

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



PROFESSIONAL ENGINEERS IN
CALIFORNIA GOVERNMENT,

Charging Party,

v.

STATE OF CALIFORNIA (WATER
RESOURCES CONTROL BOARD),

Respondent.

Case No. SA-CE-1083-S

PERB Decision No. 1337-S

July 16, 1999

Appearance: State of California (Department of Personnel Administration) by Paul M. Starkey, Labor Relations Counsel, for State of California (Water Resources Control Board).

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the State of California (Water Resources Control Board) (WRCB or State) to a Board administrative law judge's (ALJ) proposed decision. In his proposed decision, the ALJ held that the WRCB violated section 3519(b) and (c) of the Ralph C. Dills Act (Dills Act)¹ when it implemented a new internet/intranet policy without

¹The Dills Act is codified at Government Code section 3512 et seq. Section 3519 provides, in relevant part:

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

(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.

providing the Professional Engineers in California Government (PECG) with notice or an opportunity to bargain.

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript and the WRCB's exceptions.² For the reasons that follow, the Board concludes that the WRCB violated the Dills Act when it unilaterally implemented a new internet/intranet usage policy without providing PECG with notice or an opportunity to bargain over that change.

PROCEDURAL HISTORY

PECG filed the underlying unfair practice charge on February 5, 1998. On April 24, 1998, the Board's Office of General Counsel issued a complaint based on the charge. The complaint alleged that the State violated Dills Act section 3519(a), (b) and (c) when it implemented a new internet/intranet usage policy without giving PECG notice or an opportunity to bargain over the policy or the effects thereof.

The ALJ held a formal hearing on July 27, 1998 and issued a proposed decision on October 22, 1998. WRCB filed exceptions to the proposed decision on November 16, 1998.

FACTS

The respondent is the State employer within the meaning of section 3513 (j) of the Dills Act. The WRCB is an appointing authority of the State. PECG is a recognized employee organization within the meaning of section 3513(b) and is the

²The WRCB's request for oral argument is denied.

exclusive representative of State bargaining unit 9. The State and PEGC were parties to a memorandum of understanding that expired by its terms on June 30, 1995.

On July 24, 1997, the WRCB issued a memo advising all employees that it was "poised to provide internet e-mail and World Wide Web access as a tool to be used by you to accomplish this agency's missions and program goals." The memo further advised that the State Department of Information Technology (DOIT) had developed an internet usage policy which the WRCB would follow until it promulgated its own policy. The WRCB did not provide PEGC with a copy of this memorandum, nor did it offer to meet and confer with PEGC regarding the internet policy.

In late July, PEGC queried the WRCB's labor relations officer regarding rumors of a new internet policy. The WRCB's labor relations officer denied knowledge of any new policy. Thereafter, on July 31, 1997, PEGC wrote to the WRCB, indicating that it believed that the WRCB had unilaterally implemented a policy regarding internet access. PEGC demanded that the WRCB rescind any such policy.

On August 11, PEGC obtained a copy of the July 24 memorandum (apparently without the attached DOIT policy) and faxed it to the WRCB's labor relations officer. On August 20, the WRCB responded that DOIT's internet policy was consistent with the State's policy regarding the misuse of State equipment and indicated that it would not negotiate over the policy.

On October 8, 1997, the WRCB informed PEGC that it had

completed an internet/intranet policy to supersede the DOIT policy. The WRCB asserted that the policy did not constitute a change in past practice, but was an extension of the long-standing State policy prohibiting the misuse of State equipment. On October 15, PEGC contacted WRCB management to complain about its implementation of the new policy. On October 22, the WRCB responded that it had reviewed PEGC's complaints and intended to proceed with implementation without bargaining.

