STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA UNION OF SAFETY EMPLOYEES, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Respondent.	Case No. S-CE-756-S Request for Reconsideration PERB Decision No. 1145-S PERB Decision No. 1145a-S August 29, 1996

Appearances: Carroll, Burdick and McDonough by Gary M. Messing, Attorney, for California Union of Safety Employees; Roy J. Chastain, Labor Relations Counsel, for State of California (Department of Personnel Administration).

Before Caffrey, Chairman; Garcia and Johnson, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on a request by the California Union of Safety Employees (CAUSE) that the Board reconsider its decision in State of California (Department of Personnel Administration) (1996) PERB Decision No. 1145-S (DPA (CAUSE)). In that decision, the Board affirmed a Board agent's partial dismissal of an unfair practice charge in which CAUSE alleged that the State of California (Department of Personnel Administration) (State) violated section 3519(a), (b) and (c) of the Ralph C. Dills Act (Dills Act)[1] when it unilaterally changed

[1]The Dills Act is codified at Government Code section 3512 et seq. Section 3519 states, in pertinent part:

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

released time rights, transferred the work of the California State Police (CSP) to another bargaining unit, and unlawfully delegated responsibility to negotiate from the State to individual departments.[2]

BACKGROUND

CAUSE appealed to the Board only the dismissal of the allegation that the State unilaterally transferred the work of the CSP to another bargaining unit. The Board in DPA (CAUSE) rejected CAUSE'S appeal of that allegation, concluding that the facts presented described a unilateral transfer of bargaining unit work rather than a unilateral modification of a bargaining unit, as CAUSE had argued. A transfer of work from one bargaining unit to another affects the wages, hours and working conditions of employees in the former unit. (Rialto Unified

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

[2]A complaint was issued on the remaining allegations in CAUSE'S charge involving alleged unilateral changes in released time provisions of the parties' collective bargaining agreement. The parties reached a tentative settlement of the complaint through PERB's informal settlement conference process.

School District (1982) PERB Decision No. 209.) Since CAUSE and the State were parties to a collective bargaining agreement (CBA) which included a provision calling for negotiations over the impact of any changes in working conditions proposed by the State, the Board concluded that a proposal by the State to transfer bargaining unit work was covered by that CBA provision. Since the CBA included a grievance and arbitration procedure which covered the conduct in question, the Board in DPA (CAUSE) dismissed and deferred the matter to the contractual grievance and arbitration procedure. (Lake Elsinore School District (1987) PERB Decision No. 646.)

CAUSE'S REQUEST FOR RECONSIDERATION

CAUSE'S request for reconsideration is based on two grounds. First, CAUSE argues that new facts exist which were not available when the Board considered CAUSE'S appeal of the partial dismissal of the unfair practice charge. The Board in DPA (CAUSE) stated:

> The assertion that the State intends to transfer CSP officers into Unit 5 CHP [California Highway Patrol] positions in the future does not demonstrate that a bargaining unit is being modified by the removal or transfer of job classifications.

CAUSE interprets this statement as an indication that the Board focused on the fact that the State had not yet made the described transfer at the time that CAUSE'S appeal was being considered. CAUSE opines that the Board would have reached a different conclusion if the transfer had already occurred at the time of the Board's review. CAUSE asserts that the State has now "transferred all but a handful of the Unit 7 CSP positions into

Bargaining Unit 5." CAUSE argues that this fact constitutes newly discovered evidence which was not previously available, and provides appropriate grounds to grant its request for reconsideration.

Second, CAUSE argues that the Board's decision in DPA (CAUSE) contains a prejudicial error of fact. CAUSE asserts that the Board incorrectly characterized the facts of the case as a transfer of Unit 7 CSP employees into existing Unit 5 positions. On the contrary, CAUSE asserts that the State is eliminating positions from Unit 7 and creating them in Unit 5. CAUSE argues that this action represents more than a mere transfer of work, and demonstrates that the bargaining units are being modified. CAUSE asserts that "the Board's characterization of the facts as simply a transfer of CSP employees into existing Unit 5 positions is a significant factual error" which should lead the Board to reconsider its decision in DPA (CAUSE).

STATE'S RESPONSE

The State opposes CAUSE'S request for reconsideration. The State asserts that the new facts offered by CAUSE merely restate information previously provided to PERB by the State. With regard to CAUSE'S assertion that the Board's decision in DPA (CAUSE) contains a prejudicial error of fact, the State argues that CAUSE is simply disagreeing with the Board's finding that the underlying dispute in this case involves a transfer of bargaining unit work rather than a unit modification.

DISCUSSION

PERB Regulation 32410[3] provides parties with the opportunity to request the Board to reconsider a decision. It states, in pertinent part:

> (a) Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. . . . The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

In its request for reconsideration, CAUSE focuses on the Board's reference in DPA (CAUSE) to the State's intent to transfer Unit 7 employees to Unit 5 positions in the future. CAUSE asserts that the fact that the transfer of Unit 7 employees and positions to Unit 5 has now occurred constitutes newly discovered evidence not previously available within the meaning of PERB Regulation 32410.

