart regarding a meeting of a breakfast club.

CSEA also produced examples of e-mail messages, distributed to supervisors and managers, which did not involve State business.[23] Among these messages were the following: announcement of a bake sale with proceeds going to "Cancer Kids" distributed to all employees including supervisors and managers in two sections at DWR; a solicitation for memberships in the Alhambra Athletic Club distributed to all employees including

[23]See in particular charging party's exhibits 9, 10 and 12. These exhibits involve messages that were transmitted after the events at issue. However CSEA witnesses testified that they had not retained copies of messages from the period prior to the filing of the unfair practice charge. They also testified that the messages which they produced, some of which were sent during the period of the unfair practice hearing, were representative of messages which they had seen for years.

supervisor and managers in two sections at DWR; an announcement sent out by a DWR supervisor to all employees in two DWR sections that a sign-up list for the purchase of Girl Scout cookies was available in front of his office; an announcement sent to all 300 employees at a Caltrans laboratory, including managers and supervisors, regarding a bicycle ride over the Golden Gate Bridge sponsored by an employee club.

Both the Union and the State have proposed during the current round of bargaining to change contract section 2.3, regarding Union use of State phones. The Union proposed to expand the section to permit reasonable use by Union stewards of all "State electronic and telecommunication devices." Such language would include e-mail and facsimile machines. The State countered with a proposal that would have placed more restrictions on the use of State telephones. The State also proposed contractual language which would explicitly prohibit Union stewards from using "any State machine, equipment, or communication system, including but not limited to computer, photocopier, E-mail, voice mail, fax machine, for Union representation or other Union purposes." Ultimately, the Union dropped its proposal. As of the conclusion of the hearing, the State proposal was still on the table.

The State presented evidence demonstrating that CSEA has other means of communication, apart from the use of the State e-mail system. Both Mr. Landingham and Ms. Hackett have personal computers at home with access to e-mail. CSEA has a home page on

the World Wide Web which contains provision for e-mail. In addition, CSEA has bulletin boards in State buildings and several publications which it distributes to members. CSEA offices have facsimile machines. CSEA also maintains a telephone hot line with recorded messages which members may call for up-to-date information about bargaining and other subjects.

Finally, the State introduced copies of various grievances and unfair practice charges in an attempt to demonstrate that the policies at issue do not constitute a change in the past practice. These exhibits include: a 1985 settlement agreement[24] between the State and the Teamsters Union establishing the procedure for the distribution of mail from the Teamsters Union at Caltrans work sites; a 1988 grievance filed by Ms. Hackett[25] challenging a prohibition against the placement by her of Union literature into employee mailboxes; a 1993 settlement agreement[26] in an unfair practice case in which the State grants CSEA stewards the right to "reasonable use" of typewriters, copy machines and word processors to prepare grievances and grievance appeals.

The State also introduced as evidence a 1995 Caltrans "Information Security Policy Manual"[27] which was sent to CSEA as a "final draft" on or about January 31, 1995. A letter

[24]Respondent's exhibit 52.

[25]Respondent's exhibit 58.

[26]Respondent's exhibit 1.

[27]Respondent's exhibit 61.

accompanying the manual invited CSEA to contact the Caltrans labor relations office if the Union "wish[ed] to discuss" the manual. The introduction to the manual states that it "sets forth the polices of Caltrans and the State of California with respect to information security." The document is a summary of rules and procedures for use of information possessed by Caltrans. An examination of the document shows that its purpose is to set out rules for the protection of Caltrans information and data from unauthorized persons. One line in the five-page, single-spaced document reads as follows:

> Use Caltrans information asstes [sic] for business purposes only.

In one other place, the document asserts that Caltrans reserves the right "to monitor and inspect E-mail transmissions for reasonable business purposes."

LEGAL ISSUES

1. Did the State, on or about October 30, 1995, change its past practice on the use of State electronic mail, personal computers and telefax machines, and thereby fail to meet and confer in good faith in violation of section 3519(c)?