The WRCB internet/intranet policy defines both acceptable and unacceptable uses of the internet and the WRCB's internal network. Unacceptable uses are those which interfere with the rights of others, are illegal, socially improper, or those that impair the efficiency of the computer system. The policy permits incidental personal use by employees so long as that use does not interfere with job performance or otherwise violate the terms of policy. The policy also provides that:

When an instance of noncompliance is suspected or discovered in a computing system or network connected to the Organizations' network, supervisors and managers shall immediately take action to correct the situation. Internal discipline, up to and including dismissal, may be appropriate in some cases of noncompliance with this policy. Criminal or civil action may be initiated in appropriate instances.
(PEGC's Ex. 1.)

There is no evidence of any State policy specifically addressing the use of the internet prior to the DOIT policy. However, the WRCB has a well-established incompatible activities policy which prohibits employees from "[u]sing state time,

facilities, equipment, or supplies for private gain or advantage," and sets forth misuse of State equipment as a ground for discipline.³

DISCUSSION

Timeliness

Dills Act section 3514.5(a) precludes PERB from issuing a complaint based on conduct that occurred more than six months prior to the filing of the charge. The Board has held that this six-month time period is jurisdictional. (California State University, San Diego (1989) PERB Decision No. 718-H.) Accordingly, neither the parties nor the Board can waive the issue of timeliness. Further, a defense based on timeliness need not be pled affirmatively. It is the charging party's burden to show timeliness as part of its prima facie case. (The Regents of the University of California (1990) PERB Decision No. 826-H (Regents).)

The limitations period "begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to [engage in the prohibited conduct], providing that nothing subsequent to that date evinces a wavering of that intent." (Regents.) Notice of a proposed change must be given to an official of an employee organization who has the

³Section 19990 of the California Government Code requires each state agency to determine those activities which "are inconsistent, incompatible or in conflict with their duties as state officers or employees." The WRCB most recently revised its incompatible activities policy in 1987.

authority to act on behalf of the organization, and the notice must clearly inform the recipient of the proposed change.

(Victor Valley Union High School District (1986) PERB Decision No. 565; see also, State of California (Board of Equalization) (1997) PERB Decision No. 1235-S.)

PECG filed its charge on February 5, 1998. Accordingly, the charge would not be timely if PECG knew or reasonably should have known of the alleged unilateral change on or before August 5, 1997.

PECG first heard rumors that the WRCB had adopted a new internet policy in late July. It immediately began an investigation of those rumors by contacting the WRCB's labor relations officer, who denied any knowledge of the policy. Thereafter, PECG obtained a copy of the July 24 memorandum and faxed it to WRCB's labor relations officer.

The earliest date on which the record establishes that PECG had actually seen any portion of the WRCB's internet policy is August 11, when PECG faxed a partial copy of the policy to the WRCB and requested an explanation. Based on the foregoing, we conclude that PECG has filed its charge in a timely manner.

Unilateral Change

To prevail on a complaint of unilateral change, the exclusive representative must establish by a preponderance of the evidence that: (1) the employer breached or altered the parties' written agreement or own established past practice; (2) such action was taken without giving the exclusive representative

notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounted to a change of policy (i.e., has a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members); and (4) the change in policy concerned a matter within the scope of representation. (State of California (Department of Forestry and Fire Protection) (1993) PERB Decision No. 999-S (Forestry and Fire Protection); Grant Joint Union High School District (1982) PERB Decision No. 196.)

On appeal, the WRCB renews its argument that the new internet/intranet policy is merely an expression of its existing policy concerning incompatible activities. Accordingly, the WRCB contends that its imposition of the internet/intranet policy did not constitute a change in the terms or conditions of employment and was not negotiable. We disagree.

