STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 39,	)	
Charging Party,	)	Case No. S-CE-554-S
v.	)	PERB Decision No. 928-S
STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION),	)	April 20, 1992
Respondent.	)	

Appearance: Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for International Union of Operating Engineers, Local 39.

Before Hesse, Chairperson; Caffrey and Carlyle, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (Board) on appeal by the International Union of Operating Engineers, Local 39 (IUOE) of a Board agent's dismissal, attached hereto, of its charge that the State of California (Department of Personnel Administration) violated sections 3516.5, and 3519(a), (b), and (c) of the Ralph C. Dills Act (Dills Act)[1] by failing to provide IUOE with notice and an opportunity to bargain prior to proposing an initiative measure to the Attorney General and announcing it to the people of California. The initiative measure would allow the Governor, in a state of fiscal emergency, to furlough or reduce salaries of state employees.

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

The Board has reviewed the dismissal and, finding it to be free of prejudicial error,[2] adopts it as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. S-CE-554-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairperson Hesse and Member Caffrey joined in this Decision.

[2]References to section 3516.5 of the Dills Act in the warning letter are inadvertently cited as 3515.6.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

January 17, 1992

Stewart Weinberg, Attorney
Van Bourg, Weinberg, Roger & Rosenfeld
875 Battery St., 3rd Floor
San Francisco CA 94111

Re: International Union of Operating Engineers, Local 39 v. State of California (Department of Personnel Administration)
Unfair Practice Charge Case No. S-CE-554-S
DISMISSAL LETTER

Dear Mr. Weinberg:

I indicated to you in my attached letter dated January 8, 1992, 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 January 16, 1992, 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 January 8, 1992 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 Regs., tit. 8, sec. 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 Regs., tit. 8, sec. 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 Regs., tit. 8, sec. 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 Regs., tit. 8, sec. 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 Regs., tit. 8, sec. 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 SPITTLER
General Counsel

Michael E. Gash
Regional Attorney

Attachment

cc: Christopher Waddell, Chief Counsel
Dept, of Personnel Administration
1515 S St., North Bldg., Suite 400
Sacramento CA 95814

PUBLIC EMPLOYMENT RELATIONS BOARD

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

January 8, 1992

Stewart Weinberg, Attorney
Van Bourg, Weinberg, Roger & Rosenfeld
875 Battery Street, 3rd Floor
San Francisco, CA 94111

Re: International Union of Operating Engineers, Local 39 v. State of California (Department of Personnel Administration)
Unfair Practice **Charge No. S-CE-554-S**

Dear Mr. Weinberg:

On December 23, **1991,** you **filed a charge in which** it appears you allege that the **Governor, has violated sections 3515.6,** 3519(a) **(b)** and (c) of **the Government Code (the Dills Act).**[1]

[1]Your charge states in **its totality:**

> On December 9, 1991, Governor Pete Wilson began a statewide initiative measure including various cost saving measures, among which is a provision which, if adopted by the electorate, would give the Governor the authority to reduce salaries and benefits of state employees not covered by a collective bargaining agreement by up to 5% and to make other changes affecting employees within Bargaining Units 12 and 13 of the State of California represented by Charging Party. Although Charging Party has the right to represent employees in Units 12 and 13, those employees are not always covered by a collective bargaining agreement. The Governor gave no notice or opportunity to meet and confer to charging party regarding the initiative before he began to use the resources of his office to promote the initiative.

Specifically, you allege that the Governor has violated section 3515.6 of the Dills Act by failing to provide charging **party with written notice and the opportunity to meet and** confer **prior to proposing an initiative measure to the** Attorney General, **which reforms the budget process and the welfare system** and **empowers the Governor to reduce the salaries of state employees or furlough state employees when there is a fiscal emergency. Charging party also contends that the Governor or his designee by failing to notify and give it the opportunity to meet and confer over the Governor obtaining, through the initiative process, the power, when a fiscal emergency is declared, to reduce the salaries of state employees or furlough state employees, violated sections 3519(a), (b) and (c) of the Dills Act. My investigation revealed the following facts.**

The International Union of Operating Engineers, Local 39 (IUOE) is a recognized employee organizations that is the exclusive bargaining agent for approximately 11,000 employees in Bargaining Units 12 and 13.

The current Memorandum of Understanding (MOU or contract) between IUOE and the State expired at midnight on June 30, 1991. Contract extensions were granted by the State on June 30, 1991 and expired on July 30, 1991. No further contract extensions were agreed to, as such there is no MOU in effect between charging party and the State.

