STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

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| CALIFORNIA DEPARTMENT OF FORESTRY EMPLOYEES ASSOCIATION,<br><br>Charging Party,<br><br>v.<br><br>STATE OF CALIFORNIA, DEPARTMENT OF FORESTRY,<br><br>Respondent. | ) | Case No. S-CE-4-S (78-79)<br><br>PERB Decision No. 119-S<br><br>March 25, 1980 |

Appearances: Ronald Yank and Russell L. Richeda, Attorneys (Carroll, Burdick & McDonough) for California Department of Forestry Employees Association; and Barbara Stuart, Assistant Chief Counsel, Governor's Office of Employee Relations, for State of California.

Before: Gluck, Chairperson; Gonzales and Moore, Members.

## DECISION

The California Department of Forestry Employees Association (hereafter CDFEA) appeals from a Public Employment Relations Board (hereafter PERB or Board) hearing officer's order dismissing with leave to amend its unfair practice charge against the State of California.

For the reasons discussed below, the Board itself reverses, in part, and affirms, in part, the decision of the hearing officer.

## FACTUAL SUMMARY

In May, 1978, the Department of Forestry amended its departmental Manual of Instructions for personnel by adding a

provision[1] generally directing managers and supervisors to avoid participating in or expressing a preference for any employee organization competing to represent nonsupervisory

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[1]The added provision read as follows: (emphasis in original)

> Pre-election Conduct
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> During the election period, managers and supervisors should exercise care to avoid committing unfair practices. In addition to the guidelines which have been outlined in the Unfair Labor Practices section, managers/supervisors should give attention to the following:
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> A. Do not support one organization in preference to another or take any advocacy role in the election.
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> B. Avoid the appearance of supporting a particular organization through bumper stickers or other means.
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> C. Do not go into the polling area during elections unless authorized to do so.
>
> D. Avoid criticism of any employee organization, verbal or written.
>
> E. Do not attend any rank and file employee organization meetings.
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> F. Do not monitor who attends employee organization meetings.
>
> G. Assure that any restrictions (time, access, etc.) placed on organizational representatives are reasonable and equitable and based upon legitimate management needs.
>
> H. Afford all organizations fair and equitable treatment.

employees under the State Employer-Employee Relations Act (hereafter SEERA).[2] CDFEA filed an unfair practice charge alleging that the policy curtails the constitutional and SEERA rights of expression and association of supervisors,[3] deprives rank and file[4] employees of their right to communicate with supervisors in order to learn the supervisors'

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(Footnote 1 con't.)

I. Continue to counsel or discipline employees for job-related reasons.

J. Cooperate fully with agents of PERB. Section 3514 of SEERA states:

"Any person who shall willfully resist, prevent, impede or interfere with any member of the board, or any of its agents, in the performance of duties pursuant to this chapter, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be sentenced to pay a fine of not more that one thousand dollars ($1,000)."

[2]The SEERA is codified at Government Code Section 3512 et seq. All further section references are to the Government Code unless otherwise indicated.

[3]Section 3522.1 defines "supervisory employee" to mean:

> . . . any individual, regardless of the job description or title, having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if, in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.

[4]The term "rank and file" as used in this decision includes those persons covered by the definition of "state employee" contained in section 3513(c).

preferences and rationales concerning employee organizations, and harms CDFEA by depriving it of an important means of demonstrating the range and nature of its membership.

In a separate case (S-CE-5-S) CDFEA challenged the same policy insofar as it affected employees whose designation as "supervisors" was being contested by CDFEA. In that case a settlement agreement was reached between the parties whereby CDFEA agreed to withdraw its unfair practice charge without prejudice in consideration for the adoption of certain amendments by the department revising the policy.[5] The

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[5]The amendments revised the section of the policy set forth in footnote 1 by including a statement in the first paragraph thereof limiting the application of the policy to managers and supervisors while on the job. An additional provision was added to another section of the policy reading as follows:

> The state acts through its managers and supervisors. Thus, the State may be charged with an unfair practice due to the conduct of a manager or supervisor. On the other hand, SEERA gives supervisors the right to be members of employee organizations. Because of their dual role, supervisors' participation in employee organizations must be limited by their duty to protect the State from unfair practices. SEERA specifically provides that supervisors shall not participate in the handling of grievances or in meet and confer sessions on behalf of nonsupervisory employees, and that supervisors shall not vote to ratify or reject agreements reached on behalf of nonsupervisory employees. Further, under SEERA a supervisor shall not use his/her position or authority as a supervisor, either on or off the job, to dominate or interfere with the organizational activities of a rank and file employee or employee organization. When participating in rank and file employee organization activities, supervisors should make it clear that their participation is not as an agent or representative of management.

revised policy did not become effective until February 9, 1979, and thus the question in this case is whether the original policy violated the SEERA rights of employees or of CDFEA during the period it was in effect, i.e., from May 1978 to February 1979. Because CDFEA does not challenge the revised policy we intimate no judgment as to its legality.