PERB's "newly discovered evidence" standard for reconsideration was established to address situations in which an evidentiary hearing has been held on the merits of the case. (San Joaquin Delta Community College District (1983) PERB Decision No. 261b.) The Board has described the problems inherent in attempting to adapt this standard to a prehearing setting in which the Board agent performs a limited investigatory

[3]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

function for the purpose of determining if a prima facie case of a violation has been alleged. (State of California. Department of Developmental Services (1987) PERB Decision No. 551a-S.) In a prehearing investigation, the Board agent does not act in an adjudicatory role and does not make evidentiary determinations regarding credibility, hearsay, disputed issues of fact, or the weight of the evidence. Thus, the Board has not considered the "newly discovered evidence" standard to be appropriate grounds for reconsideration of a Board agent's prehearing, partial dismissal of an unfair practice charge. (Ibid.)

Assuming that the Board did apply the "newly discovered evidence" reconsideration standard to the instant prehearing, partial dismissal case, CAUSE'S request fails. CAUSE'S assertion that the Board would have reached a different conclusion in DPA (CAUSE) had the transfer of Unit 7 employees and positions to Unit 5 already occurred, misinterprets the gravamen of the Board's decision. In concluding that the allegations presented by CAUSE did not describe a modification of the bargaining units involved, the Board noted that "CAUSE does not assert that job classifications are being removed or transferred by the State in this case." The Board expressly adopted the Board agent's dismissal letter which similarly stated "that there has been no attempt to place the State Police classifications in the Highway Patrol bargaining unit." The Board concluded in DPA (CAUSE) that the alleged transfer of employees and positions from Unit 7 to Unit 5, which did not include the transfer of job

classifications, described a transfer of bargaining unit work and not a modification of the bargaining units involved. This conclusion is unaffected by whether or not the transfer of employees and positions had already occurred at the time of the Board's consideration. CAUSE'S assertion that the fact that the transfer has now occurred constitutes "newly discovered evidence" within the meaning of PERB Regulation 32410 is without merit.

CAUSE'S assertion that the Board's decision in DPA (CAUSE) contains a prejudicial error of fact is also without merit. In its decision, the Board described CAUSE'S argument on appeal as asserting "that the State's actions constitute an unlawful modification of a bargaining unit by transferring Unit 7 CSP positions to Unit 5." (Emphasis added.) The State's argument is described by the Board as asserting "that CSP positions have been placed under the management and administration of the CHP but that no classifications have been transferred from Unit 7 to Unit 5." (Emphasis added.) It is clear from these descriptions that the Board understood the State's action to include the transfer of positions from Unit 7 to Unit 5. CAUSE'S assertion that the Board's decision in DPA (CAUSE) contains a prejudicial factual error by mischaracterizing the State's action as a transfer of Unit 7 employees into existing Unit 5 positions is simply incorrect.

In numerous cases, the Board has reiterated that reconsideration is not appropriate when a party merely restates arguments previously considered by the Board. (California State

University (1995) PERB Decision No. lO93a-H.) Since CAUSE'S assertion of a prejudicial error of fact merely restates an argument considered and rejected by the Board in DPA (CAUSE). it fails to meet the standard for reconsideration included in PERB Regulation 32410.

ORDER

The request for reconsideration of State of California (Department of Personnel Administration) (1996) PERB Decision No. 1145-S is hereby DENIED.

Member Johnson joined in this Decision.

Member Garcia's concurrence begins on page 9.

GARCIA, Member, concurring: In State of California (Department of Personnel Administration) (1996) PERB Decision No. 1145-S, the Public Employment Relations Board (PERB or Board) affirmed a Board agent's deferral of an alleged unfair practice charge to the contractual grievance procedure. The facts and circumstances of the underlying allegations presented a picture that showed the conduct complained of was susceptible to an interpretation that it constituted a breach of the collective bargaining agreement between the parties. Under the terms of that agreement such breaches are grievable and could go to arbitration. In that situation PERB must defer to the grievance procedure.[1] The facts offered to warrant reconsideration do not preclude the interpretation that the conduct complained of could be grievable. On that basis alone, the Board's decision to defer the case in PERB Decision No. 1145-S remains justified.

[1]In addition to the cases cited by the Board agent, the exhaustion of remedies doctrine precludes PERB from taking jurisdiction of this case. California courts will refuse to consider disputes between parties to a collective bargaining agreement until the parties to the dispute have exhausted internal remedies under the terms of their grievance agreement. (See, e.g., Cone v. Union Oil Co. (1954) 129 Cal.App.2d 558, 563-564 [277 P.2d 464]; George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1985) 40 Cal.3d 654, 663 [221 Cal.Rptr. 488]; and County of Contra Costa v. State of California (1986) 177 Cal.App.3d 62, 77-78 [222 Cal.Rptr. 750].)