STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ENGINEERS, CRAFT-MAINTENANCE DIVISION, UNIT 12,	)	
Charging Party,	)	Case No. SF-CE-100-S
v.	)	PERB Decision No. 999-S
STATE OF CALIFORNIA (DEPARTMENT OF FORESTRY AND FIRE PROTECTION),	)	June 22, 1993
Respondent.	)	

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for International Union of Operating Engineers, Craft-Maintenance Division, Unit 12; Joan Branin, Labor Relations Counsel, for the State of California (Department of Forestry and Fire Protection).

Before Blair, Chair; Hesse and Caffrey, Members.

DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the State of California (Department of Forestry and Fire Protection) (CDF) to a PERB administrative law judge's (ALJ) proposed decision. The ALJ found that CDF violated section 3519(a), (b) and (c) of the Ralph C. Dills Act (Dills Act)[1] when it refused to negotiate

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3519 states, in pertinent part:

> It shall be unlawful for the state to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce

with the International Union of Operating Engineers, Craft-Maintenance Division, Unit 12 (IUOE) over the issue of designating the area of layoff in which the employees of CDF are considered for layoff.

SUMMARY

The Board has reviewed the entire record in this case, including the proposed decision, transcript, exhibits, CDF's exceptions, IUOE's response thereto, and the collective bargaining agreement between the parties. The Board finds that the state employer's prerogative to reduce its operations includes the authority to identify the specific positions in specific locations to be eliminated, and is not a negotiable subject under the Dills Act. However, the layoff of employees occupying the positions management has decided to eliminate affects the fundamental employment relationship. Under the express terms of the Dills Act, a supersession statute, subjects affecting the fundamental employment relationship, such as the designation of the area in which employees will be laid off, are negotiable subjects. Therefore, the Board concludes that a violation of the Dills Act has occurred in this case, in accordance with the following discussion.

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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.

FACTUAL BACKGROUND

IUOE is an employee organization and the recognized exclusive representative of State Bargaining Unit 12, within the meaning of Dills Act section 3513. CDF is a state employer within the meaning of Dills Act section 3513.

CDF is made up of four geographical regions, which are further broken down into ranger units. Some ranger units contain only one county, others contain more than one county. Ranger stations, or fire stations, are located within ranger units.

On November 12, 1991, Walt Norris, director of IUOE's public employees section, received a letter from Ronald McGee (McGee), CDF labor relations officer, announcing that seven positions had been targeted for elimination, resulting in a probable layoff effective January 7, 1992.[2] Prior to that time there had been no layoffs at CDF.

On November 14, 1991, pursuant to Department of Personnel Administration (DPA) regulations, CDF submitted to DPA a "request for approval of area of layoff and demotion charts." The requested "area of layoff" was "county." McGee testified that one factor which prompted CDF to request DPA to designate specific counties as the area of layoff was the desire to avoid payment of employee transfer and relocation expenses which could

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[2]These positions and their locations are as follows: two Electrician II positions (one each in Sonoma and Humboldt Counties); two Carpenter II positions (one each in Sonoma and Shasta Counties); one Carpenter Supervisor position (Shasta County); one half-time Warehouse Worker position (Shasta County); and one Skilled Laborer position (Fresno County).

result from employees bumping to a different location if a broader area of layoff was established.[3] In addition, CDF asserted that layoffs based on a broader area of layoff might not result in vacant positions in the locations desired by CDF. CDF also noted, among other things, that the targeted positions had been filled based on an open statewide examination with a county location preference, that employees in the counties designated for layoff had been hired pursuant to their indicated county location preference, and that department employees typically did not transfer between counties and units. CDF's request to designate specific counties as the area of layoff was approved by DPA.

IUOE filed a charge on November 15, 1991 alleging that CDF was attempting to layoff employees without first meeting and conferring. On November 22, 1991, IUOE formally requested to meet and confer with CDF about the layoffs. A meet and confer session was scheduled for December 19, 1991.

