STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, Charging Party,	)	Case No. SA-CE-917-S
v.	)	PERB Decision No. 1339-S
STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS), Respondent.	)	August 3, 1999

Appearances: Michael D. Hersh, Attorney, for California State Employees Association; State of California (Department of Personnel Administration) by Roy J. Chastain, Labor Relations Counsel, for State of California (Department of Corrections).

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the State of California (Department of Corrections) (State or Department) to the proposed decision of a PERB administrative law judge (ALJ). The ALJ found that the Department denied the California State Employees Association (CSEA) the right of reasonable access to its members' work areas and the right to use institutional facilities for meetings in violation of section 3519(b) of the Ralph C. Dills Act (Dills Act)[1]

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

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

The Board has reviewed the entire record in this case including the original and amended unfair practice charge, the complaint, the proposed decision, the hearing transcript and the filings of the parties. The Board affirms the ALJ's proposed decision, in accordance with the following discussion.

BACKGROUND

The parties stipulated to CSEA being a recognized employee organization and the Department being the state employer within the meaning of section 3513.

The Central California Women's Facility (CCWF) is a State correctional facility that houses female inmates. CSEA is the exclusive representative for a number of bargaining units that have members working at CCWF.

At various times since CCWF opened in early 1990, CSEA Labor Relations Representative Frank H. Pulido (Pulido) asked CCWF's Employee Relations Officer, Celeste Landess (Landess), to permit CSEA to use one of CCWF's "In Service Training" (1ST) classrooms for the union's monthly meeting. The classrooms are located in the administration building, outside the fenced security perimeter of the prison. The most recent request was in October 1996.

Landess denied these requests, the effect of which was the continuation of CSEA's meetings in the snack bar.

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

Landless was acting under the direction of CCWF Warden Teena Farmon who cited a February 1, 1994, directive from Chief Deputy Director R. H. Denninger as the basis for her decision.

Simultaneous with its denial to CSEA, CCWF permitted Merced College, a local community college, to conduct classes in these same rooms. These classes were open to all members of the community, not just CCWF employees. The local blood bank and several financial institutions were also permitted to utilize these classrooms for various activities and presentations.

CSEA argues that being required to use the snack bar severely hampered its ability to hold a private membership meeting because the room is readily accessible to both institutional employees and visitors during the meetings. There is a fold-out divider that separates the meeting area from the general population, but it does not provide a sound barrier. For example, if a CSEA member were to comment about a particular policy or supervisor during a meeting, the comment could be overheard by the supervisor or other member of management outside the divider. CSEA argued that this puts a severe limitation on the level of candor at such meetings. According to the record, a number of CSEA members told Job Steward Jess Beltran they would not attend meetings if they continued to be held in the snack bar.

On at least one occasion, there was evidence that a Department representative intruded on a CSEA meeting. At the hearing, Associate Warden Monty Frederick told of one occasion

when he walked into the snack bar. He saw the fold-out divider extended, and upon hearing a female voice coming from behind it, he pulled it back to investigate. Once he saw that a CSEA meeting was in progress, he repositioned the divider and left. He stated that the reason he took this action was that female inmates are responsible for cleaning the snack bar area, however, they are not permitted behind the closed divider.

On January 20, 1995, Pulido filed a grievance requesting that CCWF "allow CSEA to conduct meetings with its members in a private setting, at a time that is convenient for CCWF employees." He cited contractual section 2.2 as the provision he believed CCWF violated. The grievance was denied at all levels, culminating with a July 3, 1995, letter from the Department's Chief, Michael H. Jaime, Labor Relations Branch.

On December 4, 1996, CSEA filed an unfair practice charge against the Department. The charge alleged violations of Dills Act section 3519(a) and (b). The Office of the General Counsel of PERB, after an investigation of the charge, issued both a partial dismissal and a complaint. After a formal hearing, the ALJ issued a proposed decision on September 23, 1998 in which he found the Department violated section 3519(b) of the Dills Act. The allegations related to Dills Act section 3519(a) were dismissed.

DISCUSSION

The issue before us is whether the State interfered with rights guaranteed to CSEA under the Dills Act when it denied CSEA access to classrooms for union purposes.

