STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA UNION OF SAFETY EMPLOYEES,	)	
Charging Party,	)	Case No. S-CE-867-S
v.	)	PERB Decision No. 1179-S
STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION),	)	December 4, 1996
Respondent.	)	

Appearances: Neil Robertson, Legal Counsel, for California Union of Safety Employees; Paul M. Starkey, Labor Relations Counsel, for State of California (Department of Personnel Administration).

Before Caffrey, Chairman; Garcia and Dyer, Members.

DECISION AND ORDER

CAFFREY, Chairman: This case is before the Public Employment Relations Board (Board) on appeal by the California Union of Safety Employees (CAUSE) of a Board agent's dismissal (attached) of its unfair practice charge. In the charge, 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] by soliciting employees to

[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:
>
> (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

resign from membership in CAUSE, and by attempting to undermine employee support of CAUSE during negotiations.

The Board has reviewed the entire record in this case, including CAUSE'S original and amended unfair practice charge, the Board agent's warning and dismissal letters, CAUSE'S appeal and the State's response thereto. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

The unfair practice charge in Case No. S-CE-867-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Garcia and Dyer joined in this Decision.

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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.

STATE OF CALIFORNIA PETE WILSON, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

September 20, 1996

Neil Robertson, Legal Counsel
California Union of Safety Employees
2029 "H" Street
Sacramento, CA 95814

Re: **NOTICE OP DISMISSAL AND REFUSAL TO ISSUE COMPLAINT**
California Union of Safety Employees v. State of California (Department of Personnel Administration)
Unfair Practice Charge No. S-CE-867-S

Dear Mr. Robertson:

I indicated to you, in my attached letter dated August 22, 1996, 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 3, 1996, the charge would be dismissed. This deadline was subsequently extended to September 13, 1996, at your request.

On September 13, 1996, your First Amended Charge was received. The amended charge does not allege any new or additional facts. Instead, the amended charge reiterates the allegations contained in the original charge and argues that the case law cited in my earlier letter, when applied to these allegations, should result in issuance of a complaint.

The gravamen of the argument presented by both the original and the amended charge is that the State has violated the Act by circulating memos to employees informing them how they may withdraw from membership in the Union and, at the same time, informing them that the State has maintained the status quo on salaries and benefits in the absence of an agreement with the Union in order to avoid adversely affecting employees. This juxtaposition of messages, under the "objective standard" urged on PERB by the Union, constitutes both a promise of benefit and a solicitation of employees to withdraw from the Union.

The analysis of the facts and law urged by the Union in its amended charge was previously considered and rejected, for the reasons set forth in my earlier letter. Therefore, I am dismissing the charge based on the facts and reasons set forth above as well as those contained in my August 22, 1996 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:

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
Les Chisholm
Regional Director

Attachment

cc: K. William Curtis

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

August 22, 1996

Neil Robertson, Legal Counsel
California Union of Safety Employees
2029 "H" Street
Sacramento, CA 95814

Re: **WARNING LETTER**
California Union of Safety Employees v. State of California (Department of Personnel Administration)
Unfair Practice Charge No. S-CE-867-S

Dear Mr. Robertson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on August 13, 1996. In its charge, the California Union of Safety Employees (Union or Charging Party) alleges that the California Department of Personnel Administration (State or DPA) violated Government Code section 3519(a) and (b) by soliciting employees to resign from membership in the Union, and violated Government Code section 3519(c), (a) and (b) by attempting to undermine employee support of the Union during negotiations.

Investigation of this charge revealed the following information. Charging Party is the exclusive representative of State bargaining unit 7. The Union and the State were parties to a Memorandum of Understanding (MOU) that expired June 30, 1995, and are currently engaged in negotiations for a successor agreement.

DPA periodically issues memos or bulletins advising departments of the status of negotiations, and encourages departments to disseminate this information to employees. The Department of Mental Health and the Office of Emergency Services, among others, have promulgated memos to their employees which disseminated the information provided by DPA.

These memos to employees vary in wording, but a typical example is that issued by the Department of Insurance on May 24, 1996. That memo informed employees that 20 of 21 bargaining units "have not reached agreement and negotiations continue to proceed slowly." The memo also stated that:

> DPA is not optimistic that agreements will be reached in the near future. DPA's pessimism is based on the reluctance of the unions to agree to the civil service reform proposals and that the 1996/97 State budget does not include funding for salary increases.

The memo continued as follows:

> . . . DPA has continued the status quo on salaries, benefits, and other terms and conditions of employment in an effort to: 1) minimize administrative and operative disruptions to the department; and 2) DPA wishes to avoid adversely affecting employees simply because of the inability to reach agreement with the employee's union.
>
> However, there are three major changes which impact the department's employees that are directly caused by the expiration of the CBAs in July of 1995. Although employees were informed of these changes last July, DPA believes it is important to inform new employees and remind other employees of the following policy changes.
>
> 1. Employees are no longer subject to fair share deductions (agency shop fees or voluntary fee payer deductions in unit 9);
>
> 2. Employees are no longer prohibited from dropping their union membership. Employees may withdraw their union membership at any time by notifying the State Controller's Office and their respective union in writing.
>
> 3. Except for unit 7 employees, all represented employees covered by the Labor Standards Act (Work Week Group 2) are no longer permitted to earn compensating time off (CTO) for overtime; payment for overtime must be in cash only.

On June 4, 1996, DPA issued a "confidential" memo to Agency Secretaries and Department Directors concerning union membership.[1] The memo attached three reports. One reported

[1]Recipients of the memo were asked not to distribute the information beyond their "immediate management team."

monthly union losses of fair share contributions (based on the fair share fees being received in June 1995). The second report compared the gain or loss of employees and union dues for each union, again using June 1995 as a base. The third report compared union membership in June 1995 with union membership in April 1996.

