STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION,	)	
Charging Party,	)	Case No. S-CE-417-S
v.	)	PERB Decision No. 84Q-S
STATE OF CALIFORNIA (DEPARTMENT OF MENTAL HEALTH),	)	September 18, 1990
Respondent.	)	

Appearances: Howard Schwartz, Attorney, for California State Employees' Association; Joan Branin, Labor Relations Counsel, Department of Personnel Administration for State of California (Department of Mental Health).

Before Craib, Shank and Camilli, Members.

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Department of Personnel Administration (DPA) on behalf of the State of California, Department of Mental Health (DMH or Respondent), to the proposed decision (attached hereto) of a PERB administrative law judge (ALJ). The ALJ determined that DMH violated subdivisions (c) and, derivatively, (b) of section 3519 of the Ralph C. Dills Act (Act)[1] by implementing a change in the

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

Section 3519 states, in pertinent part:

> It shall be unlawful for the state to do any of the following:

scheduling system of employees working in treatment units at Metropolitan State Hospital (Metropolitan) from a rotational scheduling system to a set day off scheduling system without notifying the California State Employees' Association (CSEA) or giving it an opportunity to negotiate on the change.

We have reviewed the record in this case in its entirety, including the proposed decision, Respondent's exceptions and CSEA's response thereto and, finding the ALJ's findings of fact to be free from prejudicial error, adopt them as our own. The arguments raised by Respondent in its exceptions were, for the most part, raised below and properly rejected by the ALJ.[2] Therefore, with one exception and two clarifications noted below, the Board adopts the ALJ's conclusions of law and affirms his proposed finding that DMH unlawfully imposed a unilateral change

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. . . . . .

(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.

[2]In its exceptions, DMH cites Nazareth Literary and Benevolent Institute, Inc. (1986) 282 NLRB No. 10 (Nazareth) for the proposition that an employer's action which is consistent with the management rights clause in an expired agreement does not constitute unlawful unilateral change. DMH complains that the ALJ did not explain why the rule in that case was not applied to the instant matter. Although the ALJ found, in this case, that the memorandum of understanding (MOU) had expired, he also noted that even if the MOU had not expired, the provisions relied upon by DMH did not establish a status quo nor constitute a "clear and unmistakable" waiver of CSEA's right to demand to meet and confer on a scheduling system change. As we agree with the ALJ's findings in this regard, we find Nazareth inapposite.

by implementing the set day off scheduling system at Metropolitan.

DISCUSSION

1. DMH IS HELD RESPONSIBLE FOR VIOLATIONS OF THE ACT.

In its exceptions, DPA argues on behalf of DMH that DMH is not authorized to meet and confer or negotiate on behalf of the state; therefore, DMH could not be responsible for violating the Act by refusing to negotiate. Although the ALJ implicitly rejects this argument, the proposed decision does not explicitly state the grounds therefor. We wish to do so here.

The labor relations representatives from both DMH and DPA testified at the hearing concerning their involvement in this matter. The CSEA representative also testified that she contacted and discussed the issue with both DMH and DPA representatives. The evidence is uncontradicted that the DMH representative informed the CSEA representative that DMH was not required to meet and confer on this issue, and referred the CSEA representative to DPA. The CSEA representative promptly contacted DPA, whose representative also stated that DPA, on behalf of DMH, was not required to meet and confer on this issue. The DPA representative confirmed this statement in writing, agreeing solely to meet concerning the impact of the change.

It was DMH who unilaterally implemented the change in scheduling, and refused to negotiate the matter. Then, DPA, authorized to speak on behalf of DMH, likewise refused to negotiate this change. The fact that DPA was not involved in the

unilateral change at its inception is of no import. Therefore, DMH is properly held to have violated the Act by unilaterally implementing the change.