On or about December 9, 1991, the Governor proposed an **initiative measure to the Attorney General and publicly announced the initiative measure. The initiative measure would if approved by the voters, in relevant part, add sections 12.2, 12.5** and **12.7 to Article IV of the California Constitution** to read:

> **12.2. (a) Whenever the budget** bill has not **been passed and signed by** July **1,** the **Governor may declare** a state of fiscal **emergency. When a fiscal emergency** has been declared, **the prior** year budget, adjusted as required **by Article XIII,** section 25, Article **XIII** B, sections 6 and 8, Article XVI, section 8, and state debt service, shall **become the state's** operational budget and shall **remain** in effect until the Legislature passes and the Governor signs a budget bill. In order to bring anticipated revenues and expenditures for the fiscal year into balance, the Governor may immediately propose

reductions in any category of expenditure, including any state entitlement, except expenditures required by Article XIII, Section 25, Article XIIIB, Sections 6 and 8, funding for education as provided in Article XVI, section 8, and state debt service.

(b) Any reductions proposed under subdivision (a) shall become effective 30 days after the proposal is transmitted to the Legislature unless, prior to the end of the 30-day-calendar period, the Legislature passes the budget bill and the bill is signed by the Governor.

12.5. (a) After the budget bill has been enacted, the Governor may declare a state of fiscal emergency and, in order to bring anticipated State General Fund revenues and expenditures for the fiscal year into balance, may reduce any category of expenditure, including any state entitlement, except expenditures protected by Article XIII, Section 25, Article XIII B, sections 6 and 8, funding for education as provided in Article XVI, section 8, and state debt service if at the end of any quarter:

(1) Cumulative fiscal year State General Fund cash receipts fall at least three percent (3%) below revenues as estimated by the Department of Finance **upon** enactment of the budget: or

(2) Cumulative fiscal year State General Fund expenditures exceed budgeted amounts by three percent (3%); or

(3) Cumulative fiscal year State General Fund cash receipts fall at least one and one-half percent (1-1/2%) below revenues as estimated by the Department **of** Finance upon enactment of the budget and cumulative fiscal year expenditures exceed budgeted amounts by at least one and one-half percent (1-1/2%).

For purposes of this provision, a quarter is any three month period ending September 30, December 31, or March 31.

(b) Any reduction proposed under subdivision (a) shall become effective 30 days after the proposal is transmitted to the Legislature unless, prior to the end of the 30-day-calendar period, **the** Legislature enacts in each house by rollcall **vote** entered **in** the journal, **two thirds of the membership** concurring, **alternate legislation to bring anticipated revenues and expenditures for** the fiscal year **into balance and that legislation** is **signed by the Governor.**

12.7. (a) When a state of fiscal emergency has been **declared pursuant to Sections 12.2 or 12.5, the Governor may, by Executive Order, reduce the salaries of state employees or furlough state employees, provided that** the **total reduction from such actions does** not **exceed five percent (5%) of an employee's** salary in any pay period.

(b) The Governor may **not** reduce the salary of or furlough a state employee during the agreed upon term of a Memorandum **of** Understanding that has been negotiated pursuant to Chapter 10.3 (commencing with Section 3512), Division 4, Title 1 of the Government Code, which covers the terms and conditions of employment for such employee, unless the Memorandum of Understanding itself allows such actions to be taken by the Governor or his or her designee.

(c) the issuance of an Executive Order pursuant to subsection (a) shall not be subject to Chapter 10.3 (commencing with Section 3512), Division 4, Title 1 of the Government Code or the provisions of any other state law governing salary setting for state officers and employees.

(d) As used in this section, the term "employee" or "state employee" includes those

> **employees defined** in Government Code Section **19815(d)**.

Based **on the facts set** forth above, I do not find that you have established **a prima facie** violation of sections 3515.6, 3519(a), **(b) and (c) of the Dills Act.**

The violation alleged in this unfair practice charge revolve **around sections 3516.5 and 3517 of the Dills** Act. Section **3516.5** reads:

> **Except in cases of emergency as provided** in **this section, the employer shall give reasonable written notice to each recognized employee organization affected by any law, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the employer, and shall give such recognized employee organizations the opportunity to meet and confer with the administrative officials or their delegated representatives as may be properly designated by law.**
>
> **In cases of emergency when the employer determines that a law, rule, resolution,** or **regulation must be adopted** immediately **without prior notice or meeting** with a **recognized employee organization,** the **administrative officials or** their delegated representatives as may be properly designated by law shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation.