2. Did the State, on various dates in 1995 and 1996, by denying four CSEA stewards the right to use State computers, e-mail, and/or telefax equipment, thereby:

   A. Interfere with the rights of the four stewards to participate in the activities of an employee organization in violation of section 3519(a);

B. Interfere with the right of CSEA to have access to State employees in violation of section 3519(b)?

CONCLUSIONS OF LAW

Timeliness

As an initial line of defense, the State argues that the charge must be dismissed because it is untimely.[28] The State cites what it finds to be clear evidence that CSEA knew of State restrictions on the use of e-mail substantially more than six months prior to April 3, 1996, the filing date of the present charge. The State finds evidence of prior knowledge in: (1) an information policy which Caltrans gave to CSEA in February of 1995, (2) a long-standing Caltrans policy on distribution of personal letter mail, known to Ms. Hackett as early as March of 1988, and (3) a warning about e-mail use given to Mr. Landingham and his CSEA representatives on August 9, 1995.

The PERB is precluded under section 3514.5(a)[29] from issuing a complaint based on conduct that occurred more than six months prior to the filing of the charge. The Board has held that the six-month time period is jurisdictional. (California

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[28]This argument resurrects a motion to dismiss the State made following the presentation of the charging party's case in chief. That motion was not granted.

[29]Section 3514.5(a) provides that the Board:

> . . . shall not . . . (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; . . .

State University (San Diego) (1989) PERB Decision No. 718-H.) Timeliness cannot be waived either by the parties or the Board itself and need not be plead affirmatively. It is the charging party's burden to show timeliness as part of its prima facie case. (Regents of the University of California (1990) PERB Decision No. 826-H.)

The limitations period "begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to [engage in the prohibited conduct], providing that nothing subsequent to that date evinces a wavering of that intent." (Regents of the University of California, supra. PERB Decision No. 826-H.) Notice of a proposed change must be given to an official of an employee organization who has the authority to act on behalf of the organization, and the notice must clearly inform the recipient of the proposed change. (Victor Valley Union High School District (1986) PERB Decision No. 565; see also State of California (Board of Equalization) (1997) PERB Decision No. 1235-S.) The six-month period is to be computed by excluding the day the alleged misconduct took place and including the last day, unless the last day is a holiday, and then it also is excluded. (Saddleback Valley Unified School District (1985) PERB Decision No. 558.)

Two types of unfair practices are alleged here: interference and failure to negotiate by making a unilateral change.

The evidence in support of the charge of interference establishes that the departments whose conduct is under attack prohibited the four employees from using either e-mail, computers or the fax machine for Union business. The evidence establishes that the restrictions, once put into effect, remained in effect continuously thereafter. Meanwhile, the evidence establishes, the four departments continuously tolerated use of the same equipment by other employees for certain other non-business purposes.

The challenged conduct, therefore, is continuing in nature. At issue is a continuously discriminatory application of a policy that treats usage of State communications equipment one way for Union purposes and another way for other non-business purposes. This type of unfair practice is a "continuing violation." In such cases, even if the first act in a series was outside the period of timeliness, the underlying unfair practice may be revived by a subsequent act within the statutory period. Although the prior incidents may not be the basis for the finding of a violation, the underlying unfair practice can be "revived" by the new wrongful act that was timely raised. (Compton Community College District (1991) PERB Decision No. 915.)

I conclude that as to the alleged interference with employee and employee organization rights, the unfair practice charge was timely filed. This is because the challenged discriminatory application of the State policy remained in effect during the period six months prior to the filing of the charge.

A somewhat different situation is presented in the State's timeliness challenge to the Union's charge of unilateral change. A unilateral change in a past practice, as alleged here, is not a continuing violation. Even though the effects of a unilateral change may be continuous, the time line for filing a charge commences to run when the appropriate Union representative has notice that the change has been made.

In contending that the Union had notice more than six months prior to the filing of the charge, the State points first to the Caltrans "Information Security Policy Manual." A draft copy of this document was given to CSEA in January of 1995. I conclude that the manual provides no clear notice of intent to prohibit all use of State equipment for Union communications. The manual, by title and content, pertains to the protection and confidentiality of information maintained in Caltrans computer files. It says nothing about prohibitions against use of State equipment for Union purposes. The section of the manual quoted by the State limits the use of Caltrans "information assets" to "business purposes only." It does not even deal with use of Caltrans equipment. The limitations period for the filing of a charge was not commenced by this vague comment.