2. MODIFICATION OF ORDER.

The proposed order requires DMH to cease and desist from:

> Continuing to implement a fixed day off scheduling system at the Metropolitan State Hospital and at any of its other hospitals that have a cyclical scheduling system, including, but not limited to, the Patton State Hospital, until it has met and conferred with the affected employees' recognized employee organization(s). (Proposed decision, p. 19.)

Respondent excepts to the proposed order claiming that the ALJ exceeded his jurisdiction by ordering DMH to refrain from making similar scheduling changes at other state hospitals and institutions, similar to those made at Metropolitan, without bargaining with the appropriate employee organizations.

At the hearing in this matter, the negotiator for DPA testified that his department director had told him to proceed with a department-wide change to the new scheduling system. The negotiator for CSEA also testified that the DPA negotiator stated at a meeting that the intention was to move the remaining mental health hospitals into the new system after Metropolitan had implemented that system. There was no other evidence in the record that DMH unilaterally implemented the change in schedule at any other state mental hospital or institution. Because there is insufficient record evidence that a statewide program of unilateral implementation of a change in scheduling systems is in

progress, the Board finds the cease and desist order shall be limited to the Metropolitan State Hospital.[3]

In accord with the discussion above, the Board must also clarify the proposed decision. Citing Respondent's decision to implement a statewide schedule modification, the ALJ finds that the change in scheduling system constituted a change of policy which has a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. (Grant Joint Union High School District (1982) PERB Decision No. 196, p. 9.) For the reasons stated above, we do not adopt that portion of the analysis which relies upon a statewide scheduling modification to support the conclusion that a unilateral change was implemented.

However, the ALJ also states that a change in scheduling has a continuing impact on all of the employees it touches. The Board has held that in a unilateral change case, the number of employees affected is not always indicative of whether a policy change has occurred. (Jamestown Elementary School District (1990) PERB Decision No. 795.) It is not necessary in this case to find that the change in policy affects all the institutions in the department because, as the ALJ noted, a change in scheduling

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[3]Although we find that the order and statement of violation in the notice should be limited to Metropolitan, we find it is appropriate to require that the notice be posted systemwide, as the violation to be remedied herein concerns contract language applicable to the entire unit, whose members are employed on a systemwide basis. (Regents of the University of California (1990) PERB Decision No. 826-H, p. 13; Trustees of the California State University (1988) PERB Order No. Ad-174-H.)

policy at Metropolitan is a change which has a continuing impact upon the terms and conditions of employment of bargaining unit members, regardless of the number of employees involved.[4]

ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this case, it is found that the State of California (Department of Mental Health) violated subdivision (c) and, derivatively, subdivision (b) of section 3519 of the Ralph C. Dills Act. Pursuant to section 3514.5(c), it is hereby ORDERED that the State of California (Department of Mental Health), its director and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer with the California State Employees' Association on the scheduling system of employees working in treatment units at the Metropolitan State Hospital.

2. Continuing to implement a fixed day off scheduling system at the Metropolitan State Hospital until it has met and conferred with the California State Employees' Association.

3. Denying the California State Employees' Association rights guaranteed it by the Ralph C. Dills Act.

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[4]PERB precedent requires a finding of violation of the duty to bargain in good faith when a change in policy has a generalized effect or continuing impact upon terms and conditions of employment. (Imperial Unified School District (1990) PERB Decision No. 825, fn. 3, p. 6.)

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF THE RALPH C. DILLS ACT:

1. Rescind the implementation of the fixed day off scheduling system at the Metropolitan State Hospital and reinstate the cyclical system used prior to such implementation.

2. Within thirty-five (35) days following the date the Decision is no longer subject to reconsideration, post at all work locations where notices to employees are customarily placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

3. 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 his instructions.

It is further ORDERED that all other aspects of the Charge and Complaint are hereby DISMISSED.

Members Craib and Shank 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. S-CE-417-S, California State Employees' Association v. State of California (Department of Mental Health). in which all parties had the right to participate, it has been found that the State of California (Department of Mental Health) has violated subdivision (c) and, derivatively, subdivision (b) of section 3519 of the Ralph C. Dills Act (Act). The State violated the Act when it failed to meet and confer with the California State Employees' Association before implementing a change in the scheduling system.