In early December, employees in the designated area of layoff were notified by CDF of the impending layoff. The notice informed the employees that the designated area of layoff was by county and that county seniority lists of affected employees had been compiled.

[3]Generally, the narrower the designated area of layoff, the fewer the options available to the employees of that area who are being considered for layoff, and the less likelihood of bumping and the possible resulting employer-paid transfer and relocation.

CDF and IUOE met on December 19, 1991 to negotiate the impact of the decision to reduce operations through layoff. Seniority was discussed and CDF described the process which resulted in designating specific counties as the area of layoff. When IUOE requested to bargain over the designation of the area of layoff, CDF took the position that it was not a proper subject for meeting and conferring.

Although ultimately no layoffs occurred, IUOE amended its charge on February 4, 1992, challenging CDF's unilateral adoption of the policy designating specific counties as the area of layoff. The PERB General Counsel issued a complaint on February 24, 1992, alleging that CDF had unilaterally changed its policy concerning layoff.

The ALJ found that CDF established a new policy when it designated "county" as the area of layoff. Concluding that the designation of the area of layoff is a negotiable subject, the ALJ found that CDF violated the Dills Act when it failed to negotiate with IUOE over that subject.

On appeal, CDF argues that the obligation to bargain over area of layoff was not the subject of the complaint in this case and therefore was not appropriately before the ALJ. CDF asserts that the designation of area of layoff is a fundamental management decision inseparable from the decision to reduce operations through layoff. CDF also argues that the collective bargaining agreement (CBA) between the parties covers the matter

at issue in this case, and provides for deferral to arbitration thus depriving PERB of jurisdiction.

In response, IUOE supports the ALJ's findings and argues that the parties' CBA was not in effect at the time in question. IUOE further asserts that reference to the CBA is improper since it was not made part of the record in this case, nor was testimony offered regarding the relevant sections of the CBA.

DISCUSSION

This case involves management's prerogative to determine which component of a state agency will be subject to reduction, and to achieve that reduction by layoff of employees. The issue raised is whether under the Dills Act that prerogative extends to certain aspects of the layoff process affecting the employment relationships of the employees facing layoff, without requiring negotiations with an exclusive representative.

The complaint in this case alleged that CDF violated its duty to bargain under Dills Act section 3519(c) by making a unilateral change in its policy concerning layoff. The ALJ makes references to CDF's unilateral adoption of policy, but frames the issue as a question of whether CDF breached its obligation to bargain in good faith when it refused to negotiate over the area of layoff. The ALJ finds a violation under a refusal to bargain theory. The Board will analyze CDF's conduct under both the unilateral change and refusal to bargain theories.[4]

[4]CDF contends that the issue of whether it breached its obligation to bargain was never before the ALJ. CDF argues the complaint instead alleged that CDF altered an established past

Unilateral Change

An employer commits a unilateral change and violates Dills Act section 3519(c) if the following criteria are met: (1) the employer breached or altered the parties' written agreement or established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to

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practice by designating counties as the area of layoff without meeting and conferring with IUOE.

The Board, adopting standards used by the National Labor Relations Board, has held that where an unalleged violation is intimately related to the subject matter of the complaint, the conduct in question is part of the same course of conduct, the unalleged violation has been fully litigated, and the parties have had the opportunity to examine and be cross-examined, the Board will entertain the violation. (Santa Clara Unified School District (1979) PERB Decision No. 104; Yolo County Superintendent of Schools (1990) PERB Decision No. 838.)

Here, the complaint alleges, in part:

> 4. In or about October 1991, Respondent changed this policy by selecting employees for layoff by seniority in the classification on the basis of the county in which the employee worked. A county is not recognized by Respondent as a geographic, organizational, or functional subdivision.
>
> 5. Respondent engaged in the conduct described in paragraph 4 without prior notice to Charging Party and without having afforded Charging Party an opportunity to meet and confer over the decision to implement the change in policy and/or the effects of the change in policy.
>
> 6. By the acts and conduct described in paragraphs 4 and 5, Respondent has failed and refused to meet and confer in good faith in violation of Government Code section 3519(c).