It is axiomatic that an employer's unilateral change in a matter within the scope of negotiations is, absent a valid defense, a per se refusal to bargain in violation of the Dills Act. (State of California (Department of Motor Vehicles) (1998) PERB Decision No. 1291-S at pp. 3-4 (Motor Vehicles); Forestry and Fire Protection at pp. 17-18; State of California (Department of Transportation) (1983) PERB Decision No. 361-S, proposed dec. at pp. 31-32.) As the ALJ found, the WRCB unilaterally imposed the new internet/intranet policy without providing PEGC with notice or an opportunity to bargain over that policy. Further, the creation or alteration of a statement of incompatible

activities is a matter within the scope of representation. (Forestry and Fire Protection at pp. 17-18 [holding that supersession language of Dills Act sec. 3517.6⁴ evidences a Legislative intent that the subject matter of certain provisions of the Government Code, including sec. 19990, are within the scope of bargaining].) Accordingly, insofar as the internet/intranet policy constituted a departure from the terms of the WRCB's incompatible activities policy, the imposition of the internet/intranet policy violated Dills Act section 3519(c).

The WRCB has had the same incompatible activities policy in

⁴Section 3517.6 provides, in relevant part:

(a) (1) In any case where the provisions of Section 70031 of the Education Code, or subdivision (i) of Section 3513, or Section 14876, 18714, 19080.5, 19100, 19143, 19261, 19818.16, 19819.1, 19820, 19822, 19824, 19826, 19827, 19828, 19829, 19830, 19831, 19832, 19833, 19834, 19835, 19836, 19837, 19838, 19839, 19840, 19841, 19842, 19843, 19844, 19845, 19846, 19847, 19848, 19849, 19849.1, 19849.4, 19850.1, 19850.2, 19850.3, 19850.4, 19850.5, 19850.6, 19851, 19853, 19854, 19856, 19856.1, 19858.1, 19858.2, 19859, 19860, 19861, 19862, 19862.1, 19863, 19863.1, 19864, 19866, 19869, 19870, 19871, 19871.1, 19872, 19873, 19874, 19875, 19876, 19877, 19877.1, 19878, 19879, 19880, 19880.1, 19881, 19882, 19883, 19884, 19885, 19887, 19887.1, 19887.2, 19888, 19990, 19991, 19991.1, 19991.2, 19991.3, 19991.4, 19991.5, 19991.6, 19991.7, 19992, 19992.1, 19992.2, 19992.3, 19992.4, 19993, 19994.1, 19994.2, 19994.3, 19994.4, 19995, 19995.1, 19995.2, 19995.3, 19996.1, 19996.2, 19998, 19998.1, 20796, 21600, 21602, 21604, 21605, 22825, or 22825.1 are in conflict with the provisions of a memorandum of understanding, the memorandum of understanding shall be controlling without further legislative action.

place since at least 1987. That policy prohibits, inter alia, the use of "state time, facilities, equipment, or supplies for the employee or officer's private gain or advantage, or the gain or advantage of another person," and notes that the misuse of state property is a subject of discipline. The internet/intranet policy, on the other hand, prohibits all uses that interfere with the rights of others, are illegal, socially improper, or impair the efficiency of the computer system.

The WRCB contends that the quoted portion of its incompatible activities policy subsumes all actions which potentially violate the internet/intranet policy. We conclude, however, that the internet/intranet policy actually expands the definitions of incompatible uses of state facilities and misuse of state property. For example, an employee may violate this policy by sending, receiving, or retaining large volumes of e-mail, or downloading information from the internet, either for public or private purposes. These actions could certainly impair the efficiency of the computer system in violation of the internet/intranet policy. Unless the employee undertook these activities for private gain, however, they would not have violated the WRCB's existing policy concerning incompatible activities. Accordingly, we find that the WRCB's internet/intranet usage policy constitutes a negotiable departure from its existing statement of incompatible activities. (Motor Vehicles, at pp. 3-4; Forestry and Fire Protection, at pp. 17-18.)

ORDER

Upon the findings of fact, conclusions of law, and the entire record in this case, it is found that the State of California (Water Resources Control Board) (WRCB) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(b) and (c), when it unilaterally established a new rule altering the conduct which constitutes an incompatible activity or a misuse of state property. By adopting the rule without first meeting and conferring with the Professional Engineers in California Government (PECG), the WRCB failed to meet and confer in good faith in violation of section 3519 (c). Because this action had the additional effect of interfering with the right of PECG to represent its members, the failure to meet and confer in good faith also violated section 3519(b).