Nor do I find that Ms. Hackett's knowledge, as early as March of 1988, about the Caltrans policy on letter mail constituted knowledge about the Caltrans policy on e-mail. Letter mail and e-mail are entirely different types of communication. Establishment of a policy regarding one form of

communication does not constitute establishment of a policy regarding the other.

Accordingly, I find no grounds for dismissing the allegation of unilateral change as untimely because of the Caltrans policies cited by the State.

However, a somewhat different situation obtains regarding the allegation of unilateral change at DWR. Mr. Landingham and Ms. Bryant, CSEA manager of bargaining services, were told on August 9, 1995, that DWR would not permit Mr. Landingham to use DWR e-mail for CSEA communications. Indeed, at the meeting of August 9, CSEA accused the DWR of making a unilateral change. Plainly, if this was a new policy, CSEA was explicitly informed about it on August 9, 1995, and understood the possibility it was a unilateral change. The present charge was not filed until April 3, 1996, nearly eight months later. I conclude therefore that the allegation of unilateral change was untimely insofar as it pertains to the DWR.

The State asserts that the August 9, 1995, notice about the rules at DWR constituted notice about the rules throughout all departments in Unit 1. Thus, in the State's view, all allegations of unilateral change must be dismissed from this case as untimely.

The four operating departments in this case are separate appointing authorities. They do not operate in lock step with each other. While it is doubtless true that the Governor could impose uniform rules on State departments, absent such an

exercise of gubernatorial authority the various State departments have autonomy in many areas. This is evidenced by the various rules and regulations which have been introduced in the record, here. They are not identical.[30]

There is no PERB decision on the question of whether notice to the Union regarding a planned change at one State department constitutes notice in another. But the Board has faced the question in a case under the Higher Education Employer Employee Relations Act[31] (HEERA). In Regents of the University of California, supra, PERB Decision No. 826-H, the Board held that university notice to a union representative at the Santa Cruz campus regarding an alleged change in appointment policies was not applicable to determine the timeliness of a parallel unfair practice charge at UCLA. I believe that the same rule is applicable among the various departments of State government.

According, I conclude that the unfair practice charge was timely filed insofar as it pertains to a unilateral change at the

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[30]See testimony of James Wheatley, the chief State negotiator for Unit 1. (Reporter's Transcript, Vol. 8, pp. 104-105.) Mr. Wheatley testified:

> . . . some departments may permit employees to use it [e-mail] for reasons, and they have -- the department has identified a need. It could be for morale, wanting the employees to communicate with each other, but I also know the departments have -- other departments have strict prohibitions against the use of e-mail for personal reasons.

[31]Section 3560 et seq.

Departments of Banking and Transportation and the Board of Equalization.

Alleged Failure to Negotiate

Regarding the allegation of unilateral change, CSEA contends that it was the past practice that employees could use e-mail for non-business purposes. The practice was and continues to be, CSEA argues, one of limited tolerance. CSEA notes that in the course of the present round of bargaining, the State proposed specific contract language that would have prohibited employees from using State equipment for Union proposes. As of October 1995, CSEA contends, the State recognized that the Union was using State e-mail systems. When restrictions on e-mail subsequently were imposed on Ms. Hackett, Mr. Landingham and Ms. Nordendahl, CSEA concludes, they were done unilaterally and prior to the parties reaching agreement on the subject.

The State argues that CSEA has demonstrated no change from the past practice. The MOU is clear and unambiguous, the State continues, and it permits a limited use of State telephones by Union stewards for representational purposes, only. The MOU does not authorize the use of e-mail or facsimile machines. Nor, the State continues, has the Union demonstrated the existence of a practice whereby the State permitted Union activists to use the e-mail for Union business. The fact that some individual employees did use the State e-mail for Union business does not establish a practice, the State argues. There is no evidence, the State points out, that State management permitted or condoned

such use. In sum, the State concludes, the Union has failed to show any change in the status quo.

An employer's pre-impasse unilateral change in an established, negotiable practice violates the duty to meet and confer in good faith. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) Such unilateral changes are inherently destructive of employee rights and are a failure per se of the duty to negotiate in good faith. (Davis Unified School District, et al. (1980) PERB Decision No. 116; State of California (Department of Transportation) (1983) PERB Decision No. 361-S.)

