

the exclusive representative.

The Board has reviewed the entire record in this case, including the unfair practice charge, the warning and dismissal letters, and IUOE's appeal. The Board finds the warning and dismissal letters to be free of prejudicial error and therefore adopts them as the decision of the Board itself consistent with the following discussion.

DISCUSSION

After investigation of IUOE's charge, the Board agent determined that PERB is without jurisdiction in this case and the charge must be dismissed and deferred to the parties' contractual grievance and arbitration procedure. Assuming PERB had jurisdiction over the charge, the Board agent found that IUOE's charge failed to demonstrate a prima facie violation of the employee's right to representation and IUOE's right to represent its members.

On appeal, IUOE contends that the Board agent erred in finding that the matter must be dismissed and deferred to arbitration. IUOE argues that the contract does not cover the dispute at issue. IUOE asserts that section 5.1 of the parties' agreement requires that the Department deal with IUOE-designated

to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

stewards on employee adverse actions, not business agents.² IUOE also argues that the Board agent reads section 21.3 (which prohibits interference, restraint or coercion of employee rights) too broadly to cover the instant dispute.

In Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore), the Board held that section 3541.5(a) of the Educational Employment Relations Act, which contains language identical to Dills Act section 3514.5(a), established a jurisdictional rule requiring that a charge be dismissed and deferred to arbitration if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and, (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties.

As correctly determined by the Board agent, the Lake Elsinore deferral standard has been met in this case. First, the grievance machinery provides for resolution of this dispute and culminates in binding arbitration. Second, the conduct complained of in the charge, that the Department dealt directly with an employee concerning an adverse action rather than the exclusive representative, is arguably prohibited by sections 5.1 and 21.3. Section 5.1 requires that the Department deal with IUOE-designated stewards. IUOE alleges that the Department failed to contact any IUOE representative when it

²An IUOE business agent represented the employee in the "Skelly" hearing prior to the employee receiving the settlement offer.

presented a settlement offer directly to the employee. Clearly, the Department's conduct is arguably prohibited by section 5.1. Similarly, section 21.3 prohibits interference with employee rights. IUOE's allegation that the Department, by the same conduct, interfered with the employee's right to representation is arguably prohibited by this provision. Accordingly, the Lake Elsinore standard has been met. PERB is without jurisdiction over this matter and it must be dismissed and deferred to the parties' contractual grievance and arbitration procedure.

ORDER

The unfair practice charge in Case No. SF-CE-134-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey joined in this Decision.

Member Garcia's concurrence begins on page 5.

GARCIA, Member, concurring: After review of this case, it is my conclusion that sections 5.1 and 21.3 of the parties' agreement are susceptible to an interpretation that those provisions cover the conduct alleged to be an unfair practice and this case must be deferred until the parties exhaust their contractual grievance process.

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
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Los Angeles, CA 90010-2334
(213)736-3127



September 12, 1995

Stewart Weinberg, Esq.
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, California 94612

Re: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT, Unfair Practice Charge No. SF-CE-134-S International Union of Operating Engineers, Craft-Maintenance Division, Unit 12 v. State of California (Department of Corrections)

Dear Mr. Weinberg:

The above-referenced charge alleges the Department of Corrections (CDC) dealt directly with an employee rather than through the exclusive representative, the International Union of Operating Engineers, Craft-Maintenance Division, Unit 12 (IUOE). The charge alleges this conduct violated Government Code sections 3519(a) and 3519 (b) (Dills Act or Act).

I indicated to you, in my attached letter dated August 29, 1995, 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 which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to September 11, 1995, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my August 29, 1995, 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. (Cal. 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 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

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September 12, 1995
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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 (20) calendar days following the date of service of the appeal. (Cal. 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 Cal. 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 (3) 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. (Cal. 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,

ROBERT THOMPSON
Deputy General Counsel

By
Tammy L. Samsel
Board Agent

Attachment

PUBLIC EMPLOYMENT RELATIONS BOARD



Los Angeles Regional Office
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(213) 736-3127



August 29, 1995

Stewart Weinberg, Esq.
Van Bourg, Weinberg, Roger & Rosenfeld
180 Grand Avenue, Suite 1400
Oakland, California 94612

Re: WARNING LETTER Unfair Practice Charge No. SF-CE-134-S
International Union of Operating Engineers, Craft-
Maintenance Division, Unit 12 v. State of California
(Department of Corrections)

Dear Mr. Weinberg:

The above-referenced charge alleges the Department of Corrections (CDC) dealt directly with an employee rather than through the exclusive representative, the International Union of Operating Engineers, Craft-Maintenance Division, Unit 12 (IUOE). The charge alleges this conduct violated Government Code sections 3519(a) and 3519(b) (Dills Act or Act). My investigation of the charge revealed the following facts.