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

A. CEASE AND DESIST FROM:

1. Failing to meet and confer with the California State Employees' Association on the scheduling system of employees working in treatment units at the Metropolitan State Hospital.

2. Continuing to implement a fixed day off scheduling system at the Metropolitan State Hospital until we have met and conferred with the California State Employees' Association.

3. Denying the California State Employees' Association rights guaranteed it by the Ralph C. Dills Act.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF THE RALPH C. DILLS ACT:

1. Rescind the implementation of the fixed day off scheduling system at the Metropolitan State Hospital and reinstate the cyclical system used prior to such implementation.

Dated:

STATE OF CALIFORNIA
(DEPARTMENT OF MENTAL HEALTH)

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 MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF MENTAL HEALTH), Respondent.	)	Unfair Practice Case No. S-CE-417-S PROPOSED DECISION (5/18/90)

Appearances: Howard Schwartz, Attorney, for the California State Employees' Association; Joan Branin, Labor Relations Counsel, Department of Personnel Administration for State of California (Department of Mental Health).

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On January 12, 1989, the California State Employees' Association (hereafter Charging Party or CSEA) filed an unfair practice charge with the Public Employment Relations Board (hereafter PERB or Board) against the State of California (Department of Mental Health) (hereafter Respondent or DMH) alleging a violation of subdivisions (a), (b) and (c) of section 3519 of the Ralph C. Dills Act (hereafter Act).[1]

[1]The Ralph C. Dills Act is codified at Government Code section 3513 et seq. All section references, unless otherwise noted, are to the Government Code. Subdivisions (a), (b) and (c) of section 3519 state:

3519. ILLEGAL ACTS OR CONDUCT OF STATE

It shall be unlawful for the state to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

On March 21, 1989, the General Counsel of PERB, after an investigation of the charge, issued a Complaint alleging a violation of subdivision (c), with a derivative violation of subdivision (b), of section 3519. The allegation regarding a violation of subdivision (a) of section 3519 was not included in such Complaint. On April 3, 1989, the Respondent filed its Answer to the Complaint.

On April 18, May 1 and September 18, 1989, informal conferences were held to explore voluntary settlement possibilities. No settlement was reached.

The formal hearing was held on October 11, 1989. The parties briefed their respective positions. The case was submitted for decision on March 7, 1990.

INTRODUCTION

Charging Party alleges that the Department of Mental Health at the Metropolitan State Hospital, unilaterally instituted a change in the employee work scheduling system, i.e. a change from a "cycle" system to a "set days off" system.

The Respondent denies it violated the Act insisting, in the alternative, that (1) the matter should be deferred to

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> 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.
>
> (c) Refuse or fail to meet and confer in good faith with a recognized employee organization.

arbitration, (2) it did not alter either a written agreement or a past practice, (3) CSEA waived its right to negotiate the matter, and (4) the Department has met and conferred with CSEA regarding the matter.

JURISDICTION

The parties stipulated, and it is therefore found, that the Charging Party is the recognized employee organization for, among others, the nurses at Metropolitan State Hospital and the Respondent is the state employer within the meaning of section 3513.

FINDINGS OF FACT

CSEA is the nurses' Dills Act recognized employee organization or exclusive representative. Prior to 1987, nurses at the Metropolitan State Hospital had various cyclical scheduling systems, i.e. each employee had a set of revolving days off. In 1987, DMH determined that the then existing system had to be changed due to what it believed was an excess of forced overtime, budget overruns and difficulties in providing adequate coverage. The DMH created a Labor/Management Committee in the fall of 1987 to survey the employees and to make recommendations regarding a new scheduling procedure. CSEA recommended the employee nursing representatives for DMH's appointment to this committee. As a result of this committee's recommendations, a pilot program was instituted in May of 1988. Under this program, the nurses had set days off for a period of time but were on either a one-or two-month cycle or rotation system.

