STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS & REHABILITATION, AVENAL STATE PRISON), Respondent.	Case No. SA-CE-1703-S PERB Decision No. 2111-S June 3, 2010

Appearances: Suzanne L. Branine, Staff Counsel, for California Correctional Peace Officers Association; State of California (Department of Personnel Administration) by Dana R. Brown, Labor Relations Counsel, for State of California (Department of Corrections & Rehabilitation, Avenal State Prison).

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Correctional Peace Officers Association (CCPOA) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the State of California (Department of Corrections & Rehabilitation, Avenal State Prison) (CDCR or State) violated the Ralph C. Dills Act (Dills Act), section 3519,[1] by unilaterally changing the release time policy and by engaging in surface bargaining. The Board agent dismissed the charge for failure to state a prima facie case.

[1] The Dills Act is codified at Government Code section 3512 et seq. Section 3519 states, in relevant part, that it is unlawful for the State to:

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

The Board reviewed the dismissal and the record in light of CCPOA's appeal,[2] the State's response to the appeal,[3] and the relevant law. Based on this review, the Board finds the dismissal of the unfair practice charge to be well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board adopts the warning and dismissal letters as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SA-CE-1703-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.

[2] CCPOA did not appeal the dismissal of the unilateral change allegation.

[3] The Department of Personnel Administration (DPA) contends the charge was filed against the wrong respondent and should be dismissed on that basis. CCPOA listed DPA as the party against which the charge was filed, rather than CDCR. The Board agent identified CDCR as the respondent in the case caption, consistent with information contained in the statement of the charge. DPA was served with a copy of the charge and has shown no prejudice as a result of the failure to identify the specific department alleged to have committed an unfair practice on the face of the charge form. Therefore, CCPOA's failure to name CDCR as the respondent in this case is not sufficient, standing alone, to warrant dismissal of the charge. (*State of California (Department of Corrections & Rehabilitation)* (2010) PERB Decision No. 2108.)

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-7242
Fax: (916) 327-6377

December 4, 2008

Suzanne L. Branine, Staff Legal Counsel
California Correctional Peace Officers Association
755 Riverpoint Drive, Suite 200
West Sacramento, CA 95605-1634

Re: California Correctional Peace Officers Association v. State of California (Department of Corrections & Rehabilitation, Avenal State Prison)
Unfair Practice Charge No. SA-CE-1703-S
DISMISSAL LETTER

Dear Ms. Branine:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 30, 2008. The California Correctional Peace Officers Association (CCPOA or Charging Party) alleges that the State of California (Department of Corrections & Rehabilitation, Avenal State Prison) (State, CDCR, or Respondent) violated section 3519 of the Ralph C. Dills Act (Dills Act)[1] by: (1) implementing a unilateral change without notifying CCPOA and giving it an opportunity to bargain; and (2) engaging in surface bargaining.

You were informed in the attached letter dated November 4, 2008 (Warning Letter), 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 that 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 November 14, 2008, the charge would be dismissed. On November 10, 2008, you verified to me during our telephone conversation that you had in fact received the Warning Letter. At your request, I extended at that time the deadline to file an amended charge to December 3, 2008.

No amended charge was filed with PERB by or on the December 3, 2008 deadline. Therefore, this charge is being dismissed based on the facts and reasons set forth in the Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[2] Charging Party 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

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

this dismissal. (Cal. Code Regs, tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, secs. 32135(a) and 32130; see also Gov. Code, sec. 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

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 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 Regs., tit. 8, sec. 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, sec. 32135(c).)