The IUOE is the exclusive representative of the Unit 12 employees at CDC. The IUOE and the State of California were parties to a collective bargaining agreement effective from July 1, 1992 through June 30, 1995. The collective bargaining agreement contains a grievance and arbitration procedure which ends in binding arbitration. Section 21.3 of the agreement provides:

The state and IUOE shall be prohibited from imposing or threatening to impose reprisals by discriminating or threatening to discriminate against employees, or otherwise interfering with, restraining, or coercing employees because of the exercise of their rights under the Dills Act or any right given by this agreement.

Section 5.2 of the agreement is entitled "Representatives," and it states, in part:

The State recognizes and agrees to deal with IUOE-designated stewards on the following employer-employee relations matters: . . .
(2) employee adverse actions;

CDC initiated an adverse action against Unit 12 member, Debréa Greenfield. On April 25, 1995, IUOE informed CDC that Greenfield would be represented by IUOE and requested a neutral Skelly officer to hear Greenfield's appeal of the adverse action. On May 4, 1995, IUOE's Stephanie Allan represented Greenfield during the Skelly hearing.

Later the same day, Skelly officer Susan Yearwood presented Greenfield with a proposed settlement agreement to the adverse action. Without the counsel of Allan or any other IUOE representative, Greenfield read and signed the document. The agreement was titled Stipulated Agreement, and it stated:

You may consider discussing this agreement with your representative or other counsel. Your signature will signify your complete understanding and voluntary willingness to enter into this agreement.

Based on the facts provided above, the charge does not state a prima facie violation of the Act within the jurisdiction of the Public Employment Relations Board (PERB or Board), for the following reasons.

The employer's duty to respect the right to representation does not arise until an employee requests representation. California Department of Forestry (1988) PERB Decision No. 690-S. An employee may forego his guaranteed right to representation. The facts presented did not indicate that Greenfield made a request for representation. The charge does not allege any facts indicating that CDC refused to allow Greenfield and IUOE the opportunity to communicate. In fact, the stipulated agreement specifically informed Greenfield of her right to seek representation. Accordingly, the charge as presently written does not demonstrate a violation of Greenfield's right to representation or the IUOE's right to represent.

Section 3514.5(a) of the Ralph C. Dills Act (Dills Act) states, in pertinent part, that PERB shall not:

Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining agreement in effect] between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Lake Elsinore School District (1987) PERB Decision No. 646, PERB held that section 3541.5(a) of the Educational Employment Relations Act, which contains language identical to section 3514.5(a) of the Dills Act, established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and, (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties. PERB Regulation 32620(b)(5) (Cal. Code of Regs., tit. 8, sec. 32620(b)(5)) also requires the investigating Board agent to dismiss a charge where the allegations are properly deferred to binding arbitration.

These standards are met with respect to this case. First, the grievance machinery of the agreement covers the dispute raised by the unfair practice charge and culminates in binding arbitration. Second, the conduct complained of in this charge that CDC denied Greenfield's and IUOE's representation rights by dealing directly with Greenfield rather than through the IUOE representative is arguably prohibited by Article 21.3 of the agreement, which prohibits such interference. In addition to Article 21.3, Article 5.1 includes language specifically addressing representation rights in the context of employee adverse actions.

Accordingly, this charge must be deferred to arbitration and will be dismissed. Such dismissal is without prejudice to the Charging Party's right, after arbitration, to seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (See PERB Reg. 32661 [Cal. Code of Regs., tit. 8, sec. 32661]; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a.)

If there are any factual inaccuracies in this letter or any additional facts which would require a different conclusion than the one explained above, please amend the charge. The amended

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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 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 filed with PERB. If I do not receive an amended charge or withdrawal from you before September 11, 1995. I shall dismiss your charge without leave to amend. If you have any questions, please call me at (213) 736-7508.

Sincerely,

Tammy L. Samsel
Board Agent