According to the latter report, the unions representing seven bargaining units (including Charging Party) had increased membership as a percentage of the unit even though the number of members had declined.

Discussion

Charging Party argues that these memoranda, when "viewed in their overall text and in the light of the surrounding circumstances," have "coercive meaning." Charging Party's argument is as follows:

> DPA is proclaiming that it has provided employees with a great favor by maintaining crucial terms and conditions, conversely, it is implied that DPA could unilaterally remove these benefits should negotiations become too protracted. The fact that DPA discusses employees right to withdraw membership in the same memorandums in which it proclaims the conveyance of a favor, takes on a form of solicitation. Clearly, such correspondence is geared to encourage current members to withdraw their membership, and to dissuade new employees from joining the Union.

Further, continues the Union's argument, "DPA is engaging in tactics to undermine the Union during this time of negotiations" as evidenced by their "solicitation" of members to withdraw from unions and their reports on union membership and dues income. This conduct, according to Charging Party, is "a form of bad faith negotiations."

The Board has long held that an employer has a protected right to communicate with employees on employment related matters, so long as that communication does not violate certain standards. (Alhambra City and High School Districts (1986) PERB Dec. No. 560, citing Rio Hondo Community College District (1980) PERB Dec. No. 128 (Rio Hondo).) In Rio Hondo the Board considered the language of section 8(c) of the National Labor Relations Act in adopting a test regarding an employer's free speech rights as

follows:

> [T]he Board finds that an Employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by [the Act].

Statements made by an employer are viewed in their overall context to determine if they have a coercive meaning (Los Angeles Unified School District (1988) PERB Dec. No. 659). The Board considers the accuracy of the content of the speech in determining whether the communication constitutes an unfair labor practice (Alhambra City and High School Districts, supra; Muroc Unified School District (1978) PERB Dec. No. 80; Chula Vista City School District (1990) PERB Dec. No. 834), but even where allegations arguably establish that an employer's "statements are false, misleading and derogatory, [the statements do not] constitute unlawful communication [if their] expression contains no threat of reprisal or force or promise of benefit." (Charter Oak Unified School District (1991) PERB Dec. No. 873.) The determination whether an employer's speech is protected or constitutes a proscribed threat or promise is made by applying an objective rather than a subjective standard. (Trustees of the California State University (1989) PERB Dec. No. 777-H.)

The National Labor Relations Board (NLRB) has applied this same test to questions involving employer conduct like that complained of here. Citing Perkins Machine Company (1963) 141 NLRB 697 and Cyclops Corp. (1975) 216 NLRB 857,[2] the NLRB held that:

> Established [NLRB] principle holds that while employers may not solicit employees to withdraw from union membership, they may, on the other hand, bring to employees' attention their right to resign from the union and revoke dues-checkoff authorizations so long as the communication is free of threat and coercion or promise of benefit. [Ace Hardware Corp. (1984) 271 NLRB 178.]

The State's conduct in this case does not violate the standards

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[2]In Perkins, the employer distributed, an unsolicited communication informing employees how they could withdraw from union membership, and in Cyclops a similar communication was included in employee pay envelopes.

described above. First, the memos conveying information concerning the right to resign from Union membership simply communicate that the right exists and do not advocate a course of action. The allegations do not establish that the State's communications concerning fair share fees or union membership was inaccurate, nor that it contained promise of benefit or threat of coercion. The facts alleged do not establish that the State solicited employees to withdraw from membership, only that the State informed employees of their right to do so. The Union's subjective perception of this conduct as employer solicitation of employees to drop out of the Union does not establish prima facie evidence of a violation under the applicable, objective standard.

Likewise, the State's statement of its opinion regarding the reasons for the parties' lack of progress in negotiations does not constitute prima facie evidence of bad faith bargaining or interference with the Union's representational rights. An employer does not violate the Act by the expression of opinion, even opinion critical of the union, so long as the communication is not threatening and coercive. (Temple City Unified School District (1990) PERB Dec. No. 841; see also Charter Oak Unified School District, supra.) Here, DPA's explanation of the reasons for its maintenance of employment terms and conditions may be incomplete and/or misleading, in that it fails to reference relevant statutory or decisional law, but the communication does not "on its face carry the threat of reprisal or force, or promise of benefit," and thus does not constitute unlawful communication. (Chula Vista City School District, supra; Charter Oak Unified School District, supra.)

Finally, the allegation that the State's communications evidence a violation of Government Code section 3519(c) also fails to state a prima facie case. The standard generally applied to determine whether good faith negotiations have occurred is called the "totality of conduct" test. This test reviews the entire course of conduct during negotiations to determine whether the parties have negotiated in good faith with the "requisite subjective intention of reaching an agreement." (Pajaro Valley Unified School District (1978) PERB Dec. No. 51.). As discussed above, relevant precedent gives employers considerable latitude to exercise free speech rights concerning negotiations so long as the speech is not coercive or threatening. (See, for example, Rio Hondo Community College District, supra. and Chula Vista City School District, supra.) The State's communications, lacking the element of coercion or promise of benefit under an objective

standard, do not comprise evidence of bad faith bargaining.[3]

Conclusion

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 additional facts which would correct the deficiencies explained above, please amend the charge. 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 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 September 3, 1996. I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198, ext. 359.

Sincerely,

Les Chisholm
Regional Director

HLC:cb

[3]The allegations in the instant case are easily distinguished from those in Modesto City Schools (1986) PERB Dec. 291, where the Board found that a communication which came "at a critical juncture and misrepresented the positions of the parties by alleging that an offer had been made . . . and rejected" was evidence of bad faith.