The complaint broadly alleges that CDF took action in establishing counties as the geographical area of layoff without negotiating with IUOE. The complaint is sufficiently clear to put the parties on notice of the issue to be addressed.

bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy (i.e., has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196; Glendora Unified School District (1991) PERB Decision No. 876.)

To determine whether a unilateral change has occurred we must analyze the status of the written agreement between the parties to determine whether it includes provisions concerning area of layoff, and if so, whether the terms of that agreement arguably were breached by CDF.[5]

The parties' CBA contains provisions concerning area of layoff. However, the CBA had expired prior to the alleged unlawful conduct in this case, and negotiations over a successor agreement were underway. Traditionally, an employer must maintain certain terms contained in an expired contract until such time as bargaining over a successor agreement has been

[5]IUOE argues that the parties' CBA was never made part of the record and, therefore, is not appropriately before the Board. PERB Regulation 32120 requires employers to file a copy of their collective bargaining agreements with PERB. (Cal. Code of Regs., tit. 8, sec. 17.) As a copy of the agreement is on file with PERB, the Board hereby takes official notice of the terms of the collective bargaining agreement in effect between the parties from January 30, 1989 through June 30, 1991. (Fountain Valley Elementary School District (1987) PERB Decision No. 625.) IUOE's exception is therefore rejected.

completed either by reaching agreement or impasse. (Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]; DPA v. Superior Court of Sacramento County (1992) 5 Cal.App.4th 155 [6 Cal.Rptr.2d 714].) Therefore, the layoff provisions of the parties' expired CBA were operative at the time CDF made the decision to reduce operations through layoff.

The express terms of the parties' CBA contain provisions governing layoff and designation of the area of layoff. Section 18.1(b) of the CBA states:

> Order of Layoff. Employees shall be laid off in order of seniority pursuant to Government Code Sections 19997.2 through 19997.7 and applicable State Personnel Board and Department of Personnel Administration rules.

The relevant Government Code section is 19997.2, "Layoff and reemployment lists by subdivision; conflict of section with memorandum of understanding." It states:

> (a) With the approval of the department [DPA], only the employees of a designated geographical, organizational or functional subdivision of a state agency need be considered for layoff, and reemployment lists shall be established for such subdivision. Such lists take priority over the departmental and other reemployment or employment lists.
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> (b) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall

> not become effective unless approved by the Legislature in the annual Budget Act.

DPA Regulation section 599.845 outlines the procedure through which employees of a specific subdivision are designated to be considered for layoff. It states, in pertinent part:

> Procedure. In making layoffs, the appointing power shall first communicate with the Director of the Department of Personnel Administration regarding the designation of the subdivision, if any, to be considered and submit a list of employees in the unit of layoff who are in the class or classes of layoff.

The inclusion of these provisions in the CBA indicates that the parties have negotiated over the subject of layoff and area of layoff, and have agreed to be governed by the layoff procedures included in the Government Code and implemented through DPA regulations, rather than supersede them with an alternative process. These provisions provide DPA with the authority to designate a specific subdivision of CDF as the area of layoff after reviewing the proposal of the appointing power. Therefore, that area, once it has been designated by DPA, becomes the area of layoff under the negotiated terms of the CBA. These contract provisions do not require any further negotiations between the appointing power (CDF) and an exclusive representative (IUOE) before implementing the procedure whereby DPA designates the area of layoff.

The evidence indicates that CDF followed the procedures described above. Thus, there is no demonstration that the employer breached the parties' written agreement concerning the

area of layoff and no violation is found under a theory of unilateral change.[6]

Had these circumstances occurred during the negotiated term of the CBA, this analysis would conclude at this point with a finding that no violation had occurred since CDF had acted in accordance with the express terms of the agreement. However, the CBA also contained an "Entire Agreement" or waiver clause, which by its own terms was effective only for the negotiated term of the parties' CBA.