In order to establish a unilateral change an exclusive representative must prove that there existed a past practice involving a negotiable subject. The exclusive representative must prove that the employer changed that practice in a manner that will have "a generalized effect" or a "continuing impact" on the members of the negotiating unit. (Grant Joint Union High School District (1982) PERB Decision No. 196.)

An employer makes no unilateral change where an action the employer takes does not alter the status quo. "[T]he 'status quo' against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment." (Pajaro Valley Unified School District (1978) PERB Decision No. 51.)[32] Only changes that so

[32]Thus, where an employer's action was consistent with the past practice, no violation was found in a change that was not a change in the status quo. (Oak Grove School District (1985) PERB Decision No. 503.)

deviate from the past practice as to change its "quantity and kind" are inconsistent with the status quo and a failure to negotiate in good faith. (Oakland Unified School District (1983) PERB Decision No. 367.)

It is well established that access rights are negotiable and, if the parties so agree, can be set out in contract language.[33] Clearly, however, the parties have not negotiated access rights that would grant by MOU the right of CSEA activists to use State e-mail, computers and facsimile machines for Union business. As the State argues, the applicable MOU clause pertains only to the use of State telephones, and then only by stewards performing representational duties. By its very wording, the clause does not create the past practice which CSEA advocates here.

I also conclude that CSEA has failed to establish the existence of any practice by which the State permitted CSEA activists to use e-mail and facsimile machines for Union business. While is clear that the four employees in this case did use State electronic equipment for Union purposes, CSEA has not established that State management knew of such use. Mr. Jelincic's testimony that State managers knew of and

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[33]See Healdsburg Union High School District (1984) PERB Decision No. 375, at p. 18, and Davis Joint Unified School District (1984) PERB Decision No. 474. The negotiability of access rules under HEERA also is strongly implied in California State University (1982) PERB Decision No. 211-H, a case involving a non-exclusive representative. See also, BASF Wyandotte Corporation (1985) 274 NLRB 978 [119 LRRM 1035] enf. NLRB v. BASF Wyandotte Corporation (5th Cir. 1986) 798 F.2d 849 [123 LRRM 2320].

tolerated his use of State e-mail for Union business is uncorroborated hearsay and cannot be the basis for a finding.[34] As to Ms. Hackett and Ms. Nordendahl, the weight of the evidence is that State managers stopped their use of e-mail for Union business as soon as it was discovered. While there are indications Ms. Ontiveros' supervisors may have seen some Union-related faxes addressed to her, I do not find this evidence sufficient to show the existence of a practice.

I conclude, therefore, that the State did not change a past practice nor fail to meet and confer in good faith by prohibiting Ms. Hackett and Ms. Nordendahl from using State computers and e-mail and Ms. Ontiveros from using State facsimile machines for Union business. Accordingly, the allegation that by such conduct the State violated section 3519(c) must be dismissed.

Alleged Interference

CSEA argues that the State's restrictions on the use of e-mail, computers and facsimile machines are an unreasonable interference with the Union's "implied" right of access. Acknowledging that the Dills Act contains no provision that explicitly grants work site access to employee organizations, CSEA nevertheless finds such a right in PERB decisions. PERB decisions, CSEA argues, have extended to State employee

[34]In addition, Mr. Jelincic works for the Public Employees Retirement System (PERS), a State department not a party to this case. No policies of the PERS are under consideration here and establishing that a practice exists at PERS does not establish that the same practice exists in the four departments that are parties to this case.

organizations the same access rights as are found in the Educational Employment Relations Act[35] (EERA) and HEERA. Since the other statutes provide access to "other means of communication," CSEA argues, the Dills Act must be read to include the same rights. Thus, although there is no PERB decision specifically granting employee organizations the right to use e-mail, computers and facsimile machines, the right can be implied, CSEA reasons.

The State reads the statute and PERB decisions exactly the opposite. By its plain terms, the State points out, the Dills Act affords no access rights to employee organizations or their members. Nor, the State continues, are there any PERB decisions that would include a protected employee or employee organization right to use State e-mail, computers or facsimile machines. In the absence of a specific legislative grant of such a right, the State reasons, it is clear that the Legislature did not intend it. This is especially clear, the State reasons, since access rights are included within the EERA and HEERA.