The DMH determined the pilot program was unsuccessful. In October 1988, it decided to implement a fixed day off scheduling system with no cycling or rotational component. This new scheduling system would affect approximately 125 nurses at the Metropolitan State Hospital.

On November 22, 1988, DMH notified the CSEA the nurses' scheduling system was to be changed. Attached to such notification was an offer to consult and discuss the matter. DMH admitted this was just a first step and it would soon implement this scheduling change on a state-wide basis at all of its hospitals. Preliminary steps in this regard had been already taken at Patton State Hospital in San Bernardino.

On December 8, 1988, CSEA Senior Labor Relations Representative Elizabeth Russo met with representatives of DMH and demanded to meet and confer[2] on the subject of the decision to change the scheduling system at Metropolitan. James Moore, chief of labor relations for DMH, was the spokesperson for DMH. He declined to "meet and confer" over the decision and referred Russo to the Governor's Department of Personnel Administration (hereafter DPA) stating they had the exclusive right to meet and confer on such matters. Moore cited numerous contacts and discussions that he had had with Russo in the past regarding the hospital's scheduling system and the formation of the

[2] Meet and confer is the term used by the Dills Act to denote negotiations.

Labor/Management Committee as additional justification for his refusal to meet and confer.

Moore did agree to allow CSEA to offer input into the implementation of the plan. He reminded Russo that the new scheduling system would be implemented on January 1, 1989. CSEA was only allowed to discuss such matters as the method by which various seniority lists would or would not be merged. Moore once again made it clear that DMH was going to change each of its hospitals to a set days off scheduling system.

On December 22, 1988, Russo wrote to DPA demanding negotiations on the decision to change the scheduling system. On December 29, 1988, David Gilb, senior labor relations officer for DPA, responded to Russo. He refused to meet and confer on the subject, citing the parties' MOU as justification for this position. He also explained that the implementation date for the new system had been delayed to February 1, 1989.

On January 19, 1989, at a meet and confer session on the subject of a successor MOU, Russo accused DPA of refusing to meet and confer over the decision to change the scheduling system. Gilb, without admitting the DPA was not meeting and conferring, agreed to set up a series of meetings for the purpose of meeting and conferring over the impact or the "effects" of the change in the scheduling system. Russo agreed to these meetings but insisted she reserved the right to bring up alternative scheduling systems. Gilb told her that he would listen to anything that she had to say.

On February 6 and March 20, 1989, these meet and confer sessions on the impact or the "effects" of the scheduling system modification were held. Pursuant to DPA's statement on January 19, the scope of the discussion was generally limited to the impact or "effects" of DMH's scheduling change, although there was some general discussion regarding alternatives to the fixed days off system. On March 20, the parties entered into an agreement that covered the effects of DMH's new scheduling system. At that time the state offered to include a provision in the agreement that would allow CSEA to meet and confer on any problem(s) that arose relative to the implementation of the new system, if CSEA would withdraw its unfair labor practice charge. CSEA would not agree to withdraw the charge. The State said it wanted this meet-and-confer provision in the agreement anyway and CSEA agreed but there was no quid pro quo given for the provision.

This written "effects" agreement states, in its opening sentence, "(T)he parties have met and conferred over the fixed days off system and hereby agree to the following." There is nothing in the agreement that suggests any bilateral accord on DMH's decision to modify the Metropolitan scheduling system. In paragraph no. 4, the agreement states that the parties will meet to evaluate the new system no later than September 15, 1989, and that the "State shall seriously consider input from CSEA/SEIU Local 1000 and any recommended changes to the days-off scheduling system." (Emphasis added.)

On March 30, the state signed the agreement. On May 1, 1989, CSEA signed the agreement. When this agreement was reached, Russo made it very clear that CSEA did not waive any of its rights and would continue to press the unfair labor practice it had filed on January 12, 1989, concerning DMH's and DPA's failure to meet and confer on the scheduling decision.

