STATE OP CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION),		
Charging Party,	)	Case No. S-CO-127-S
v.	)	PERB Decision No. 900-S
PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT,	)	September 13, 1991
Respondent.	)	

Appearance: M. Jeffrey Fine, Deputy Chief Counsel, for State of California (Department of Personnel Administration).

Before Shank, Camilli and Carlyle, Members.

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the State of California (Department of Personnel Administration) (DPA) of a PERB regional attorney's dismissal (attached) of its charge alleging the Professional Engineers in California Government (PECG) violated section 3519.5(c) of the Ralph C. Dills Act (Act).[1]

[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 3519.5 provides, in pertinent part:

> It shall be unlawful for an employee organization to:
>
> (c) Refuse or fail to meet and confer in good faith with a state agency employer of

DPA alleged that PECG violated its duty to bargain in good faith by insisting on negotiating and reaching agreement on ground rules/released time before discussing proposals on other issues. In the warning and dismissal letters, the regional attorney found that the charge failed to state a prima facie violation of the duty to bargain in good faith based on either a totality of the circumstances or a per se test. (Stockton Unified School District (1980) PERB Decision No. 143.)

DPA has appealed the dismissal, contending that PECG's conduct constitutes a per se violation of the duty to bargain in good faith. In addition, DPA claims that the regional attorney's determination that the allegations fail to state a prima facie case under the totality of the circumstances test was flawed.

The Board has reviewed the dismissal and, finding it to be free from prejudicial error, adopts it as the decision of the Board itself, consistent with the following discussion.

DISCUSSION

Although the Board affirms the regional attorney's analysis concerning the totality of the circumstances test, the Board

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any of the employees of which it is the recognized employee organization.

The Board notes that an amended charge was filed in this case which alleged violations of section 3519(3), (b) and (c) of the Act. As that section concerns unlawful actions engaged in by the state, it appears that DPA may have meant to allege violations of 3519.5(a), (b) and (c) of the Act. Because the Board affirms the regional attorney's dismissal of an alleged violation of section 3519.5(c), alleged violations of subsections (a) and (b) of that section would also be dismissed.

finds it necessary to further address the issue of an alleged per se violation of the duty to bargain in good faith.

The regional attorney cites Stockton Unified School District (1980) PERB Decision No. 143 for the proposition that the conditioning of negotiation of substantive issues on agreement on ground rules (in this case, released time) is not a per se violation of the duty to bargain in good faith. (Warning letter, p. 4.) In Stockton, supra. the Board found it unnecessary to determine whether the district's conduct of conditioning negotiation of substantive issues on agreement on ground rules constituted a per se violation of the duty to bargain in good faith. The Board determined that the district's conduct was part of a total course of conduct which, taken together, established a violation of the duty to bargain in good faith. (Id. at p. 24.) Based upon the above, the Board finds that the determination that PECG's conduct does not constitute a per se violation requires further analysis.

The facts of this case potentially implicate two separate per se violation theories. An absolute refusal to meet and negotiate on demand of another party may constitute a per se violation. (Sierra Joint Community College District (1981) PERB Decision No. 179.) If a subject is outside the scope of representation, a party may refuse to negotiate. (Healdsburg Union High School District (1980) PERB Decision No. 132, p. 8.) However, the issue of released time is within the scope of

representation and is a mandatory subject of bargaining. (Gonzales Union High School District (1985) PERB Decision No. 480, p. 45; Compton Community College District (1989) PERB Decision No. 728, p. 56.) The Board has found that the district's categorical refusal to negotiate released time is a violation of the Educational Employment Relations Act section 3543.5(c) because released time is a subject within the scope of representation. (Sierra Joint Community College District, supra, PERB Decision No. 179.)

Based upon the above, it is clear that because released time is a subject within the scope of representation, neither party may refuse to negotiate this issue. However, there is no allegation that PECG refused to negotiate this issue. Because there is no allegation that PECG refused to bargain the issue of released time, the charge fails to state a prima facie case that PECG failed to bargain in good faith under this per se theory.

The Board has also found a per se violation of the duty to negotiate where a party insists to impasse on a non-mandatory subject of bargaining as a condition of settlement of mandatory subjects of bargaining. (Lake Elsinore School District (1986) PERB Decision No. 603.) In the present case, DPA alleges that PECG insisted on negotiating and reaching agreement regarding the issue of ground rules/released time before it would negotiate substantive issues. The issue of released time, however, is a mandatory subject of bargaining. (Los Rios Community College District (Barth) (1991) PERB Decision No. 867, warning letter,

p. 2; Gonzales Union High School District (1985) PERB Decision No. 480, p. 45.) Because the issue of released time is a mandatory subject of bargaining, PECG's insistence upon negotiations on that issue does not constitute a per se violation of the duty to bargain in good faith.

Based upon all of the above, the Board finds that the charge fails to state a prima facie case of a failure to bargain in good faith under a per se theory.