Despite the statutory differences, the PERB long has found "a right of access . . . implicit in the purpose and intent" of the Dills Act. (State of California (Department of Corrections) (1980) PERB Decision No. 127-S.) This right, according to the Board, is inherent in the required nature of public access to the functioning of government. Since a public employer cannot

[35]Section 3540 et seq.

totally exclude members of the public from its place of operation, neither can it totally exclude employee organizations.

Within the right of access is a protected right of employee organizations to communicate with employees and their members at the work site. (See State of California (Department of Transportation et al.) (1981) PERB Decision No. 159b-S, p. 18, (Department of Transportation).) The extent of the right to communicate has not been fully identified.

Still, as the State points out, the Dills Act contains no provision explicitly granting employee organizations the right to use the State's internal methods of communication. By contrast, the EERA and HEERA assure employee organizations of a statutory right of communication through the "use [of] institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, . . ."[36] There is no PERB decision that extends to unions operating under the Dills Act the right to use an employer's bulletin boards, mail boxes or "other means of communication" as those terms are used in the EERA and HEERA.

The PERB may not overlook textual differences among the three collective bargaining laws in an attempt to make all three statutes identical. Differences among the three PERB-administered statutes must be recognized, even where this leads to different results under each statute. (See Regents of

[36]The EERA access rights are set out at section 3543.1(b). HEERA access rights are set out at section 3568.

the University of California v. Public Employment Relations Board (1985) 168 Cal.App.3d 937 [214 Cal.Rptr. 698].)

If employees or employee organizations have a right to use State e-mail, computers and facsimile machines for union business that right is not found in the text of the Dills Act. I share the State's view that this statutory omission is significant. In the absence of Dills Act language granting employee organizations the right to use "other means of communication," PERB has no power to create such a guaranteed right.

Nevertheless, even absent statutory authorization it is well established in federal cases that employee organizations may in some circumstances gain access rights to an employer's property. (NLRB v. Babcock & Wilcox Co. (1956) 351 U.S. 105 [38 LRRM 2001].) Such access rights become available in two circumstances: (1) the usual means of communication are ineffective or unreasonably difficult, or (2) the employer's prohibition on access is discriminatory on its face or as applied. This rule has been adopted by the PERB. (Department of Transportation; Sierra Sands Unified School District (1993) PERB Decision No. 977.)

Although acknowledging the rule, CSEA attempts to shift the burden of proof that is implicit in it. The Union would place the burden on the State to show that its prohibition against use of e-mail, computers and facsimile machines is "reasonable." CSEA argues that an employer may place only "reasonable" restrictions on access to e-mail and facsimile machines, citing

PERB cases decided under the EERA and HEERA. CSEA argues that there is no evidence of disruption caused by CSEA's use of e-mail and facsimile machines and no showing of costs to the State. CSEA thus finds the State's restrictions to be unreasonable and would have them overturned.

The PERB has applied a "reasonableness" standard under the EERA and HEERA. This is because those statutes grant employee organizations "use [of] institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, . . ." Therefore, under those statutes an employer must justify its regulation of means of communication by showing that a regulation is a "reasonable regulation."

However, application of the "reasonableness" standard in PERB cases, is limited to an employer's regulation of the statutory access rights found in the EERA and HEERA. Since there is no statutory right of access under the Dills Act, the standard is not the "reasonableness" of the State employer's rules on use of means of communication. The Dills Act rule, like the federal rule, is whether the Union's usual means of communication are ineffective or unreasonably difficult, or the State's prohibition on access is discriminatory on its face or as applied. The burden of proof in meeting this requirement is on the charging party.

CSEA next argues that even if the existence of alternative means of communication is a relevant factor, CSEA should prevail nonetheless. It is clear, CSEA continues, that alternatives

to e-mail are "ineffective and difficult to use." Citing the size and geographic dispersal of Unit 1, CSEA argues that communications with Unit 1 members through traditional means is very difficult. E-mail messages, transmitted simultaneously to a specific group of employees, are far superior as a means of communication to newsletters and pamphlets, CSEA argues.