As the State points out in its exceptions, the text of the Dills Act does not explicitly grant employee organizations a right of access to the employer's property for purposes of communication with members. Even absent statutory authorization, it is well established in federal cases that employee organizations may in some circumstances gain access rights to an employer's property. (NLRB v. Babcock & Wilcox Co. (1956) 351 U.S. 105 [38 LRRM 2001].) Such access rights become available in two circumstances: (1) when the usual means of communication are ineffective or unreasonably difficult, or (2) when the employer's prohibition on access is discriminatory on its face or as applied. This rule has been adopted by the PERB. (See State of California (Department of Transportation, et al.) (1981) PERB Decision No. 159b-S (Transportation); Sierra Sands Unified School District (1993) PERB Decision No. 977; State of California (Departments of Personnel Administration, et al.) (1998) PERB Decision No. 1279-S (DPA).)[2] The burden of proof in meeting this requirement is on the charging party.

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[2]In DPA, the Board held that various State departments violated the Dills Act when they applied policies regarding use of the State's e-mail system in a discriminatory manner. The violation was based on the fact that the State tolerated minimal and incidental use of State e-mail for personal (non-union) communication by employees, but prohibited all use of State e-mail for communication regarding union matters.

The challenged conduct in this case is the Department's application of a 1994 departmental directive, which states, in pertinent part:

> Institutions are instructed to restrict access for bona fide employee organization representatives to only those areas and during those hours that you would normally allow access to members of the public or public businesses. This may include areas such as the employee parking lot or outside the entrance gate or any other similar area when that area is outside of the institution's security perimeter.

Applying the Transportation test in the case at bar, we analyze whether the State's prohibition on access is discriminatory on its face or as applied. In cases involving allegedly discriminatory access rules, the Board analyzes the employer's rule as a potential interference with employee exercise of protected rights.

To establish unlawful interference with protected rights, the charging party must first make a prima facie showing that the employer's conduct tends to or does result in some harm to protected rights. Where the harm to employee rights is slight, and the employer offers justification based on operational necessity, the interests of the employer and the rights of employees will be balanced and the charge resolved accordingly. Where harm to protected rights is inherently destructive, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available. (Carlsbad

Unified School District (1979) PERB Decision No. 89, pp. 10-11; see also, Novato Unified School District (1982) PERB Decision No. 210.) In an interference case, it is not necessary for the charging party to show that the respondent acted with an unlawful motivation. (Regents of the University of California (1983) PERB Decision No. 305-H.)

Considering the Department's policy on its face, the intent is for the Department to permit substantially the same type of access to employee organization representatives that it "normally allows" to members of the public or public businesses. Under the plain meaning of the words used, we cannot conclude that this policy interferes with or tends to interfere with protected rights.

The remaining question is whether the directive, as applied, constitutes an interference with protected rights. The evidence establishes that the Department made its 1ST classrooms available to groups other than CSEA for non-business purposes, such as a blood bank. Department management knew of such use, since they approved the use of the classrooms for these purposes.

During the same time period, when presented with requests by CSEA to use the same classrooms for non-State business purposes, the Department refused.

We conclude that the Department's application of its 1994 directive to prohibit union access to the 1ST classrooms meets at least the "slight" harm element of the Carlsbad test. Even though CSEA has other means of communicating with its members,

the lack of a private meeting room at least slightly hinders it in doing so.[3] As noted above, the record tends to support CSEA's assertion that the quality of membership meetings is diminished by the prospect of management representatives' overhearing conversation.

The burden thus shifts to the State to demonstrate a justification for its discriminatory application of the directive. Rather than presenting a vigorous defense on the grounds of operational necessity, the State's main argument appears to be that the other entities were "invited" to use the classrooms, whereas CSEA was not.

The State's argument misses the point and ignores the main issue; i.e., whether the State refused CSEA access to the classrooms because it was CSEA seeking to conduct a private meeting with its members. The issue is not what the State's motive or purpose was in allowing others to use the same rooms. It is certainly true that the State has no obligation to "invite" CSEA to use State property for union meetings. However, it would be absurd to rule that the State may discriminate with impunity by endlessly "refraining from inviting" CSEA to use the classrooms. The State cites no case, and we are aware of none, in which a union's "lack of invitee" status insulates the State employer from its obligations under Dills Act section 3519(b).

[3]Based on the facts presented, we do not conclude that the Department's conduct was inherently destructive of protected rights.

The State has not explained why some requestors are permitted access to the classrooms and CSEA is not. Lacking such an explanation, it appears that the State makes the distinction solely based on the identity of the requestor coupled with the purpose for the meeting, and not based on legitimate operational concerns such as scheduling conflicts or physical limitations of the facility.

We conclude that the Department interfered with CSEA and its members by applying its 1994 directive in a discriminatory manner, in violation of Dills Act section 3519(a) and (b),[4],[5] The State's request for oral argument is denied.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the State of California (Department of Corrections) (State or Department) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(a) and (b) when it discriminatorily applied a policy in a way that prohibits the California State Employees Association (CSEA) use of particular classrooms while permitting other organizations to use the same classrooms for non-business

*We affirm the ALJ's conclusion that the charge is timely filed. Despite the fact that CSEA filed a grievance involving the disputed conduct in 1995, the charge clearly alleges unlawful conduct occurring within six months prior to the date of the charge.