Section 24.1(a) of the parties' CBA states, in pertinent part:

> Entire Agreement. This Agreement sets forth the full and entire understanding of the parties regarding the matters contained herein, and any other prior or existing understanding or agreement by the parties, whether formal or informal, regarding any such matters are hereby superseded. Except as provided in this Agreement, it is agreed and understood that each party to this Agreement voluntarily waives its right to negotiate with respect to any matter raised in negotiations or covered in this Agreement, for the duration of the Agreement. (Emphasis added.)

The Board has held, absent some form of waiver, that the duty to bargain continues during the term of the collective

[6]The agreement also contains grievance provisions which result in final and binding arbitration. The Board recently concluded in State of California (Department of Youth Authority) (1992) PERB Decision No. 962-S, that arbitration clauses continue in effect after expiration of a CBA only in situations which: (1) involve facts and occurrences that arose before expiration; (2) involve post-expiration conduct that infringes on rights accrued or vested under the agreement; or (3) under normal principles of contract interpretation, survive expiration of the agreement. The circumstances in this case do not meet this test and therefore deferral to binding arbitration is not an available avenue of resolution.

bargaining agreement. (Placentia Unified School District (1986) PERB Decision No. 595; South San Francisco Unified School District (1983) PERB Decision No. 343; NLRB v. Jacobs Manufacturing Co. (2d Cir. 1952) 196 F.2d 680 [30 LRRM 2098].) However, the parties may agree to contractual language specifically waiving or limiting the right to bargain about particular matters. A waiver clause typically provides that there is no further duty to bargain specified negotiable subjects during the term of the agreement. The purpose of such a clause is to lend stability to the bargaining relationship by limiting the possibility of continuous negotiations.

The "Entire Agreement" clause in the parties' CBA prohibits either party from negotiating any matter addressed during negotiations or covered in the agreement. Therefore, IUOE waived its right to further negotiations over layoff provisions during the negotiated term of the contract. However, as the negotiated term of the CBA had expired, the waiver provisions were not in effect during the period in question. It is clear that parties are free to seek negotiations on subjects within the scope of representation which are covered by an agreement which does not include a waiver clause.[7] Consequently, we now consider whether CDF breached its obligation to bargain in good faith when it

[7]The process of negotiating over terms within the expired contract does not result in suspension of those terms during negotiations. Rather, the terms of the expired agreement remain in effect throughout negotiations and may continue to be implemented in accordance with those terms.

refused to negotiate over the designation of the area of layoff.

Refusal to Bargain

A per se violation of the duty to meet and negotiate in good faith results from an employer's refusal to participate in negotiations on a subject within the scope of representation. (Healdsburg Union High School District (1980) PERB Decision No. 132.) IUOE sought to negotiate over the designation of the area of layoff at the December 19 meeting. To determine whether CDF failed to bargain in good faith when it refused IUOE's demand to negotiate, we must determine whether the designation of the area of layoff is a negotiable subject within the scope of representation under the Dills Act.

Relying on decisions under the Educational Employment Relations Act[8] and the test set forth in State of California (Department of Transportation) (1983) PERB Decision No. 361-S, the Board has concluded that a decision to reduce operations and lay off employees covered by the Dills Act is not negotiable because it is a matter of "fundamental management concern that requires that such decisions be left to the employer's prerogative." (State of California (Department of Personnel Administration) (1987) PERB Decision No. 648-S.) Although no Dills Act case directly addresses the negotiability of effects of the decision to layoff, it is well established under analogous PERB precedent that effects of layoff decisions are negotiable

[8]Anaheim Union High School District (1981) PERB Decision No. 177; Newman-Crows Landing Unified School District (1982) PERB Decision No. 223.

topics. (See e.g., Newman-Crows Landing Unified School District, supra, PERB Decision No. 223; Kern Community College District (1983) PERB Decision No. 372; Oakland Unified School District (1985) PERB Decision No. 540.)

Dills Act section 3516 states:

> 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.