However, CSEA cites no case in which a labor board has granted a union access to an employer's property because access would provide a more efficient means of communication. In the private sector, unions get access to the employer's property when other means of communication with employees are virtually non-existent.[37]

Moreover, even under the statutory access provisions of EERA and HEERA, an employer is not obligated to open to the unions "every and all other means of communication." In Regents of the University of California v. Public Employment Relations Board (1986) 177 Cal.App.3d 648 [223 Cal.Rptr. 127], the court observed:

> . . . It is unreasonable to assume the Legislature intended that the University could reserve no forms of communication for official University communications only, and that the University would have to provide to the Union access to every other means of communication. [Id. at 654; emphasis in original.]

[37]See, for example, Husky Oil. N.P.R. Operations, Inc. v. NLRB (10th Cir. 1982) 669 F.2d 643 [109 LRRM 2548]. There, the court enforced a National Labor Relations Board (NLRB) order granting union organizers access to an employer's work site on the remote northern slope of Alaska. The NLRB concluded that all other means of communication were unsatisfactory.

CSEA has other means, entirely apart from use of the State e-mail system, for communicating with employees who work in Unit 1 jobs. Those CSEA members with their own personal computers connected to the internet can be reached through the private e-mail systems to which they subscribe. CSEA, as an organization, has a home page on the World Wide Web which contains provision for e-mail. In addition, CSEA has bulletin boards in State buildings and several publications which it distributes to members. CSEA offices have facsimile machines. CSEA also maintains a telephone hot line with recorded messages which members may call for up-to-date information about bargaining and other subjects. CSEA has access to State employees in the non-work areas of State buildings and has a history of distributing material at work sites.

It is clear from the record that CSEA has access to employees through a number of means of communication. While these methods of communication might not be as convenient as use of the State's e-mail system, they are not inadequate. Accordingly, I conclude that CSEA has not demonstrated that the usual means of communication are ineffective or unreasonably difficult. It therefore has failed to justify use of the State's e-mail, computer or facsimile machines under the first prong of the Department of Transportation test.

The only remaining question is whether by wording or application the State policies on employee use of e-mail, computers or facsimile machines are discriminatory against

the Union. This is the second prong of the Department of Transportation test.

In cases involving allegedly discriminatory access rules, the PERB analyzes the employer's rule as a potential interference with employee exercise of protected rights. A discriminatory access rule potentially violates section 3519(a) because it places unusual burdens on employee participation in union activities. The Board seeks to determine whether the challenged act interferes or tends to interfere with the exercise of protected rights and whether the employer is able to justify its actions by proving operational necessity. (Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad).)[38] In an interference case, it is not necessary for the charging party

[38]The Board discusses its adoption of the Carlsbad test for cases involving discriminatory access rules in Department of Transportation. (See in particular footnote no. 14 and accompanying text.) The Carlsbad test for interference reads, in relevant part, as follows:

> 2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
>
> 3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
>
> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;

to show that the respondent acted with an unlawful motivation. (Regents of the University of California (1983) PERB Decision No. 305-H.)

The evidence, CSEA argues, establishes that the State has made its e-mail and facsimile equipment available to employees for personal use. This use, CSEA continues, has ranged from personal notes of congratulations or condolence to solicitations for charity and social events. Some of these personal messages were written by supervisors, CSEA asserts, while other messages included supervisors and managers in the distribution list. Notwithstanding policies to the contrary, the State has permitted such personal uses, CSEA argues. The State, CSEA continues, has not justified its dual standard of permitting some personal messages while banning those involving the Union. Therefore, CSEA concludes, the State has interfered with the rights of both individual employees and those of CSEA.

The State argues that CSEA has failed to establish any evidence of harm in its ability to represent its members. The State contends that the Union must do more than demonstrate theoretical harm; it must show actual harm to employee rights. The State does not deny that several of the departments have permitted some personal use of e-mail. But the "smattering of examples" presented as evidence all demonstrate communications "closely related to the work environment and culture," the State contends. As such, the State continues, these communications are within the ambit of State business and are not in conflict with

the policy. Incidental and occasional personal use of the computers, e-mail and facsimile machines does not open the door for the numerous regular communications CSEA has transmitted in the past and would like to transmit in the future, the State asserts.

The record here contains numerous policies and memoranda pertaining to the use of State equipment. Most of these policies and memoranda contain prohibitions and/or restrictions against the use of State equipment for any purpose other than State business. Only one policy specifically prohibits use of State e-mail for communication related to union activities, although it allows other types of personal communication. That policy, which pertains to use of computers and e-mail at Caltrans, was given to CSEA on February 5, 1996. In relevant part, the Caltrans policy sets out the following exception to its general prohibition against personal use of e-mail:

> . . . use of e-Mail systems for incidental employee social functions or public service activities not related to union business or union organization purposes is permitted.