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

[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code 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,

TAMI R. BOGERT
General Counsel

By _____
Yaron Partovi
Regional Attorney

Attachment

cc: Dana R. Brown

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
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November 4, 2008

Suzanne L. Branine, Staff Legal Counsel
California Correctional Peace Officers Association
755 Riverpoint Drive, Suite 200
West Sacramento, CA 95605-1634

Re: California Correctional Peace Officers Association v. State of California (Department of Corrections & Rehabilitation, Avenal State Prison)
Unfair Practice Charge No. SA-CE-1703-S
WARNING LETTER

Dear Ms. Branine:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 30, 2008. The California Correctional Peace Officers Association (CCPOA or Charging Party) alleges that the State of California (Department of Corrections & Rehabilitation, Avenal State Prison) (State, CDCR, or Respondent) violated section 3519 of the Ralph C. Dills Act (Dills Act)[1] by: (1) implementing a unilateral change without notifying CCPOA and giving it an opportunity to bargain; and (2) engaging in surface bargaining.

Investigation of the charge revealed the following relevant information. CCPOA is the exclusive representative of State Bargaining Unit 6 (BU 6) employees of the State. CCPOA and CDCR were parties to a Memorandum of Understanding (MOU) that expired by its terms on June 30, 2006. On September 12, 2007, the State presented its last, best, and final offer (LBFO) to CCPOA. CCPOA did not accept the State's LBFO. On September 18, 2007, the State notified CCPOA that, "[p]ursuant to the Ralph C. Dills Act, Government Code Section 3517.8, the State is exercising its right to implement. . . its last, best, and final offer. . . ."

On an unspecified time, CDCR informed CCPOA that it intended to implement changes to CDCR policy regarding "access to medical care for inmates" (ATC). The parties agreed to set May 23, 2008 as the date to negotiate the matter.

On an unspecified date, Corey Davis, CCPOA Field Representative and lead negotiator for ATC issues, contacted CDCR Labor Relations Specialist Cynthia Rojas about scheduling dates for negotiations regarding ATC issues at Avenal State Prison (ASP). It is alleged that "CCPOA requested that the negotiation occur at one of several possible locations in the area near ASP." However, Ms. Rojas allegedly insisted that negotiations could only occur at ASP, and that she would be at ASP on May 23, 2008 to negotiate. Mr. Davis stated that he would

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

not be at ASP on May 23, 2008, and that "as CCPOA lead negotiator on ATC issues, he was stating CCPOA's official position that there would be no ATC negotiations on May 23 at ASP."

On an unspecified date, Ms. Rojas contacted CCPOA member and Chapter President at ASP Vito Giannandrea on this matter. Without discussing the substance of her discussion with Mr. Davis, Ms. Rojas asked Mr. Giannandrea if it was agreeable to meet at ASP on May 23 for negotiations regarding the ATC. Mr. Giannandrea agreed to meet at May 23 negotiation session at ASP.

On an unspecified date, Ms. Rojas authorized Mr. Giannandrea and three other CCPOA members (Kelly Gomez, Tim Grove, and Pete Rivas) to be released on official business time (or "release time") from their regular jobs to attend the May 23, 2008 meeting.

On May 23, 2008, the four CCPOA members, acting as negotiating team members, arrived in civilian clothing at ASP to negotiate the ATC issue. After the meeting had begun, Ms. Rojas allegedly announced she was canceling the meeting because Mr. Davis was not present. It is alleged that Ms. Rojas retracted the release time authorization for these employees. Specifically, according to CCPOA, she informed the officers they either had to drive home, put on their uniforms, come back and work the remainder of their shifts, or burn their own holiday time for the rest of their regular shift. It is alleged that the employees were "forced to burn six hours of their own time for the remainder of their shifts that day."

Respondent alleges that "Ms. Rojas . . . authorized two hours of official union business (OB) for the CCPOA team members present and informed them that they had the option to return to work for the rest of their shift if they wished."

DISCUSSION

The charge does not specifically allege a theory by which CDCR's conduct violates the Dills Act. The Board has held that, where a charging party fails to allege that any specific section of the Government Code has been violated, the Board agent, upon a review of the charge, may determine under what section the charge should be analyzed. (See Los Banos Unified School District (2007) PERB Decision No. 1935; Los Angeles County Office of Education (1999) PERB Decision No. 1360.) It appears the charge alleges that CDCR engaged in surface bargaining and implemented a unilateral change without notice to CCPOA and an opportunity to bargain. For the reasons set forth below, the charge fails to establish, under both theories, a prima facie violation of the Dills Act.