ORDER

The unfair practice charge in Case No. S-CO-127-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Shank and Carlyle joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3088

July 9, 1991

M. Jeffrey Fine
Deputy Chief Counsel
Department of Personnel Administration
Legal Division
1515 "S" Street
North Building, Suite 400
Sacramento, CA 94244

Re: State of California (Department of Personnel Administration)
v. Professional Engineers in California Government
Unfair Practice Charge No. S-CO-127-S
DISMISSAL LETTER

Dear Mr. Fine:

On June 4, 1991, you filed a charge in which you alleged that the Professional Engineers in California Government (PECG) has violated section 3519.5(c) of the Government Code (the Dills Act). Specifically, you allege that PECG has failed to bargain in good faith by refusing to bargain substantive issues until agreement has been reached on ground rules in violation of the Dills Act.

I indicated to you in my attached letter dated June 26, 1991, that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to July 5, 1991, the charge would be dismissed.

I have not received either a request for withdrawal or an amended charge. I am therefore dismissing the charge based on the facts and reasons contained in my June 26, 1991 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal (California Code of Regulations, title

8, section 32635(a)). To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing (California Code of Regulations, title 8, section 32135). Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty calendar days following the date of service of the appeal (California Code of Regulations, title 8, section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See California Code of Regulations, title 8, section 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (California Code of Regulations, title 8, section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

JOHN W. SPITTLER
General Counsel

By _____
Michael E. Gash
Regional Attorney

Attachment

PUBLIC EMPLOYMENT RELATIONS BOARD

Headquarters Office
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3088

June 26, 1991

M. Jeffrey Fine
Deputy Chief Counsel
Department of Personnel Administration
Legal Division
1515 "S" Street
North Building, Suite 400
Sacramento, CA 94244

Re: State of California (Department of Personnel Administration)
v. Professional Engineers in California Government
Unfair Practice Charge No. S-CO-127-S
WARNING LETTER

Dear Mr. Fine:

On June 4, 1991, you filed a charge in which you alleged that the Professional Engineers in California Government (PECG) has violated section 3519.5(c) of the Government Code (the Dills Act). Specifically, you allege that PECG has failed to bargain in good faith by refusing to bargain substantive issues until agreement has been reached on ground rules in violation of the Dills Act.

On June 19, 1991, you filed a First Amended Charge alleging that PECG has failed to bargain in good faith by conditioning substantive discussions on a resolution of ground rules. My investigation revealed the following facts.

PECG is the exclusive negotiating agent for employees in Bargaining Unit 9. PECG and the State of California (Department of Personnel Administration) (hereinafter State or DPA) are currently parties to a collective bargaining agreement which expires on June 30, 1991. On May 20, 1991, PECG and the State met to negotiate ground rules for a successor agreement. The parties did not reach agreement on ground rules.

The State negotiator offered to meet with PECG in the absence of ground rules on May 28, 1991 through June 1, 1991. The State negotiator did not offer State paid release time. However, the State negotiator offered PECG representatives union leave, vacation leave or CTO for bargaining during the normal workday, or to begin bargaining at 5:30 p.m. each day beginning Tuesday,

May 28, 1991 through Friday, May 31, 1991 and on Saturday, June 1, 1991, beginning at 10:00 a.m. with no stated ending time. PECG's negotiator refused to meet between May 28, 1991 through May 31, 1991. However, by letter, he requested that the parties meet on June 1, 1991, to conclude negotiations on ground rules.

PECG and the State met on June 1, 1991. During this meeting the State negotiator stated that if the parties were unable to reach agreement on ground rules, the State was prepared to present approximately twenty substantive proposals to PECG. The State negotiator further stated that he was willing to continue to discuss ground rules as well. PECG's negotiator stated he would not agree to begin negotiations on substantive issues unless the parties reached agreement on ground rules.

Just prior to a caucus at 11:05 a.m., the State negotiator once again offered to negotiate substantive issues with or without ground rules. PECG's negotiator again stated he wanted to discuss ground rules. The State's negotiator stated "we don't believe that the conditioning of reaching agreement on ground rules is conducive to full bargaining." The State negotiator again requested PECG's negotiator to reconsider accepting the State's proposals that were prepared for June 1, 1991.

The parties reconvened at 11:55 a.m. and continued to discuss ground rules. The differences centered on the number of bargaining team members on State release time. The State had proposed four, the Union requested five. The State negotiator again offered to present proposals to PECG whether or not ground rules were agreed upon. PECG'S negotiator stated "no proposals, we are here to try to resolve ground rules, we will continue to discuss ground rules." The State negotiator again asked PECG's negotiator if he was refusing to negotiate with the State and was he conditioning negotiations of proposals with reaching prior agreement on ground rules. PECG's negotiator stated "we'll discuss ground rules."

The morning session ended at 12:15 p.m. and reconvened at 1:55 p.m. The parties continued to discuss ground rules until 2:10 p.m. when a caucus was called by the State. Just before the caucus, the State negotiator proposed four team members on release time and an "expert" who would have release time upon mutual agreement. At 2:58 p.m. a PECG representative wanted to know when the State negotiators would return. At 3:02 p.m. PECG's negotiator stated they had to leave at 3:15 p.m. to catch a plane. The parties reconvened at 3:05 p.m. During this

discussion, PECG's negotiator again stated "we have a plane problem." The State negotiator stated "we are prepared to present proposals until at least 5:00 p.m. today and we are prepared to bargain into the evening."