Through testimony and documentary evidence, CSEA established that both Caltrans and DWR tolerate a certain level of personal, non-union communication on their departmental e-mail systems. CSEA also established that managers and supervisors in both of these departments were aware of this communication either as senders or recipients.

At DWR these messages have concerned such subjects as bake sales for "Cancer Kids," the solicitation for membership to a

private athletic club, and an announcement by a supervisor that he was accepting orders for Girl Scout cookies. At Caltrans, the messages have concerned subjects such as an employee club bicycle ride over the Golden Gate Bridge. Witnesses also described e-mail messages soliciting donors for the blood bank and blood bank contributions on behalf of relatives and friends of employees. There also was evidence of considerable e-mail traffic relating to the eating and sale of food.

The Department of Banking is much stricter in its enforcement of prohibitions against personal use of e-mail. Department managers are so strict that they once scolded a fellow manager for using e-mail to make a casual comment about the Super Bowl. Even at Banking, however, a brief e-mail invitation for a walk at lunch is considered a permissible message, despite its clearly personal nature.

The State argues that it did not discriminate against Union communication, but enforces the rules evenly. As evidence, the State points to its disciplinary action against several Caltrans and DWR employees. In the main, these actions involved employees who used e-mail to sexually harass co-workers and used State computers to visit sexually-oriented web sites, store sexually-explicit pictures or prepare engineering plans for outside businesses.

The State's evidence about the discipline of such employees, thus, misses the point. It involves conduct entirely dissimilar from that of the Union activists who were warned to stop using

e-mail for Union communication. The evidence of disciplinary action fails as rebuttal to CSEA evidence about DWR and Caltrans tolerance of other types of non-business communication.

The rigid ban at Caltrans and DWR against all use of e-mail for Union communication meets at least the "slight" harm element of the Carlsbad test. Even though CSEA has other means of communication available to it, Union activists are at least slightly hindered by the ban in their ability to participate in the activities of an employee organization. This conclusion is consistent with Department of Transportation where the Board concluded that a discriminatory policy on the distribution of union mail impinged upon the rights of employees. (See also, Sierra Sands Unified School District, supra, PERB Decision No. 977.)

The burden thus shifts to the State to demonstrate a justification for its discriminatory ban against the use of e-mail for messages about Union activities. In response, the State argues that the permitted e-mail messages about bicycle rides and cookie sales constituted the business of the State. The State describes these communications as limited and incidental work environment conversations and communications between co-workers. They are part of the corporate culture and therefore State business. It follows, the State continues, that State-owned equipment can be used for such incidental and occasional conversations.

As the State argues, the e-mail conversations regarding bicycle rides, cookie sales and similar activities are normal work place interchange. Such use of State equipment apparently was anticipated and authorized by the Legislature in section 8314. That section, while prohibiting the use of State equipment for personal purposes, defines "personal purposes" in a manner that allows incidental use. Under the statute, "personal purpose"

> . . . does not include an occasional telephone call, or an incidental and minimal use of state resources, such as equipment or office space, for personal purposes.

Section 8314 further defines "use" of State resources as

> . . . a use of state resources which is substantial enough to result in a gain or advantage to the user or a loss to the state for which a monetary value may be estimated.

The types of personal uses of e-mail demonstrated at Caltrans and DWR seem well within the range of activities allowable under the statute.

What is unclear from the State's analysis, however, is why a brief employee message about a Bay Area bicycle ride is the business of the State whereas a brief employee message about collective bargaining is not. Insofar as both messages constitute "an incidental and minimal use of state resources," why is one permitted and the other is not? The State makes the distinction solely on the content of the message, not on the amount of time used to write or read it or the equipment required to deliver it. The distinction clearly is discriminatory toward

employee participation in the activities of employee organizations.

In the absence of a reasonable justification for this distinction, I conclude that Caltrans, DWR and the Department of Banking have discriminated against employee participation in protected conduct in violation of section 3519(a). Caltrans violated section 3519 (a) by its explicit policy that allows minimal personal communication by e-mail, except when it pertains to employee organization matters. All three departments violated section 3519(a) by discriminating in the application of other, more neutral policies, in a way that prohibits communication about employee organization business while permitting other personal conversation.