The Board has established a test to determine whether subjects not specifically enumerated in Dills Act section 3516 are negotiable. A subject will be found to be negotiable if it involves the employment relationship and is 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. Such subjects will be negotiable 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. (State of California (Department of Transportation), supra, PERB Decision No. 361-S.)

Layoff involves the possible termination of the employment relationship, a subject which can cause great concern to both employees and management. Collective negotiations can provide a forum in which conflicts arising from the possible termination of employment can be resolved. Thus, the first elements of the test

to determine whether a subject falls within the scope of representation are met.

The question of whether mandating negotiations over the subject of area of layoff would unduly abridge management's prerogatives is not as easily resolved. It involves management's fundamental authority to determine which components of a state agency will be subject to reduction through layoff, as well as the fundamental rights of employees and their exclusive representatives to negotiate over issues involving the employment relationship.

CDF argues that the decision to layoff employees in a particular geographical, organizational or functional subdivision is inseparable from the basic decision to reduce operations through layoff. Since the motivation for layoff is generally to achieve fiscal economies, the efficacy of layoff in attaining that goal can only be evaluated after a specific area of layoff has been designated. CDF contends that an employer cannot finalize a decision to pursue the fundamental management prerogative of layoff without the area of layoff having been designated.

The Board agrees that the state employer's fundamental management prerogative to reduce operations includes the authority to identify the specific component of a state agency to be the subject of reduction. This prerogative includes the right to designate specific positions in specific locations to be reduced through layoff. In this case, however, management's

prerogative to pursue layoff to reduce specific positions is not in question. This case involves the separable and distinct question of whether certain aspects of the process used to lay-off employees, once management has decided the positions they occupy must be reduced, are negotiable under the Dills Act.

The designation of the area of layoff, an aspect of the layoff process, determines the degree of options to actual layoff available to individual employees. A broad area of layoff (statewide) generally provides greater options, such as bumping less senior employees or demoting in lieu of layoff, than a narrow area of layoff (county) in which employees may have no option to actual layoff. The area of layoff also typically determines the reemployment rights of employees subject to demotion and layoff. Generally, the narrower the area of layoff, the broader the reemployment rights offered to employees. Therefore, the designation of the area of layoff directly affects the likelihood of demotion or termination of the employment relationship, as well as the likelihood of reemployment following demotion or layoff.

In matters involving the fundamental employment relationship, the unique status of the Dills Act as a supersession statute mandates that great deference be given to the rights of employees and their exclusive representatives. Dills Act section 3517.6 states, in pertinent part:

> In any case where the provisions of [Government Code] Section 19997.2 . . . are in conflict with the provisions of a memorandum of understanding, the terms of the

> memorandum of understanding shall be controlling unless the State Personnel Board finds those terms to be inconsistent with merit employment principles as provided for by Article VII of the California Constitution.

Thus, the Dills Act provides the state employer and an exclusive representative with the authority to supersede specified statutory provisions relating to the employment relationship by agreeing to memorandum of understanding (MOU) provisions which differ from the specified statutory provisions.[9] (DPA v. Superior Court of Sacramento County, supra. 5 Cal.App.4th 155.)

By designating specific sections of the Government Code as supersedable, the Legislature has provided clear direction of its intent to ensure that the subjects of those sections are appropriate subjects of collective bargaining within the scope of representation.

Government Code section 19997 et seq. deals with the subject of layoff. Section 19997 provides the state employer with the authority to lay off employees "because of lack of work or funds, or whenever it is advisable in the interests of economy." This section is not supersedable under the Dills Act, underscoring management's fundamental prerogative to reduce staff through layoff.

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[9]Where the parties do not agree to alter the terms of an applicable statutory provision, the specific Government Code provision is not superseded and remains in effect.

The various provisions of section 19997 et seq. deal with aspects of the layoff process, such as area of layoff, employee seniority, seniority credit for veterans, demotion in lieu of layoff, and reemployment lists. Some of these sections involving certain specific aspects of the layoff process, are subject to supersession under the express terms of the Dills Act.