I. Burden

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (State of California (Department of Food and Agriculture) (1994) PERB

Decision No. 1071-S, citing United Teachers-Los Angeles (Ragsdale) (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (Ibid.; Charter Oak Unified School District (1991) PERB Decision No. 873.)

As a threshold matter the charge fails to meet its burden under United Teachers-Los Angeles (Ragsdale), supra, PERB Decision No. 944, because it fails to describe, for example: (1) the date Mr. Davis contacted Ms. Rojas regarding scheduling any date(s) for negotiations; (2) who from CCPOA requested that negotiations "occur at one of several possible locations," and when such a request was made; (3) the means of communication used (e.g., e-mail, telephone, letter) by Mr. Davis to contact Ms. Rojas to a schedule a meeting; (4) the means of communication used (e.g., e-mail, telephone, letter) by Ms. Rojas to communicate with CCPOA regarding her alleged insistence that the meeting occur on May 23 at ASP; (5) The date Ms. Rojas contacted Mr. Giannandrea to schedule a meeting; (6) the date Ms. Rojas authorized release time for Mr. Giannandrea, Ms. Gomez, Mr. Grove, and Mr. Rivas; and (7) whether Mr. Davis was aware that the aforementioned employees would be attending the meeting on May 23, 2008.

II. Unilateral Change

It appears that charge is alleging that the State unilaterally changed (or implemented) a release time policy without providing CCPOA notice and the opportunity to bargain the matter.

In determining whether a party has violated the Dills Act section 3519(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

It is clear, initially, that the subject of this dispute, paid release time, is a negotiable matter under the Dills Act. Release time is related to the enumerated subjects of wages and hours. It is a subject well-suited to "the mediatory influence of negotiations" for resolution of disputes. (Anaheim Union High School District (1981) PERB Decision No. 177; see also, Compton Community College District (1990) PERB Decision No. 790; State of California (Department of Personnel Administration) (1991) PERB Decision No. 900-S.)

The remaining question here is whether the State has changed a supposed policy regarding release time requests. The Implemented Terms of the State's LBFO do not contain a policy for release time requests, and the charge fails to describe any such release time policy. In that regard, the charge fails to meet its burden under United Teachers-Los Angeles (Ragsdale), supra, PERB Decision No. 944, since it fails to describe: (1) whether there existed an established past practice for release time, and if so, what that practice was, how long it has

been in effect, and on what dates has such practice has been executed; (2) whether in this context, release time was negotiated as a ground rule for bargaining over the ATC, and if so, what terms were negotiated and when these terms were negotiated; (3) whether there exists a policy (either via negotiated agreement or past practice) that addresses whether CCPOA members must burn their holiday pay if a meeting is canceled; and (4) whether there exists a policy requiring members on release time to return to work when a negotiation session has been cancelled.

The charge also fails to state the alleged change was implemented before the State notified CCPOA and gave it an opportunity to request negotiations. (See Walnut Valley Unified School District, supra, PERB Decision No. 160.)

Therefore, the charge fails to demonstrate under a unilateral change theory, a prima facie violation under the Dills Act.

III. Surface Bargaining

The charge alleges that the employer violated Dills Act section 3519(c) by engaging in bad faith or "surface" bargaining. It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Muroc Unified School District (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (Oakland Unified School District (1982) PERB Decision No. 275.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (General Electric Co. (1964) 150 NLRB 192, 194, enf. 418 F.2d 736.) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (Oakland Unified School District (1983) PERB Decision No. 326.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (Ibid.) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S.)