[5]We also affirm the ALJ's conclusion that the charge is not deferrable to the parties' binding arbitration procedure. CSEA's charge involves resolution of issues beyond the scope of the parties' expired contract.

purposes. These discriminatory actions interfered with the rights of employees to participate in the activities of employee organizations and the right of CSEA to communicate with its members.

Pursuant to Dills Act 3514.5(c), it is hereby ORDERED that the State, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Discriminatorily prohibiting CSEA members employed in the Department at the Central California Women's Facility (CCWF) from meeting in the In Service Training classrooms for employee organization meetings;

2. Discriminatorily prohibiting CSEA from using CCWF facilities for employee organization business; and

3. Denying CSEA the right to represent its members.

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

l. Within ten days following the date this Decision is no longer subject to appeal, post at CCWF> where notices are customarily placed for CSEA represented employees, copies of the notice attached hereto as an Appendix. The notice must be signed by an authorized agent of the Department, indicating that it 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 insure that the notice is not reduced in size, altered, defaced or covered by any other material.

2. 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 accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on CSEA.

It is further Ordered that all other aspects of the charge and complaint are hereby DISMISSED.

Member Dyer joined in this Decision.

Chairman Caffrey's concurrence begins on p. 12.

CAFFREY, Chairman, concurring: I agree with the majority that the State of California (Department of Corrections) (State or Department) violated section 3519(a) and (b) of the Ralph C. Dills Act (Dills Act) when it denied the California State Employees Association (CSEA) and its members access to a private setting in which to conduct meetings.

I write separately to emphasize the policy of the Public Employment Relations Board (PERB or Board) with regard to union access rights under the Dills Act. PERB recently adopted the proposed decision authored by its Chief Administrative Law Judge which clearly described Board policy in this area. (State of California (Departments of Personnel Administration, Banking, Transportation, Water Resources and Board of Equalization) (1998) PERB Decision No. 1279-S (DPA).) It is the policy enunciated in DPA which must be applied to determine if a Dills Act violation occurred in this case.

The Dills Act contains no expressed provision granting work site access to employee organizations, unlike the Educational Employment Relations Act (EERA) and the Higher Education Employer-Employee Relations Act (HEERA), the other statutes administered by PERB. Despite the statutory differences, however, the Board has found "a right of access . . . implicit in the purpose and intent" of the Dills Act. (State of California (California Department of Corrections) (1980) PERB Decision No. 127-S.) Within the right of access is a protected right of employee organizations to communicate with employees at the work

site. (See State of California, California Department of Transportation, and Governor's Office of Employee Relations (1981) PERB Decision No. 159b-S, p. 18 (Department of Transportation).) The Dills Act also contains no provision explicitly granting employee organizations the right to use the state's facilities for union meetings. By contrast, the EERA and HEERA provide employee organizations the statutory right "to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of rights" guaranteed by those statutes (EERA sec. 3543.1; HEERA sec. 3568).

PERB may not overlook textual differences among the three collective bargaining laws it administers in an attempt to make all three statutes identical. Differences among the three PERB-administered statutes must be recognized, even where this leads to different results under each statute. (See Regents of University of California v. Public Employment Relations Bd. (1985) 168 Cal.App.3d 937 [214 Cal.Rptr. 698].)

If employees or employee organizations have a right to use state facilities to conduct union meetings, that right is not expressed in the Dills Act. However, even absent expressed statutory authorization, it is well established in federal cases that employee organizations may in some circumstances gain access rights to an employer's property. (NLRB v. Babcock & Wilcox Co. (1956) 351 U.S. 105 [38 LRRM 2001].) Such access rights become available in two circumstances: (1) the usual means of communication are ineffective or unreasonably difficult; or

(2) the employer's prohibition on access is discriminatory on its face or as applied. This rule has been adopted by PERB. (DPA; Department of Transportation; Sierra Sands Unified School District (1993) PERB Decision No. 977.)

In access cases arising under the EERA and HEERA, the Board has applied a "reasonableness" standard because those statutes provide for union access and use of facilities subject to reasonable regulation. Therefore, under EERA and HEERA an employer must justify its regulation of those rights by showing that it is reasonable. But even under the explicit access provisions of EERA and HEERA, an employer is not obligated to provide a union access to every possible means of communication. In Regents of University of California v. Public Employment Relations Bd. (1986) 177 Cal.App.3d 648 [223 Cal.Rptr. 127], the court observed:

> It is unreasonable to assume the Legislature intended that the University could reserve no forms of communication for official University communications only, and that the University would have to provide to the Union access to every other means of communication. (Id. at 654; emphasis in original.)