The Respondent relies on various sections of the MOU in its defense to the charge. Some of these sections are as follows:

> 20.1 Workweek
>
> . . . Workweeks and workdays of different number of hours may be scheduled by the State in order to meet the varying needs of the State.
>
> 20.10 Overtime Scheduling
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> . . . . . .
>
> b. The Departments recognize and understand the importance of reducing mandatory overtime to Registered Nurses. To this end, the departments will make every effort to schedule staff in a manner to reduce the need for mandatory overtime. The Union recognizes the need for mandatory overtime based on the fluctuating nature of the work.

The state (management) rights clause, section 4b, contains the following language:

> State Rights
>
> . . . . . .
>
> 4b. . . . the rights of the State shall include, but not be limited to, . . . to determine, consistent with Article VII of the Constitution, the Civil Service Act and rules pertaining thereto, the procedures and standards of selection for employment and promotion, layoff, assignment, scheduling and training. . . .

The MOU also contains a description of what conditions must be present in order for a duty to negotiate to arise. This description is set forth in Article 24.1, and is as follows:

> Article 24 Entire Agreement and Duration
>
> . . . . . .
>
> 24.1b. The parties agree that the provisions of the Subsection shall apply only to matters which are not covered in this Agreement.
>
> The parties recognize that during the term of this Agreement it may be necessary for the State to make changes in areas within the scope of negotiations. Where the State finds it necessary to make such changes, the State shall notify CSEA Local 1000 of the proposed change 30 days prior to its proposed implementation.
>
> The parties shall undertake negotiations regarding the impact of such changes on the employees in Unit 17, when all three of the following exist:
>
> (1) Where such changes would affect the working conditions of a significant number of employees in Unit 17;
>
> (2) Where the subject matter of the change is within the scope of representation pursuant to the Ralph C. Dills Act.
>
> (3) Where CSEA Local 1000 requests to negotiate with the State.
>
> Any agreement resulting from such negotiations shall be executed in writing and shall become an addendum to this Contract. If the parties are in disagreement as to whether a proposed change is subject to this Subsection, such disagreement may be submitted to the arbitration procedure for resolution. The arbitrator's decision shall be binding. In the event negotiations on the proposed change are undertaken, any impasse which arises may be submitted to mediation pursuant to Section 3518 of the Ralph C. Dills Act.

The MOU contains no other references to the employee work scheduling system. The successor MOU was neither offered nor admitted into evidence.

ISSUE

When the Department of Mental Health implemented the fixed days off schedule for employees in State Bargaining Unit No. 17 at Metropolitan State Hospital, did it violate subdivision (c) of section 3519?

CONCLUSIONS OF LAW

A unilateral change in terms and conditions of employment within the scope of representation is a per se refusal to negotiate. NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]. PERB has long recognized this principle. Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94.

Under section 3519(c) an employer is obligated to meet and confer in good faith with a recognized employee organization about matters within the scope of representation.

Section 3516 sets forth the Act's scope of representation.[3] It has long been held by PERB that an employee's work schedule is within the scope of representation. Palos Verdes Peninsula Unified School District/Pleasant Valley School District (1979)

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[3] Section 3516 states, in pertinent part, as follows:

> 3516. SCOPE OF REPRESENTATION
>
> The scope of representation shall be limited to wages, hours, and other terms and conditions of employment, . . .

PERB Decision No. 96; Oakland Unified School District (1983) PERB Decision No. 367.

Prior to 1987, the nurses at Metropolitan State Hospital had a cyclical scheduling system. CSEA had agreed to various adjustments in that scheduling system. However, when the DMH, in 1989, unilaterally implemented a set days off scheduling system with no cyclical component, it altered the established past practice. Such alteration required the concurrence of the affected employees' recognized employee organization, CSEA, or the completion of statutory procedures. Rather than agree, CSEA transmitted a demand to the DMH to meet and confer in good faith with regard to the matter. DMH would only agree to permit CSEA to consult, provide input and discuss. This failure to meet and confer fell below the duty required of it by the Act and is therefore, absent a valid defense, a violation of subdivision (c) of section 3519.