Other factors that have been held to be indicia of surface bargaining include: negotiator's lack of authority which delays and thwarts the bargaining process (Stockton Unified School District (1980) PERB Decision No. 143); insistence on ground rules before negotiating substantive issues (San Ysidro School District (1980) PERB Decision No. 134); and reneging on tentative agreements the parties already have made (Charter Oak Unified School District (1991) PERB Decision No. 873; Stockton Unified School District, supra, PERB Decision No. 143; Placerville Union School District (1978) PERB Decision No. 69).

It is clear, however, that while a party may not merely go through the motions, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith. (Oakland Unified School District, supra, PERB Decision No. 275.) "The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (NLRB v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229.)

A. Release Time

The Dills Act contains an express statutory provision guaranteeing employees meeting on behalf of the exclusive representative reasonable paid release time for the purpose of attending negotiating sessions. (Gov. Code, § 3518.5.) Refusal to provide release time for the purpose of attending negotiating sessions violates the duty to bargain in good faith. (Magnolia School District (1977) EERB Decision No. 19.) The "negotiations" to which the statutory right to release time applies include time spent at the negotiating table, in caucus with one's own bargaining team, and in mediation and fact-finding sessions. (Burbank Unified School District (1978) PERB Decision No. 67.) In Modesto City Schools (1983) PERB Decision No. 291, PERB addressed a refusal to grant release time as an indicia of bad faith bargaining.

Here, the charge fails to meet its burden under United Teachers-Los Angeles (Ragsdale), supra, PERB Decision No. 944, because it fails to describe, for example: (1) the actual time, on May 23, 2008, that CCPOA members spent at the bargaining table or in caucus; and (2) the number of hours of release time initially granted by Ms. Rojas for bargaining over the ATC.

The charge admits that Ms. Rojas granted four CCPOA members release time "for the day" to attend the May 23, 2008 meeting. As discussed above, it is not clear whether the release time granted "for the day" constitutes an eight-hour day. However, the facts in the record show that Ms. Rojas granted two hours of "official union business time" for the CCPOA members to be present at the May 23, 2008 meeting. Notwithstanding that Ms. Rojas was aware that Mr. Davis would not attend the May 23 meeting, the charge fails to demonstrate that the CCPOA members were not granted release time (i.e., two hours) for the period of time at the negotiation session. Therefore, indicia of bad faith bargaining in this context has not been satisfied.

B. Ms. Rojas Arrangement of Negotiations Without Mr. Davis

As previously noted, in surface bargaining cases the "totality of the conduct" test involves a contextual analysis centered around the ultimate issue of ascertaining the respondent's sincere intent to compromise differences and reach agreement. One useful approach in addressing this issue is to consider the indicia of bad faith with a view to the extent to which the offending conduct obstructs and subverts, or tends to obstruct and subvert, the negotiations in the context of the entire course of bargaining. (See San Ysidro School District, supra, PERB Decision No. 134 [employer's conduct at bargaining table and away from table analyzed as interference with employee rights]; Oakland Unified School District, supra, PERB Decision No. 326 [lack of negotiating authority must obstruct bargaining process].)

The most egregious conduct, CCPOA claims, was that Ms. Rojas was aware that Mr. Davis would not be available for negotiations on May 23, yet she scheduled a meeting with CCPOA members for that purpose, and then retracted six hours of members' release time. However, assuming these facts are true, the charge fails to demonstrate how the State's conduct has stalled the completion of negotiations or in this respect hampered an ability to arrive at an agreement. (United Teachers-Los Angeles (Ragsdale), supra, PERB Decision No. 944.) Further, Mr. Davis acknowledged that he wanted to meet with the State to negotiate over the ATC issues. There is no evidence in the charge that bargaining progress would be impeded, because the parties are always free to arrange other dates and times to meet over this matter and pass proposals.

Therefore, this conduct, as alleged also fails to demonstrate any indicia of bad faith bargaining under the "totality of the conduct" test.

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 that 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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not received from you before November 14, 2008, your charge shall be dismissed. If you have any questions, please call me at the above telephone number.

Sincerely,

Yaron Partovi
Regional Attorney

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