Since there is no statutory right of access or use of facilities under the Dills Act, the standard in assessing alleged unlawful conduct in this area is not the "reasonableness" of the state employer's policies. The Dills Act rule, like the federal rule, is whether the means of communication are ineffective or unreasonably difficult, or the State's prohibition on access is

discriminatory on its face or as applied. The burden of proof in meeting this requirement is on the charging party.

Applying this standard to the case at bar, I conclude that it has been demonstrated that the denial of access to a private setting for employees to meet with CSEA resulted in an ineffective or unreasonably difficult means of communication. As a result, the State's denial of that access constitutes a violation of Dills Act section 3519(a) and (b).

This conclusion is based largely on the fact that the specific work setting presented by this case is a state correctional facility - a prison. In this setting, the requirement that employees and their union representatives conduct meetings in the corner of a snack room within the sight and hearing of other employees, supervisors and managers, and even certain inmates, renders this means of communication unreasonably difficult.

I also note that the unfair practice charge in this case includes allegations of violations affecting members of State Bargaining Unit 3, Institutional Educators and Librarians, represented by CSEA. It is interesting to note that the Unit 3 collective bargaining agreement (CBA) between the parties, which had a term of November 1, 1992 through June 30, 1995, and their interim CBA having a term of March 4, 1999 through June 30, 1999, address access in high security settings, and appear to

anticipate the very circumstances presented by this case. In both CBAs, Article 2.2 (Access) states, in pertinent part:[1]

> The department head or designee may restrict access to certain work sites or areas for reasons of safety, security, or patient care including patient privacy; however, where access is restricted, other reasonable accommodations shall be made. The State will endeavor to provide the representative and employee(s) a location removed from the sight and hearing range of other employees. (Emphasis added.)

This CBA language acknowledges the need for security and restricted access in certain institutional settings, but it also recognizes the need for accommodations where restrictions are in place. It specifically describes an accommodation under which the State provides a private location in which employees and their union representatives may meet. Again, the denial of such a private setting results in an unreasonably difficult means of communication.

I must also briefly express my disagreement with the majority's application of the Board's Dills Act access policy in this case. Under the policy described in DPA, the majority concludes that the State's access policy was applied discriminatorily and, therefore, violated the Dills Act. The Board made such a finding in DPA based on very clear evidence of

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[1]This language is from the 1992-1995 CBA as referenced in the March 5, 1997, warning letter issued by a Board agent in this case. The Board may take official notice of the terms of a CBA filed with PERB pursuant to PERB Regulation 32120 (Cal. Code Regs., tit. 8, sec. 31001 et seq.). (State of California (Department of Forestry and Fire Protection) (1993) PERB Decision No. 999-S.)

discriminatory conduct, including a written policy allowing incidental employee use of the employer's e-mail system for various non-business purposes, provided those purposes were not related to any employee organization activity. In my view, the evidence in the instant case falls short of this type of undisputed showing of discriminatory conduct. Here, the State's approval of a private meeting setting involving any non-state entity was infrequent and related to activities conducted under the imprimatur of the employer, such as a blood drive or college class offering for employees. Further, the State's written policy is not discriminatory toward employee organization access. These facts do not approach the clear showing of discriminatory conduct found in DPA, and I am concerned that the majority's finding represents a departure from the Dills Act access policy which was so carefully crafted in that decision.

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-917-S, California State Employees Association v. State of California (Department of Corrections). in which all parties had the right to participate, it has been found that the State of California (Department of Corrections) (State or Department) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(a) and (b) when it discriminatorily applied a policy in a way that prohibits the California State Employees Association (CSEA) use of particular classrooms while permitting other organizations to use the same classrooms for non-business purposes. These discriminatory actions interfered with the rights of employees to participate in the activities of employee organizations and the right of CSEA to communicate with its members.

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

A. CEASE AND DESIST FROM:

1. Discriminatorily prohibiting CSEA members employed in the Department at the Central California Women's Facility (CCWF) from meeting in the In Service Training classrooms for employee organization meetings;

2. Discriminatorily prohibiting CSEA from using CCWF facilities for employee organization business; and

3. Denying CSEA the right to represent its members.

Dated: _____

STATE OF CALIFORNIA
(DEPARTMENT OF CORRECTIONS)

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.