Government Code section 19997.2, dealing with the subject of designating the area of layoff and reemployment, is a supersedable statute under the terms of the Dills Act. The Legislature has clearly directed that the subject of Government Code section 19997.2 is an appropriate subject of collective bargaining within the scope of representation. Therefore, under the express terms of the Dills Act, the state employer cannot refuse the valid demand of an exclusive representative to negotiate over the subject specified in Government Code section 19997.2.

CONCLUSION

In this case, CDF acted within its prerogatives in identifying seven specific positions which were to be reduced, and by pursuing layoff to achieve the reduction. However, the subject of designating the area in which employees occupying those positions will be laid off is within the scope of representation under the express terms of the Dills Act. The waiver clause of the parties' CBA had expired and IUOE made a valid demand of CDF to bargain over the subject of designating the area of layoff. Therefore, CDF could not refuse to negotiate

the matter upon IUOE's timely request.[10] The Board finds that CDF failed to bargain in good faith in violation of Dills Act section 3519(c) when it refused to negotiate over the subject of designation of the area of layoff. By the same conduct, CDF denied IUOE the right to represent its members in violation of section 3519(b). This conduct also denied bargaining unit members the right to be represented by IUOE in their employment relations with CDF in violation of section 3519(a).

REMEDY

The Board is authorized to remedy violations of the Dills Act. Section 3514.5(c) grants the Board 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.

It has been found that CDF failed to negotiate about the area of layoff. By this conduct, CDF breached its obligation to negotiate in good faith in violation of section 3519(c). By the same conduct, CDF denied IUOE the right to represent its members in violation of section 3519(b). This conduct also denied bargaining unit employees the right to be represented by IUOE in their employment relations with CDF in violation of section 3519(a).

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[10]While CDF had an obligation to negotiate with IUOE, during those negotiations it was free to continue with its layoff process as proposed under the still-in-effeet terms of the CBA. (NLRB v. Katz, supra, 369 U.S. 736.)

It is appropriate to order CDF to cease and desist from such conduct and, upon request, negotiate with IUOE about the designation of the area of layoff.

CDF is also ordered to post a notice incorporating the terms of this order. The notice must be signed by an authorized agent of CDF 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 this notice will provide employees with notice that CDF has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the Dills Act that employees be informed of the resolution of the controversy and will announce the employer's readiness to comply with the ordered remedy. (See Placerville Union School District (1978) PERB Decision No. 69; Pandol & Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587 [159 Cal.Rptr. 584]; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].)

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to the Ralph C. Dills Act (Dills Act), Government Code section 3514.5, it is hereby ordered that the State of California (Department of Forestry and Fire Protection) (CDF) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to negotiate with the International Union

of Operating Engineers, Craft-Maintenance Division, Unit 12 (IUOE), about the designation of the area of layoff.

2. Denying IUOE the right to represent its members in their employment relations with CDF.

3. Denying Unit 12 bargaining unit employees the right to be represented by IUOE in their employment relations with CDF.

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

1. Upon request, meet and negotiate with IUOE about designation of the area of layoff.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to classified employees are customarily posted, copies of the notice attached hereto as an appendix. The notice must be signed by an authorized agent of CDF, indicating that CDF will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the notice is not reduced in size, altered, defaced or covered with any other material.

3. Make written notification of the actions taken to comply with this Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the director's instructions.

Chair Blair joined in this Decision.

Member Hesse's concurrence begins on page 22.

Hesse, Member, Concurring:

I concur in the result and the majority's reasoning to the extent that it rests on the holding that the State of California, Department of Forestry and Fire Protection (CDF) violated the Ralph C. Dills Act (Dills Act or Dills)[1] when it flatly refused to bargain a mandatory subject of bargaining--the areas of layoff.

CDF contends that the complaint filed with the Public Employment Relations Board (PERB or Board) did not include the allegation that it was obligated to negotiate in good faith over the areas of layoff and, therefore, that the allegation was never before the PERB administrative law judge (ALJ). CDF argues, in support of this contention, that the issue before the Board was whether it had made a unilateral change in past practice or established a new policy without meeting and conferring about the change with the International Union of Operating Engineers, Craft-Maintenance Division, Unit 12 (IUOE).