I want to make clear, however, that the State did not violate the Dills Act by instructing Ms. Hackett and Mr. Landingham to cease their use of State e-mail for regular and voluminous messages about Union business. There is no evidence that Caltrans and DWR have ever permitted employees to conduct, for personal purposes, the frequent and heavy levels of communication that Ms. Hackett and Mr. Landingham pursued for Union business. There is no evidence that Caltrans has permitted for personal purposes the establishment of the lengthy mailing lists developed by Ms. Hackett for Union communication. There is no evidence that the Department of Banking has permitted employees to send non-business messages to the entire department.

The violation here is the prohibition by all three departments against the "incidental and minimal use" of e-mail for Union-related messages that is allowed for other non-business purposes. Once an employer has opened a forum for non-business communication, it cannot prohibit employees from using the same forum for a similar level of communication involving employee organization activities. (Sierra Sands Unified School District, supra, PERB Decision No. 977.) The same rule is applied by the NLRB in the private sector. (See, for example, Roll and Hold Warehouse and Distribution Corporation (1997) 325 NLRB No. 1 [157 LRRM 1001] and E. I. du Pont de Nemours & Co. (1993) 311 NLRB 893 [143 LRRM 1121], a case involving a discriminatory prohibition against the use of e-mail for the distribution of union literature and notices.)

In accord with Department of Transportation, I conclude that the discriminatory rule against use of e-mail for incidental and minimal union communication also violates section 3519(b).

I am not persuaded that the State violated the Dills Act by its restriction on the use of the facsimile machine at the BOE. The record contains no copies of personal documents transmitted on the machine, except for the Union-related materials sent to Ms. Ontiveros. CSEA's only witness about use of the BOE facsimile machine was Ms. Ontiveros whose work station is at a considerable distance from the facsimile machine and well out of sight of it. Mr. Cowan, whose work station is much closer, testified that he was unaware of personal use of the machine

except for an employee who requested, and was granted, the right to use the machine on an emergency basis. There is no contradicting evidence that BOE managers were aware of and permitted personal use of the facsimile machine.

Accordingly, I conclude that CSEA has failed to meet its burden of proof in establishing a discriminatory standard in the use of the BOE facsimile machine.

REMEDY

The PERB in section 3514.5(c) is given:

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

Here, the State interfered with the right of three State employees, Ms. Hackett, Mr. Landingham and Ms. Nordendahl, to engage in the activities of an employee organization. The State interfered with these protected rights when it discriminatorily prohibited the employees from using the electronic mail system to send messages about union activities. By the same conduct, the State interfered with the right of CSEA to communicate with its members.

The ordinary remedy in a case involving an interference with protected rights is an order that the employer cease and desist its unlawful denial of rights. It is further appropriate that the State be directed to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized

agent of the State, will provide employees with notice that the State has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the Dill Act that employees be informed of the resolution of this controversy and the State's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the State of California (State) violated section 3519(a) and (b) of the Ralph C. Dills Act (Act). The State violated the Act when the Department of Transportation adopted a policy that allows employees to use the State's electronic mail system for minimal amounts of personal communication so long as the subject of the communication does not pertain to employee organization matters. The State further violated the Act when the Departments of Transportation, Water Resources and Banking discriminatorily applied other, neutral policies, in a way that prohibits communication about employee organization business while permitting other personal conversation. These discriminatory actions interfered with the rights of employees to participate in the activities of employee organizations and the right of the California State Employees Association to communicate with its members.

All other allegations in the complaint are hereby DISMISSED.

Pursuant to section 3514.5(c) of the Government Code, it hereby is ORDERED that the State and its representatives shall:

A. CEASE AND DESIST FROM:

Discriminatorily prohibiting Unit 1 members employed in the Departments of Transportation, Water Resources and Banking from such incidental and minimal use of the State electronic mail system for communication about employee organization activities as those departments permit for other non-business purposes.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to persons employed in Unit 1 customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the State, indicating that the State will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

2. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the director's instructions.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become

final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code of Civ. Pro. sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Ronald E. Blubaugh
Administrative Law Judge