The allegation of a violation of Dills Act section 3519(a) by WRCB in adopting the rule is hereby DISMISSED.

Pursuant to section 3514.5(c) of the Government Code, it is hereby ORDERED that WRCB and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally establishing rules that expand or alter the conduct, which constitutes an incompatible activity or a misuse of state property;

2. By the same conduct, interfering with the right of PECG to represent its members;

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

1. Rescind for Unit 9 employees working for the WRCB,

that portion of the internet/intranet policy that expands or alters the conduct that constitutes an incompatible activity or a misuse of State property.

2. If requested by PEEG, offer to meet and confer in good faith prior to reinstating any rule that expands or alters the conduct that constitutes an incompatible activity or a misuse of State property.

3. Within ten (10) days following the date this decision is no longer subject to appeal, post at all work locations of the WRCB where notices to members of Unit 9 customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the State, indicating that the State 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.

4. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accord with the director's instructions.

Member Amador joined in this Decision.

Chairman Caffrey's concurrence begins on page 12.

CAFFREY, Chairman, concurring: I concur in the finding that the State of California (Water Resources Control Board) (WRCB or State) violated section 3519(b) and (c) of the Ralph C. Dills Act (Dills Act) when it unilaterally established a policy on internet/intranet usage which expanded or altered the conduct constituting an incompatible activity or a misuse of state property.

As noted by the majority, section 3517.6 of the Dills Act lists numerous statutory provisions which may be superseded by the terms of a memorandum of understanding. The Public Employment Relations Board (PERB or Board) has held that this section indicates the clear legislative intent that the subject matters represented in these statutory provisions are within the scope of representation. (State of California (Department of Forestry and Fire Protection) (1993) PERB Decision No. 999-S.) Among the specific statutory provisions listed in Dills Act section 3517.6 is Government Code section 19990. That section prohibits conflicting or incompatible activities by state employees, including misuse of state time, facilities, equipment or supplies. Section 19990 also directs that state appointing powers, such as WRCB, shall determine the specific activities which are conflicting or incompatible with the duties of their employees. The incompatible activities policies adopted by state appointing powers pursuant to this section are within the scope of representation under Dills Act section 3517.6.

WRCB had maintained the same incompatible activities policy, adopted pursuant to Government Code section 19990, since at least 1987. In October 1997, WRCB informed the Professional Engineers in California Government that it had adopted an internet/intranet policy - an incompatible activities policy specific to use of the internet/intranet. The dispute in this case involves the question of whether the internet/intranet policy represented a change in the existing incompatible activities policy or established past practice concerning misuse of State equipment. If it did, under the standard outlined in Grant Joint Union High School District (1982) PERB Decision No. 196, the State violated the Dills Act when it unilaterally implemented the new policy.

It is important to note that there was no internet/intranet at the time that WRCB's general incompatible activities policy was adopted prior to 1987. The internet/intranet presents unique issues relative to its use by employees. As a result, the policy adopted by WRCB concerning internet/intranet usage contains unique provisions which differ from WRCB's general incompatible activities policy. In my view, the differences are significant enough to constitute a change in the existing incompatible activities policy - a negotiable change in a condition of employment. Among those unique provisions are: a restriction on any use which "inhibits the efficiency of the computer system"; the authorization of users to "download copyrighted material" subject to certain restrictions; and a policy stating that the employer "will not be responsible for any damages whatsoever

which employees may suffer arising from or related to their use of any state agency electronic information resources, whether such damages be incidental, consequential or otherwise. . . . " Because the State refused to negotiate these unique provisions of the internet/intranet policy, it unilaterally changed a negotiable condition of employment in violation of section 3519(b) and (c) of the Dills Act.