Department's Defenses

a. Matter Should be Deferred to Arbitration

The DMH insists that the MOU provisions that require arbitration survived its expiration date of August 31, 1988,[4] and

[4] The Unit No. 17 MOU was originally effective from August 16, 1987, through June 30, 1988. Prior to completion of negotiations on a successor agreement, the parties agreed to extend the MOU expiration date to August 31, 1988. No further extensions were agreed to and the MOU expired on that date. The parties eventually agreed to and ratified a successor agreement with an effective date of May 3, 1989. There was no evidence proffered regarding any retroactivity of the MOU.

controlled any duty to meet and confer it may have had in this matter.

The Respondent propounds two theories supporting its position that these provisions survived and require deferral to arbitration. First, according to the Respondent, as the dispute arose at a time when the MOU was still in effect the obligation to arbitrate survives the termination of the MOU. Secondly, the defense continues, even though the words "during the term of this Agreement" appear in the Entire Agreement Clause of the MOU (section 24.1b - see p.8 for full text), this phrase did not cause the section to expire. The DMH insists that the parties themselves at all relevant times continued to act as though the section were in effect. Therefore, the actions of the parties provide proof that they intended section 24.1b to remain in effect even though the MOU had expired.

The first theory is based on Nolde Bros., Inc. v. Local 358, Bakery and Confectionery Workers Union (1977) 430 U.S. 243 [94 LRRM 2753]. PERB, in Anaheim City School District (1983) PERB Decision No. 364, quoting Nolde Bros., said:

> . . . the Supreme Court established a rebuttable presumption of arbitrability where the dispute arises out of a right "arguably created" by the expired collective [bargaining] agreement, where the parties have agreed to submit contractual disputes to arbitration, and where there is no clear . evidence of an intention by the parties that the duty to arbitrate will terminate upon expiration of the agreement.
>
> Anaheim, supra, at p. 18

In support of its contention that the dispute arises from a right "arguably created" by the expired MOU, the Respondent cites the 1987 establishment of the Labor/Management Committee and the 1988 initiation of the pilot program. It stresses the fact that both of these instances occurred during the term of the MOU.

The Respondent's reliance on the Nolde Bros, case in general, and these two events in particular, is misplaced. Until DMH management notified CSEA on November 22, 1988, that it was going to alter the scheduling system, there was no dispute. Even the dispute that eventually arose had nothing to do with any substantive provision of the MOU. It is difficult to understand upon what facts the Respondent relies when it contends that the dispute arose out of a right created by the expired MOU. Certainly the fact that there had been discussions regarding the general topic of scheduling while the MOU was in effect would not be sufficient to create such a nexus.

The dispute neither occurred during the effective dates of the MOU, nor did it arise over language found in such MOU. It is therefore held that the dispute did not arise out of a right "arguably created" by the expired MOU. Therefore, the arbitration provision does not survive the MOU's expiration and, consequently, does not control the rights and obligations of the parties.

The Respondent's second theory of survival hinges on the actions of the parties themselves. In an attempt to bring the matter within the ambit of the Anaheim decision (see quote

supra), the Respondent cites, at length, various provisions of the MOU that use the term, "during the term of this Contract (or this Agreement)" in support of its position that the parties meant the MOU to remain in effect until the successor contract was negotiated and ratified. It also supports its position with the fact that Russo never expressly repudiated the MOU until the unfair practice charge was filed and, in its (DMH) opinion, never "evidenced any intent to have the requirements of the Entire Agreement Clause, the State's Rights Clause, or section 20.10 terminate on August 30, 1988."

These MOU provisions are not applicable to the issue at hand. They do not cause the dispute to be "arguably created" by the MOU.