The State negotiator again asked PECG's negotiator "are you conditioning negotiating of proposals without reaching agreement on ground rules?" PECG's negotiator stated "we are out of time." He also stated two members had to catch planes. The State negotiator stated we are prepared to meet with the balance of your team into the evening. PECG's negotiator stated "staying until 5:00 p.m. is not an option."

The State negotiator offered to meet on Monday, June 3, 1991 at 5:30 p.m. or during the day and into the evening. PECG requested a caucus at 3:20 p.m. A PECG team member informed the State negotiator that PECG was leaving. At the State negotiator's request, the parties reconvened at 3:22 p.m. to determine where the differences were in positions on ground rules.

The State negotiator offered June 3, June 5, June 6, June 7 and June 9, 1991 as possible dates for negotiations. PECG's negotiator said he would meet on Wednesday, June 5, 1991 at 10:00 a.m. at PECG's offices in Sacramento, California.

The State negotiator again offered to bargain with the remaining PECG team members into the evening of June 1, 1991. The State negotiator stated "we have been prepared to present approximately twenty substantive proposals without ground rules. "Are you prepared to continue bargaining today?" PECG's negotiator responded by saying "let's discuss that Monday." Bargaining ended at 3:26 p.m.

On June 5, 1991, the parties met and exchanged materials regarding issues other than ground rules and agreed to discuss issues of mutual interest. However, the parties did not negotiate because PECG's full bargaining team was not present.

On June 12, 1991, the parties met and PECG's negotiator, Mr. Bruce Blanning, indicated that as the State has refused State-paid release time for bargaining team members, he could not bargain. Mr. Blanning gave State negotiator, Mr. Arnie Beck, a letter indicating a number of alternatives to resolve the ground rules issue. One of the alternatives was to use the services of a mediator. Mr. Beck contacted the State Mediation and Conciliation Services and arranged for the services of Dave Ruiz

as a mediator. A mediation session was scheduled by Mr. Ruiz for June 19, 1991. The parties met on June 19, 1991 and reached agreement on ground rules.

Based on the allegations set forth above, I do not find that you have established a prima facie violation of the Dills Act.

The Public Employment Relations Board (PERB or Board) utilizes either the "per se" or "totality of the conduct" test to ascertain whether a party's negotiating conduct constitutes an unfair practice, depending on the specific conduct involved and the effect of such conduct on the negotiating process. Stockton Unified School District (1980) PERB Decision No. 143.

Charging Party has failed to establish that the conduct by PECG constitutes an unfair practice. Charging Party asserts that Stockton Unified School District (1980) PERB Decision No. 143, supports its position that conditioning negotiation of substantive issues on agreement on ground rules is an unfair practice.

However, the facts in Stockton Unified School District, supra, are distinguishable from the facts presented in this unfair practice charge. In Stockton Unified, supra, the District's newly appointed negotiator reneged on an agreement for ground rules, which was reached between the employee organization and the negotiator's predecessor. In addition to reneging on previously agreed upon ground rules, the District also engaged in a course of conduct, which the Board found to be an unfair labor practice. As stated by one of the two Board members in Stockton Unified School District, supra.

> . . . conditioning negotiation of substantive issues on agreement on ground rules was a part of a total course of conduct which taken together establishes a violation of section 3543.5(c), it is not necessary to decide here whether it constituted a per se violation.

The second Board member considered conditioning negotiation of substantive issues on agreement on ground rules as evidence of failing to bargaining in good faith, but did not find it to be a per se violation. Thus, conditioning negotiation of substantive issues on agreement on ground rules is not a per se violation and there is no prima facie case under that theory.

In addition, Charging Party has failed to demonstrate any facts here that the actions by PECG were part of a total course of unlawful conduct. The parties had only met for a short period of time when this unfair practice charge was filed. During the June 5, 1991 meeting, the parties exchanged materials and agreed to discuss issues of mutual interest, but did not negotiate because PECG did not have its full bargaining team present. During the June 12, 1991 meeting, PECG proposed several alternatives to resolve the ground rules issue. One of the alternatives: to use a mediator; was chosen. Mr. Beck contacted the State Mediation and Conciliation Services and arranged for Mr. Ruiz to mediate the issues of ground rules. A mediation session was scheduled by Mr. Ruiz for June 19, 1991. The parties met on June 19 and reached agreement on ground rules.

The conduct by PECG in this case does not rise to the same level of totality of conduct as found in Stockton, supra, to be an unfair practice. Therefore, Charging Party has failed to demonstrate that PECG has violated section 3519.5(c) of the Dills Act.

For these reasons, the charge as presently written does not state a prima facie case. If there are any factual inaccuracies in this letter or any additional facts that would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and must be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before July 5, 1991, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198.

Sincerely,

Michael E. Gash
Regional Attorney