I write separately to emphasize that WRCB's internet/intranet policy, if otherwise not constituting a negotiable change in policy, would not become negotiable merely because it included a provision stating that "discipline, up to and including dismissal, may be appropriate in some cases of noncompliance with this policy."

As referenced above, Government Code section 19990 directs state agencies to develop incompatible activities policies, such as the internet/intranet policy which forms the basis of the dispute in this case. Government Code section 19572 describes causes for discipline of an employee, including "violation of the prohibitions set forth in accordance with Section 19990." Therefore, violation of WRCB's incompatible activities policy, including the specific internet/intranet policy, constitutes cause for discipline under section 19572 regardless of whether or not the policy indicates that fact. Accordingly, the mere statement within an incompatible activities policy that its violation may result in discipline does not in and of itself activate the duty to negotiate.

Notwithstanding Government Code section 19572, a review of PERB caselaw also reveals that an employer's mere indication within a policy that its violation may result in discipline does not make a non-negotiable policy negotiable. In San Bernardino City Unified School District (1982) PERB Decision No. 255 (San Bernardino), the Board stated that "rules of conduct which subject employees to disciplinary action are subject to negotiation both as to criteria for discipline and as to procedure to be followed." But in Placer Hills Union School District (1984) PERB Decision No. 377 (Placer Hills), the Board refined its earlier ruling. The Board pointed out that the rules of conduct at issue in San Bernardino were directly related to the negotiable subject of work hours. In Placer Hills, the disputed rule of conduct required employees to sign for receipt of documents or be subject to disciplinary action. Noting that the rule bore no logical relationship to wages, hours or other terms and conditions of employment, the Board stated:

The fact that discipline may result if an employee refuses to acknowledge receipt does not elevate the rule itself to a disciplinary matter with an impact on wages, hours or other enumerated subjects. To adopt this analysis would bootstrap all work rules into negotiable items within scope.

In short, a rule of conduct concerning a non-negotiable subject does not become negotiable simply because violation of the rule may result in discipline.

Summarizing, Dills Act section 3517.6 establishes that an incompatible activities policy is a negotiable subject.

Therefore, the incompatible activities policy pertaining specifically to internet/intranet usage which WRCB adopted in October 1997 was negotiable if it changed the established policy and practice embodied in the general incompatible activities policy which had been in effect since at least 1987. For the reasons stated above, I conclude that the internet/intranet policy represented such a negotiable change. It was the change in the policy itself, rather than a statement that violation of the policy could result in discipline, which activated the State's obligation to negotiate. WRCB's failure to fulfill that obligation constituted a violation of the Dills Act.

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. SA-CE-1083-S, Professional Engineers in California Government v. State of California (Water Resources Control Board), in which all parties had the right to participate, it has been found that the State of California (Water Resources Control Board) (WRCB or State) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(c) and (b). The State violated the Dills Act when it unilaterally established a new policy on internet/intranet usage. By adopting the rule without first meeting and conferring with the Professional Engineers in California Government (PECG), WRCB failed to meet and confer in good faith. Because this action had the additional effect of interfering with the right of PECG to represent its members, the failure to meet and confer in good faith also violated section 3519(b).

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

A. CEASE AND DESIST FROM:

1. Unilaterally establishing rules that expand or alter the conduct, which constitutes an incompatible activity or a misuse of state property;

2. By the same conduct, interfering with the right of PECG to represent its members;

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

1. Rescind for Unit 9 employees working for the WRCB, that portion of the internet/intranet policy that expands or alters the conduct that constitutes an incompatible activity or a misuse of State property.

2. If requested by PECG, offer to meet and confer in good faith prior to reinstating any rule that expands or alters the conduct that constitutes an incompatible activity or a misuse of state property.

Dated: _____ STATE OF CALIFORNIA (WATER
RESOURCES CONTROL BOARD)

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 BY ANY MATERIAL.