The hearing officer found that PERB lacks jurisdiction to resolve through the unfair practice provisions[6] of the SEERA

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[6]Section 3519 reads, in pertinent part, as follows:

> It shall be unlawful for the state to:
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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.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
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> . . . . . .
>
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

a charge that the policy interfered with the right of supervisors to form and participate in the activities of employee organizations in violation of sections 3519(a), 3522.3,[7] 3522.4,[8] and 3522.8.[9]

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[7]Section 3522.3 reads as follows:

> Supervisory employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on on all matters of supervisory employee-employer relations as set forth in Section 3522.6. Supervisory employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public employer.

[8]Section 3522.4 reads as follows:

> Employee organizations shall have the right to represent their supervisory employee members in their employment relations, including grievances, with the employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of employees from membership. Nothing in this section shall prohibit any employee from appearing on his or her own behalf or through his or her chosen representative in his or her employment relations and grievances with the public employer.

[9]Section 3522.8 reads as follows:

> The state employer and employee organizations shall not interfere with, intimidate, restrain, coerce, or discriminate against supervisory employees because of their exercise of their rights under this article.

The hearing officer also dismissed an allegation that the policy interfered with the rights of rank and file employees[10] by depriving them of a traditional channel of communication for learning the preferences and rationales of supervisors concerning employee organizations. He reasoned that while section 3522.3 permits supervisors to belong to employee organizations of their own choosing, section

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[10]The rights of rank and file employees allegedly interfered with are those contained in section 3515 which provides:

> Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. State employees also shall have the right to refuse to join or participate in the activities of employee organizations, except that nothing shall preclude the parties from agreeing to a maintenance of membership provision, as defined in subdivision (h) of section 3513, pursuant to a memorandum of understanding. In any event, state employees shall have the right to represent themselves individually in their employment relations with the state.

3522.2[11] limits the right of nonsupervisory employees to have the benefit of participation by supervisors in their organizational affairs.

With regard to an allegation that by limiting the participation of supervisors the personnel policy had the effect of depriving CDFEA of an important means of demonstrating the range and nature of its membership and in so

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[11]Section 3522.2 reads as follows:

> (a) Supervisory employees shall not participate in the handling of grievances on behalf of nonsupervisory employees. Nonsupervisory employees shall not participate in the handling of grievances on behalf of supervisory employees.
>
> (b) Supervisory employees shall not participate in meet and confer sessions on behalf of nonsupervisory employees. Nonsupervisory employees shall not participate in meet and confer sessions on behalf of supervisory employees.
>
> (c) The prohibition in subdivisions (a) and (b) shall not be construed to apply to the paid staff of an employee organization.
>
> (d) Supervisory employees shall not vote on questions of ratification or rejection of memorandums of understanding reached on behalf of nonsupervisory employees.

doing infringed upon its section 3515.5[12] rights in violation of section 3519(b), the hearing officer held that CDFEA has no right to have supervisory members participate in an organizing campaign directed at nonsupervisory members.

CDFEA excepts to all of the above determinations by the hearing officer but not to the hearing officer's decision that the policy did not have the effect of interfering with the internal affairs of CDFEA in violation of section 3519(d). The latter issue is therefore not before the Board for consideration.

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[12]Section 3515.5 reads as follows:

> Employee organizations shall have the right to represent their members in their employment relations with the state, except that once an employee organization is recognized as the exclusive representative of an appropriate unit, the recognized employee organization is the only organization that may represent that unit in employment relations with the state. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the state.

## DISCUSSION

### Supervisory Employees

We affirm the hearing officer's dismissal of the charge alleging that the policy had the effect of unlawfully interfering with the rights of supervisors to form and participate in the activities of employee organizations in violation of section 3519(a), 3522.3, 3522.4, and 3522.8. In State of California, Department of Health (1/10/79) PERB Decision No. 86-S, the Board held that supervisors are not covered by the unfair practice provisions of section 3519 and also rejected the argument that PERB was required to enact other rules to prevent employer interference with supervisors' rights under SEERA. The Board concluded that the statutory scheme evidenced a legislative intent that supervisors were to be excluded from PERB's jurisdiction and that any vindication of supervisors' rights must be through another forum.

### Rank and File Employees and the Employee Organization

Whether the instant personnel policy's prohibition against supervisors' participation in certain activities adversely affects rank and file employees in the exercise of their rights under SEERA is the question to be resolved through the unfair practice provisions of SEERA.

