STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ENGINEERS, UNIT 12, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Respondent.	Case No. LA-CE-664-S PERB Decision No. 2152-S December 16, 2010

Appearances: Levy, Stern & Ford by Trina R. Roderick, Attorney, for International Union of Operating Engineers, Unit 12; Shaun R. Spillane and Will M. Yamada, Labor Relations Counsel, for State of California (Department of Personnel Administration).

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 International Union of Operating Engineers, Unit 12 (IUOE) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the State of California (Department of Personnel Administration) (State or DPA) violated the Ralph C. Dills Act (Dills Act)[1] by unilaterally implementing a plan to furlough state employees three days each month pursuant to executive orders issued by the Governor. The Board agent found the charge did not state a prima facie case and dismissed the charge.

[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.

The Board has reviewed the dismissal and the record in light of IUOE's appeal,[2] the State's response thereto, and the relevant law. Based on this review, the Board affirms the dismissal as discussed below.

BACKGROUND

IUOE is the exclusive representative of employees in State Bargaining Unit 12. IUOE and the State are parties to a memorandum of understanding that expired on June 30, 2008.

On December 19, 2008, the Governor issued Executive Order S-16-08, which declared that a fiscal emergency existed within the State of California and ordered DPA to implement a plan to furlough state employees two days per month, effective February 1, 2009 through June 30, 2010. Executive Order S-16-08 described the State's fiscal situation, including declarations that without effective action the deficit was estimated to grow to a $42 billion budget shortfall, that there was a substantial risk that California would be unable to meet its financial obligations beginning February 2009, and that failure to substantially reduce the deficit would make it likely the State would miss payroll and other essential services payments in early 2009.

On January 9, 2009, IUOE filed the instant unfair practice charge alleging that the State's implementation of the furlough plan was an unlawful unilateral change in policy.

On July 1, 2009, citing new evidence of a continuing fiscal emergency, the Governor issued Executive Order S-13-09, directing DPA to increase employee furloughs to three days per month. Executive Order S-13-09 included declarations that revenue projections continued to drop, putting the State's budget shortfall at more than $24 billion for fiscal years 2008-09 and 2009-10, and that the State Controller determined that without effective action the State

[2] IUOE's subsequent request to withdraw its appeal and charge is discussed herein.

would have insufficient cash to meet its obligations starting July 2009 and would need to issue registered warrants.

On August 10, 2009, IUOE amended its charge to allege the State unilaterally implemented a third furlough day.

In a December 16, 2009 warning letter to IUOE, the Board agent cited *Sonoma County Organization Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267 (*County of Sonoma*) in support of the determination that the implementation of the furlough plan fell within the emergency exception of Dills Act section 3516.5.[3] In *County of Sonoma,* the court held that a declaration of emergency is presumed valid and the party challenging the declaration bears the burden of proving it invalid. The Board agent found that IUOE did not allege any facts to rebut the emergency presumption. IUOE declined to file an amended charge in response to the warning letter to add new factual allegations or legal theories. Thereafter, the Board agent dismissed the charge.

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[3] Dills Act section 3516.5 states:

> Except in cases of emergency as provided in this section, the employer shall give reasonable written notice to each recognized employee organization affected by any law, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the employer, and shall give such recognized employee organizations the opportunity to meet and confer with the administrative officials or their delegated representatives as may be properly designated by law.
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> In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the administrative officials or their delegated representatives as may be properly designated by law shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation.

County of Sonoma interpreted a nearly identical statutory provision under the Meyers-Milias-Brown Act (MMBA). (The MMBA is codified at § 3500 et seq.)

IUOE appealed the dismissal of the charge on February 11, 2010. The State filed an opposition to the appeal on March 1, 2010. Subsequently, in a letter to the Board dated April 28, 2010, IUOE sought to withdraw its appeal and dismiss its unfair practice charge. The State opposed the request asserting the appeal involves significant matters of public importance.[4]

While this matter was pending, the California Supreme Court considered related cases involving the State's imposition of employee furloughs and, on October 4, 2010, issued its decision in *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989 (*Professional Engineers)*.

DISCUSSION

IUOE contends that PERB Regulation 32625[5] mandates that PERB grant any request for withdrawal of a charge when the request occurs prior to the issuance of a complaint. The

[4] IUOE filed a further motion to withdraw its charge on May 28, 2010. The State continued to oppose the request to withdraw the appeal and charge. IUOE's reply was filed on June 14, 2010. IUOE's motion and DPA's opposition thereto provided further legal argument.