The Board majority entertains this argument and, in so doing, joins CDF in misunderstanding the nature of a unilateral change violation. By asserting that CDF made an unlawful unilateral change, IUOE has charged that CDF circumvented the bilateral collective bargaining process and unilaterally changed a subject within the scope of bargaining. Preliminary to any finding that a unilateral change has occurred is the determination that the matter changed is indeed a subject that

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

has been relegated by statute to the bargaining process. A unilateral change is deemed a per se refusal to bargain because, by definition, unilateral action is not bilateral bargaining. All refusals to bargain, however, (including the per se unilateral change variety) are premised on the finding that the subject about which bargaining is sought (or the subject of the unilateral change) is within the scope of bargaining as defined by law.

Subjects that are within the scope of bargaining are enumerated in Dills sections 3516 and 3517.6. (Department of Personnel Administration v. Superior Court (1992) 5 Cal.App.4th 155 [6 Cal.Rptr.2d 714]). Section 3516 enumerated "wages, hours, and other terms and conditions of employment" as within the scope of representation and Section 3517.6 expressly permits the state employer and the state employee unions to negotiate terms of a memorandum of understanding that supersede certain specified statutory provisions. Among the statutory provisions subject to supersession is Dills Act section 3517.6, which includes the designation of the area of layoff. Thus, by the express terms of the Dills Act, the designation of the area of layoff is a mandatory subject of bargaining.[2]

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[2]I find it unnecessary to apply the San Mateo City School District v. Public Employment Relations Board (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800] test cited in State of California (Department of Transportation) (1983) PERB Decision No. 361-S and follow the ALJ's analysis that the areas of layoff are subject to the bargaining obligation because it is an effect of the decision to layoff. In my opinion, the designation of the areas of layoff is an expressly enumerated subject of bargaining because it is listed in the supersession section of Dills Act, section 3517.6.

It is worth emphasizing that, while designating areas of layoff as a subject about which the state employer must negotiate, these provisions do not require the parties to reach agreement nor are the parties legally obligated to yield; they are required to bargain in good faith in a genuine effort to reach agreement. In this case, it is undisputed that CDF flatly refused to confer with IUOE over the designation of counties as areas of layoff. This conduct removed the discussion of the designation of the areas of layoff from the bargaining table and is a per se refusal to bargain.

I do not join the Board's opinion with respect to its interpretation of the expired collective bargaining agreement between CDF and IUOE. By its terms, the parties' contract expired on June 30, 1991; the conduct complained of herein occurred in November and December 1991. The contract was not made a part of the record and, in the course of the hearing before the ALJ, CDF made no argument concerning the status or the meaning of the contract. CDF raised it for the first time on appeal to the Board itself and the record is devoid of evidence concerning the existence of a contract and any interpretation of the contract language.

Having concluded that the area of layoff is a mandatory subject of bargaining under the Dills Act, I find that CDF's flat refusal to negotiation was a violation of section 3519(a), (b) and (c).

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. SF-CE-100-S, International Union of Operating Engineers, Craft-Maintenance Division, Unit 12 v. State of California (Department of Forestry and Fire Protection), in which all parties had the right to participate, it has been found that the State of California (Department of Forestry and Fire Protection) (CDF) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(a), (b) and (c).

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

A. CEASE AND DESIST FROM:

1. Refusing to negotiate with the International Union of Operating Engineers, Craft-Maintenance Division, Unit 12 (IUOE), about the designation of the area of layoff.

2. Denying IOUE the right to represent its members in their employment relations with CDF.

3. Denying Unit 12 bargaining unit employees the right to be represented by IUOE in their employment relations with CDF.

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

Upon request, meet and negotiate with IUOE about the designation of the area of layoff.

Dated: _____

State of California (Department of Forestry and Fire Protection)

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 WITH ANY OTHER MATERIAL.