Section 3517 reads:

> The Governor, or his representative as may be properly designated by law, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior

> to arriving at a determination of policy or course of action.
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> "Meet and confer in good faith" means that the Governor or such representatives as the Governor may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses.

Although not stated in your charge, your charge appears to rely on People ex rel. Seal Beach Police Officers Association v. City of Seal Beach (1984) 36 Cal.3d 591, as requiring the Governor to give written notification and the opportunity to meet and confer prior to proposing an initiative measure which reforms the budget process and empowers the Governor, when a fiscal emergency is declared, to reduce the salaries of state employees or furlough state employees.

In City of Seal Beach, supra, sections 3504.5 and 3505[2] of the Meyers-Milias-Brown Act (Government Code sections 3500-3510) were interpreted by the California Supreme Court. The Supreme Court held that a city council was required to comply with the meet and confer requirements of Government Code section 3505 before it proposes an amendment to the city charter concerning the terms and conditions of public employment.

In City of Seal Beach, supra, it was undisputed that the charter amendments concerned the terms and conditions of public employment.[3] However, in this case, charging party has failed to

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[2] Sections 3516.5 and 3517 of the Dills Act are nearly identical to sections 3504.5 and 3505 of the MMBA.

[3] In City of Seal Beach, one amendment required the immediate firing, subject to an administrative hearing procedure, of any city employee who participated in a strike; it also prohibited the city council from granting amnesty or otherwise rehiring any

demonstrate that the power conveyed to the Governor by the proposed initiative is a subject within the scope of representation.

The threshold issue is whether the Governor by obtaining the power, through the initiative process, to reduce the salaries of state employees **or** furlough state employees when a fiscal emergency is declared, is a subject within the scope of representation. Section 3516 of the Dills Act provides that:

> The **scope of** representation shall be limited **to wages, hours, and other** terms and **conditions** of employment, except, however, **that the scope of representation** shall not **include consideration of the merits, necessity, or organization of any** service or **activity provided by law or** executive order.

In State of California. (Department of Transportation) (1983) PERB **Decision No. 361-S, the Board set forth** the test for **determining whether given subjects are within the** scope of **representation. The Board stated in** State of California. (Department **of** Transportation, supra, **that**

> PERB **will** find such matters within scope if they involve the employment relationship and are of such concern to both management and employees that conflict is likely to occur, and if the mediatory influence of collective negotiations is an appropriate means of resolving the conflict.
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> Such subject will be found mandatorily negotiable under SEERA unless imposing such an obligation would unduly abridge the State employer's freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the State's mission. If requiring negotiations on a subject would

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striking public employee. The Supreme Court stated that "since the substantive validity of the amendments is not before us, . . . it is undisputed that they [the charter amendments] deal with terms and conditions of public employment. (See, City of Seal Beach. (1984) 36 Cal.3d 591, 595 footnote No. 2).

> significantly abridge the State employer's managerial prerogative as set forth above, the subject will be held outside the scope of mandatory negotiations.

Although the proposed initiative involves the employment relationship between the State employer and state employees the mediatory influence of negotiations is not suited to the resolution of conflict over whether the Governor should have the power, when a fiscal emergency is declared, to reduce the salaries of state employees, or furlough state employees. In addition imposing such an obligation would unduly abridge the State employer's freedom to exercise those managerial prerogatives essential to the achievement of the State's mission. This proposed initiative conveys power to the Governor during a fiscal emergency. The provisions of the proposed initiative do not impair or destroy the bargaining process. The proposed initiative empowers the Governor, when a fiscal emergency is declared, to reduce the salaries of state employees or furlough state employees. The terms and conditions of an existing MOU would not be abrogated, unless its terms specifically permitted the Governor to act.[4] Accordingly, the subject of the Governor obtaining the power, through the initiative process, to reduce the salaries of state employees or to furlough state employees when a fiscal emergency is declared is not a subject within the scope of representation. Therefore, charging party has failed to establish a prima facie violation of sections 3516.5, 3519(b) and (c) the Dills Act.

Your charge also alleges that the Governor has violated section 3519(a) of the Dills Act. To demonstrate a violation of section 3519(a), the charging party must show that: (1) the employee exercised rights under the Dills Act, (2) the employer had knowledge of the exercise of those rights, and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H. As presently written, your

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[4]See section 12.7(b) of Government Accountability and Taxpayer Protection Act of 1992, at p. 4, supra.

charge fails to allege any of these factors and therefore does not state a prima facie violation of section 3519(a).

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 January 16, 1992, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198.

Sincerely,

Michael E. Gash
Regional Attorney