[5] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32625 states, in relevant part:

> Any request for withdrawal of the charge shall be in writing, signed by the charging party or its agent, and state whether the party desires the withdrawal to be with or without prejudice. *Request for withdrawal of the charge before complaint has issued shall be granted.* Repeated withdrawal and refiling of charges alleging substantially identical conduct may result in refusal to issue a complaint. If the complaint has issued, the Board agent shall determine whether the withdrawal shall be with or without prejudice. If, during hearing, the respondent objects to withdrawal, the hearing officer may refuse to allow it.

(Emphasis added.)

State asserts PERB Regulation 32320[6] governs such requests made to the Board after an appeal has been filed, and argues that PERB has the discretion to grant or deny a request to withdraw a charge. The State contends that this case involves a matter of significant public importance that will provide guidance in similar cases pending before PERB.

PERB has long held that the Board has the discretion to grant or deny requests to withdraw and dismiss cases pending before the Board itself. (PERB Reg. 32320; *Grossmont-Cuyamaca Community College District* (2009) PERB Order No. Ad-380; *Oakland Unified School District* (1988) PERB Order No. Ad-171 (*Oakland Unified School District*); *ABC Unified School District* (1991) PERB Decision No. 831b.)[7] The Board has also held that when an appeal involves a matter of continuing public interest and a ruling on the matter will be instructive to parties similarly situated, the Board should exercise its discretion in the interests of justice. (*Oakland Unified School District.*) The Board finds this case presents significant legal issues and there is a need to provide guidance for similar cases pending before PERB. Therefore, the Board declines to grant IUOE's request for withdrawal.

IUOE's charge alleges the State unlawfully implemented a furlough plan requiring bargaining unit employees to be furloughed three days each month through June 30, 2010.

As noted above, the California Supreme Court considered the same facts and some of the same legal arguments that are raised in the present charge.

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[6] PERB Regulation 32320 states, in relevant part:

> (a) The Board itself may:
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> (2) Affirm, modify or reverse the proposed decision, order the record re-opened for the taking of further evidence, *or take such other action as it considers proper.*

(Emphasis added.)

[7] PERB Regulation 32625 applies to proceedings below, before a decision not to issue a complaint is appealed to the Board itself.

In *Professional Engineers*, the Court determined whether the Governor had the authority to implement the furlough plan at issue in the present charge. The Court held the emergency exception in Dills Act section 3516.5, did not independently authorize the Governor to implement the furlough plan. Rather, the Court decided that the Legislature retained the authority to modify terms and conditions of employment without first requiring collective bargaining. The Court stated:

> [N]othing in the Dills Act precludes *the Legislature* from adopting such a furlough plan through a legislative enactment as one method of reducing the compensation of state employees when such cuts are found necessary and appropriate in light of the state's fiscal condition.

(*Professional Engineers*, p. 1048; emphasis in original.)

The Court found the Legislature ratified the Governor's initial two day per month furlough plan when it adopted a revision to the Budget Act of 2008. (*Professional Engineers*, p. 1005; SB 3X 2, Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 2.)[8]

PERB has similarly held the Dills Act does not limit the Legislature's authority to enact unilateral changes in terms and conditions of employment. In *State of California (Department of Personnel Administration)* (2008) PERB Decision No. 1978-S, the Legislature enacted an alternate retirement program for state employees hired after August 11, 2004. In *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2085-S, the Legislature changed the method of calculating overtime compensation for state employees. The Legislature's action in these cases eliminated any obligation to bargain over the changes in terms and conditions of employment. Accordingly, as the Court found in the present case, the

[8] The Legislature adopted identical language in the Budget Act of 2009 and the revision to the Budget Act of 2009, thus, authorizing the imposition of the third furlough day. (*Professional Engineers*, pp. 1006-1007; SB 3X 1, Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 1; AB 4X 1, Stats. 2009, 4th Ex. Sess. 2009-2010, ch. 1.)

Legislature authorized the furlough plan by enacting and revising the Budget Acts of 2008 and 2009. Thus, the charge must be dismissed.

Finally, on appeal IUOE raises new allegations and legal theories. IUOE contends the furlough plan violated the Emergency Services Act (Gov. Code, § 8625) and Article IV of the California Constitution.

PERB's jurisdiction is limited to the determination of unfair practice claims arising under the Dills Act and related public sector labor relations statutes. PERB does not have jurisdiction to enforce other statutes or provisions of the California Constitution. (*Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S.) Thus, these claims are dismissed.

Furthermore, IUOE alleges for the first time on appeal that after implementing the furlough plan pursuant to Dills Act section 3516.5, the State failed to bargain with IUOE at the earliest practical time.

PERB Regulation 32635(b) requires that, "unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." IUOE's appeal does not demonstrate that good cause exists to consider this allegation for the first time on appeal. Therefore, this allegation cannot be considered on appeal.

ORDER

The unfair practice charge in Case No. LA-CE-664-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member McKeag joined in this Decision.