The Respondent seems to be arguing that the arbitration provision of an expired MOU is not to be terminated until one side notifies its contractual partner that it considers the contract at an end. The Respondent was not able to provide any legal authority for this rather novel contractual theory.

There has been no valid legal theory proffered by the Respondent upon which it could be held that the provision regarding arbitration in the MOU survived its expiration date. Therefore, it is held that the matter should not be deferred to arbitration.

b. No Change of Policy Proven

The Department insists that there was no change of policy on its part because the nurses in the DMH are a small percentage of

all nurses in state bargaining Unit No. 17 and the nurses at Metropolitan State Hospital are a small portion of the nurses in the Department.

DMH cites Grant Joint Union High School District (1982) PERB Decision No. 196 in support of its position. This decision, on page 9, states as follows:

> This is not to say that every breach of contract also violates the Act. Such a breach must amount to a change in policy, not merely a default in a contractual obligation, before it constitutes a violation of the duty to bargain. This distinction is crucial. A change of policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. (Emphasis added.)

The Department's reliance on this decision is misplaced for two reasons. First, a change in scheduling has a continuing impact on all of the employees it touches. Secondly, the Department cannot subdivide and chronologically stagger its state-wide schedule modification decision and then insist that each sub-decision, as it affects each hospital in turn, has no generalized effect. A schedule change at one hospital with an announced similar schedule change at all of the rest of the hospitals is held to have a generalized effect. The Grant change of policy definition is in the alternative, i.e., the presence of either a generalized effect or a continuing impact will constitute a change of policy. It is found that DMH's decision had both a generalized effect and a continuing impact on the terms and conditions of employment of bargaining unit members.

c. CSEA Waived its Right to Negotiate on the New Scheduling System

It has previously been held the MOU between the parties had expired. Given that holding, there can be no waiver defense as the contractual "waiver" referenced by DMH had expired with the MOU. However, even if the previous holding had not obviated this defense, it would not have been successful.

The Respondent bases this defense on the "state (management) rights" clause contained in the MOU. It insists that such clause gives it a right to unilaterally modify the subject employees' scheduling system. The language it refers to is "the rights of the State shall include . . . the procedures . . . for . . . scheduling. . . ." (See MOU section 4b-page 7.)

It is well settled that waiver of specific rights on the part of the charging party can be a valid defense to a unilateral change. Amador Valley Joint Union High School District (1978) PERB Decision No. 74. However, a waiver must be established by clear and unmistakable language and this clarity is even more essential when a waiver of a statutory right is asserted. The party asserting the waiver has the burden to establish such defense and any doubts must be resolved against the asserting party. Compton Community College District (1989) PERB Decision No. 720; Placentia Unified School District (1986) PERB Decision No. 595. Contract terms will not justify a unilateral management act on a mandatory subject of bargaining unless the contract expressly or by necessary implication confers such a right. Los Angeles Community College District (1982) PERB Decision 252. It

is held that the general management rights language contained in the parties' MOU does not expressly or by necessary implication confer a right on the Respondent to unilaterally modify the scheduling system at Metropolitan State Hospital. Therefore, such contractual language does not constitute a clear and unmistakable waiver of the CSEA's right to demand to meet and confer on a scheduling system change.

d. The State has Met and Conferred with the CSEA on the Scheduling System Change at Metropolitan State Hospital

First, the Respondent attempts to use the simultaneous meet and confer sessions that occurred on the successor MOU as proof that it met and conferred over the scheduling system change. This does not provide a defense to this complaint as the two duties to meet and confer are separate from one another. One duty requires the negotiations of future contractual provisions. The DMH met this duty and this matter is not at issue. The second requires the DMH to negotiate changes it proposes in the scheduling system status quo. It is this duty that DMH failed to meet.