As the Board stated in State of California, Department of Health, supra, at page 7:

> ...An employer's conduct against supervisors is generally not grounds for an unfair practice charge. However, if there is a reasonable inference that the conduct had an adverse effect on nonsupervisory employees in the exercise of their rights, an unfair practice charge will be entertained vis a vis the nonsupervisory employee. [Citation.] In this case, if CSEA can show that the personnel officer's comments would have had the effect of restraining, coercing or interfering with nonsupervisors in the exercise of their SEERA rights, the unfair practice process is the proper vehicle for resolving the dispute.

The hearing officer cited section 3522.2 (fn. 11, supra) for the proposition that rank and file employees have no right to the participation by supervisors in their organizational affairs. Section 3522.2 prohibits supervisors from participating in the handling of rank and file grievances, from participating in meet and confer sessions on behalf of nonsupervisors, and from voting on the ratification or rejection of memoranda of understanding reached on behalf of nonsupervisory employees. But it does not have the all-encompassing prohibitory effect given to it by the hearing officer.

Even though supervisors may not be included in the same bargaining unit as rank and file employees under the SEERA, there is no prohibition against both groups of employees being members of the same employee organizations. Further, under

current law supervisory employees, unlike managerial and confidential employees, may hold elective office in an employee organization that also represents rank and file employees (sec. 3518.7).[13]

These provisions indicate that the Legislature envisioned a certain amount of interaction between supervisors and rank and file employees in their organizational affairs. If the right of rank and file employees to belong to the same employee organizations as supervisors and their right to elect supervisors to offices in those organizations is to have meaning, they must have the right to freely exchange information and ideas regarding those organizations with all members, including supervisors.

Assuming the facts as stated by the charging party to be true[14] certain portions of this personnel policy would violate those rights and establish a prima facie case. For example, subdivision (A) of the policy (fn. 1, supra) directs supervisors not to support one employee organization in

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[13]Section 3518.7 reads as follows:

> Managerial employees and confidential employees shall be prohibited from holding elective office in an employee organization which also represents "state employees," as defined in subdivision (c) of Section 3513.

[14]San Juan Unified School District (3/10/77) EERB Decision No. 12.

preference to another. On its face this provision has the effect of inhibiting the flow of information between supervisory and rank and file members of CDFEA. This interferes with rank and file employees in the exercise of their SEERA rights in violation of section 3519(a).

The same provision would prevent a supervisory employee who was an elected officer of CDFEA from fully and effectively carrying out his or her duties and responsibilities. Because it restricts the internal organizational activities of the leadership of CDFEA, the policy has the effect of denying that organization its right to represent its rank and file members in their employment relations with the state in violation of section 3519(b). Of course supervisors may not, in their leadership capacity, engage in those activities prohibited by section 3522.2, supra.

The right of rank and file employees to the participation of supervisory members in their employee organizations must be balanced against the duty of the state employer to protect itself against unfair practice charges.

Because the state employer must, of necessity, act through its managers and supervisors it may be held responsible for the actions of those persons acting within their actual or apparent authority (See Antelope Valley Community College District (7/18/79) PERB Decision No. 97). For this reason, the state

employer has a legitimate interest in regulating, within permissible boundaries, the actions and conduct of its supervisory employees by restricting supervisors from holding themselves out as spokespersons for the state while engaged in organizational activity and by disavowing improper conduct or action by supervisors to the extent that such activity may be viewed as authorized by the state employer (Antelope Valley, supra).

The personnel policy here being challenged appears to exceed those boundaries and may restrict the activities of supervisors so as to unlawfully interfere with rank and file employees and CDFEA in the exercise of their respective rights guaranteed by SEERA. We therefore reverse the hearing officer's dismissal and remand this case to the chief administrative law judge for hearing.

ORDER

The Public Employment Relations Board ORDERS that the hearing officer's dismissal of the unfair practice charge of a violation of sections 3519(a) and 3519(b) is reversed; and, affirms dismissal of the other charge filed herein. The unfair practice charges are remanded to the chief administrative law judge for hearing.

By: Barbara D. Moore

Harry Gluck, Chairperson

Raymond J. Gonzales, Member

PUBLIC EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

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| CALIFORNIA DEPARTMENT OF FORESTRY EMPLOYEES ASSOCIATION,<br><br>Charging Party,<br><br>v.<br><br>STATE OF CALIFORNIA DEPARTMENT OF FORESTRY,<br><br>Respondent. | ) | Case No. S-CE-4-S (78-79)<br><br>NOTICE OF DISMISSAL WITH LEAVE TO AMEND<br><br>(9/11/78) |

Notice is hereby given that the above-captioned unfair practice charge is dismissed with leave to amend within twenty (20) calendar days after service of this Notice.