Secondly, DMH cites the March 20 agreement on the "effects" of DMH's unilateral scheduling decision as proof that the parties did meet and confer over the decision itself. The "effects" agreement, in neither its opening paragraph nor its general provisions, does not support DMH's position. In addition, paragraph No. 4 of this "effects" agreement supports CSEA's contention that the State agreed to only "seriously consider input" into the eventual schedule modification decision and

refused to agree to meet and confer over the matter. (See Findings, page 6-7.)

Based on all of the evidence presented, it is determined that the Respondent did not meet and confer with the CSEA on the subject of the scheduling system modification and had no valid reason for not doing so. It is held, therefore, that such action violated subdivision (c) of section 3519. As this action concurrently denied to the CSEA rights guaranteed to it by the Act, it is also found that the State of California violated subdivision (b) of section 3519.

SUMMARY

Based on the foregoing Findings of Fact and Conclusions of Law, and the entire record in this case, it is determined that when the Respondent modified the scheduling system at the Metropolitan State Hospital, it violated subdivisions (b) and (c) of section 3519.

REMEDY

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.

In order to remedy the unfair practice of the Respondent and to prevent it from benefiting from its unfair labor practice, and to effectuate the purposes of the Ralph C. Dills Act, it is appropriate to order the State to cease and desist from failing

to meet and confer with the California State Employees Association on the scheduling system for Bargaining Unit No. 17 nurses employed at the Metropolitan State Hospital. A unilateral change, when involving a refusal to bargain, is typically remedied by restoring the status quo ante, by ordering the employer to negotiate on the matter at issue, and by making particular employees whole for any benefits the employer discontinued. The discontinued benefit, periodic weekend days off, does not lend itself to a monetary quantification. There will be no monetary award.

It is also appropriate that the Respondent be required to post a notice incorporating the terms of this order. The notice should be subscribed by an authorized agent of the State, indicating that it will comply with the terms thereof. The notice shall not be reduced in size, defaced, altered or covered by any other material. Posting such a notice will provide employees with notice that the Respondent has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the act that employees be informed of the resolution of the controversy and will announce the Respondent's readiness to comply with the ordered remedy. See Placerville Union School District (1978) PERB Decision No. 69. In Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587 [159 Cal.Rptr. 584], the California District Court of Appeal approved a similar

posting requirement. See also, NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and the entire record of this case, it is found that the State of California (Department of Mental Health) violated subdivision (c) and, derivatively, subdivision (b) of section 3519 of the Ralph C. Dills Act. Pursuant to section 3514.5(c) it is hereby ORDERED that the State of California (Department of Mental Health), its director and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer with the California State Employees Association on the nurses' scheduling system at the Metropolitan State Hospital.

2. Continuing to implement a fixed day off scheduling system at the Metropolitan State Hospital and at any of its other hospitals that have a cyclical scheduling system, including, but not limited to, the Patton State Hospital, until it has met and conferred with the affected employees' recognized employee organization(s).

3. Denying the California State Employees Association rights guaranteed it by the Ralph C. Dills Act.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF THE RALPH C. DILLS ACT:

1. Rescind the implementation of the fixed day off scheduling system at the Metropolitan State Hospital and

reinstate the cyclical system used previous to such implementation.

2. Within the (10) workdays of service of a final decision in this matter, post at all work locations where notices are customarily placed at all Department of Mental Health hospitals, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the State of California, indicating that the state shall comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be take to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the Sacramento Regional Director of the Public Employment Relations Board in accordance with his instructions. Continue to report in writing to the Regional Director thereafter as directed. All reports to the Regional Director shall be concurrently served on the Charging Party herein.

It is further ORDERED that all other aspects of the Charge and Complaint are hereby dismissed.

Pursuant to California Administrative Code, 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 California Administrative Code, title 8, section 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 California Administrative Code, title 8, section 32135. Code of Civil Procedure section 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 California Administrative Code, title 8, sections 32300, 32305 and 32140.

Dated: May 18, 19 90

ALLEN R. LINK
Administrative Law Judge