The charge is based on the promulgation of a personnel policy by the respondent which sets out guidelines for "managers and supervisors" to follow during the "election period" in order to avoid committing unfair practices. (The terms quoted above are not defined in the policy.) The policy basically directs managers and supervisors to avoid participating in or expressing a preference for any employee organization competing to represent non-supervisory employees under the SEERA. Case number S-CE-4-S attacks the policy insofar as it might be applied to employees conceded by CDFEA to be supervisory ("conceded supervisors"). A separate charge, case number S-CE-5-S, attacks the policy insofar as it affects employees

whose supervisory designation is being contested by CDFEA ("contested supervisors"). The latter charge is not affected by this dismissal.

With respect to conceded supervisors, the charging party's contentions (as clarified by reference to a request for injunctive relief submitted to the Board) are as follows: (1) The rights of the supervisors themselves to form and participate in the activities of employee organizations are being interfered with. The statutory bases for this charge are sections 3519(a), 3522.3, 3522.4, and 3522.8. (2) The rights of rank-and-file employees are being interfered with because they are being deprived "of their traditional communication channel for learning the preferences and rationales of their supervisors concerning employee organizations." It is alleged that this constitutes a violation of section 3519(a). (3) The charging party is being deprived "of an important means of demonstrating the range and nature of its membership." It is alleged that this violates section 3519(b). (4) The policy interferes with the charging party's internal administrative affairs by directing supervisor-members not to attend organizational meetings. It is alleged that this violates section 3519(d).

With respect to the first theory, it is concluded that the PERB lacks jurisdiction to grant relief. Section 3522 provides:

> "Except as provided by Sections 3522.1 to 3522.9, inclusive, supervisory employees shall not have the rights or be covered by any provision or definition established by this chapter."

The sections establishing the rights of supervisory employees to form organizations and to meet and confer with the state employer do not establish unfair practice procedures. Section 3522.9 specifically provides that the employer, not the PERB, may adopt rules and regulations for the administration of supervisory employer-employee relations. Since the remedial power of the PERB is set forth in portions of the statute not referenced by section 3522, this aspect of the charge is dismissed.

With respect to the second theory, it is noted that the statute itself contemplates that employee organizations will be deprived of the participation of supervisory members in rank-and-file organizational work. Section 3522.2 provides that supervisors shall not participate in the handling of grievances on behalf of non-supervisory employees, shall not participate in meet-and-confer sessions on behalf of non-supervisory employees, and shall not vote on questions of ratification or rejection of memorandums of understanding reached on behalf of non-supervisory employees. Thus, the statutory scheme, while permitting supervisors to belong to employee organizations of their choosing, does not establish a collateral right of non-supervisory employees to have the benefit of participation by supervisors in their organizational

affairs. For this reason, the aspect of the charge alleging a violation of the rights of non-supervisory employees under section 3519(a) is dismissed.

It follows from the conclusion that non-supervisory employees have no protected right at stake under the allegations of the charge, that similarly there is no organizational right to have supervisory members participate in an organizing campaign directed at non-supervisory employees. Therefore, the section 3519(b) charge is dismissed.

With respect to the fourth theory, it is noted that the language of section 3519(d) is derived in large part from NLRA section 8(a)(2). The purpose of that provision is generally to insure that an organization that purports to represent employees will not be subject to the control of, or dependent on the support of, the employer. Otherwise, the right of employees to be fully represented in dealings with the employer would be diminished. See generally Morris, The Developing Labor Law (BNA, 1971) chapter 7. The present charge does not allege that the employer is using any employee organization as a vehicle for subverting employee rights. Therefore, the section 3519(d) charge is dismissed.

For the foregoing reasons, the unfair practice charge is dismissed in its entirety with leave to amend within twenty (20) calendar days.

This action is taken pursuant to PERB Regulation 32630(a). If the charging party chooses to amend, the amended charge must be filed with the Sacramento Regional Office of the PERB within

twenty (20) calendar days. (PERB Regulation 32630(b).) Such amendment must be actually received at the Sacramento Regional Office of the PERB before the close of business (5:00 p.m.) on October 31, 1978 in order to be timely filed. (PERB Regulation 32135.)

If the charging party chooses not to amend the charge, it may obtain review of the dismissal by filing an appeal to the Board itself within twenty (20) calendar days after service of this Notice. (PERB Regulation 32620(b).) Such appeal must be actually received by the Executive Assistant to the Board before the close of business (5:00 p.m.) on October 31, 1978 in order to be timely filed. (PERB Regulation 32135.) Such appeal must be in writing, must be signed by the charging party or its agent, and must contain the facts and arguments upon which the appeal is based. (PERB Regulation 32630(b).) The appeal must be accompanied by proof of service upon all parties. (PERB Regulation 32135, 32142 and 32630(b).)

Dated: October 11, 1978

WILLIAM P. SMITH
General Counsel

By _____
Franklin Silver
Hearing Officer