STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNION OF AMERICAN PHYSICIANS & DENTISTS, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Respondent.	Case No. SA-CE-1754-S PERB Decision No. 2210-S October 13, 2011

Appearances: Davis, Cowell & Bowe by Andrew J. Kahn, Attorney, for Union of American Physicians & Dentists; Shaun R. Spillane, Legal Counsel, for State of California (Department of Personnel Administration).

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

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Union of American Physicians & Dentists (UAPD) 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 a month pursuant to executive orders issued by then Governor Arnold Schwarzenegger. The Board agent found the charge did not state a prima facie case and dismissed the charge.

The Board has reviewed the dismissal and the record in light of UAPD's appeal, the State's response thereto, and the relevant law. Based on this review, the Board affirms the dismissal for the reasons discussed below.

[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.

BACKGROUND[2]

UAPD is the exclusive representative of employees in State Bargaining Unit 16. UAPD and the State are parties to a memorandum of understanding that expired on June 30, 2008.

On December 19, 2008, Governor Schwarzenegger 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 in 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 December 24, 2008, UAPD 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, Governor Schwarzenegger 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 would have insufficient cash to meet its obligations starting July 2009 and would need to issue registered warrants.

---

[2] Most of the underlying facts in this case are identical to those set forth in the Board's decision in *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2152-S (*Department of Personnel Administration*).

On December 16, 2009, the Board agent issued a warning letter to UAPD in which the Board agent, relying on *Sonoma County Organization Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267 (*County of Sonoma*), determined 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 UAPD did not allege any facts to rebut the emergency presumption.

On December 23, 2009, UAPD amended its charge to allege that the State unilaterally implemented a third furlough day.[4]

---

[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.
>
> 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.)

[4] In addition to the amended charge, UAPD filed "supplemental" documents on December 29, 2009, January 4, 2010, and February 3, 2010. The State filed a response to each supplemental filing. The Board agent treated the supplemental filings as part of the amended charge.

While the charge remained pending before the Board agent, on December 31, 2009, Alameda County Superior Court Judge Frank Roesch issued an order granting a writ of mandate in an action brought by UAPD and other labor organizations that the furloughs were invalid as applied to employees performing services funded by special funds including federal funds, rather than by the general fund. (Alameda County Superior Court Case No. RG09456684.) The State appealed that ruling, and it was still pending on appeal when the parties submitted briefing in this matter on appeal before the Board.

In addition, while the charge remained pending before the Board agent, on October 4, 2010, the California Supreme Court issued its decision in *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989 (*Professional Engineers*). In that decision, the Court held that the emergency exception in Dills Act section 3516.5 did not independently authorize the Governor to implement the furloughs. The court further determined, however, that the Legislature had the authority to modify terms and conditions of employment without first requiring collective bargaining and that, by adopting the Budget Acts of 2008 and 2009 and revisions to those acts, the Legislature effectively ratified the Governor's furlough orders. (*Id.*, at p. 1005.) Relying on *Professional Engineers*, on December 16, 2010, the Board reached the same result in *Department of Personnel Administration*, holding that the Legislature's action in authorizing the furlough plan by enacting and revising the Budget Acts of 2008 and 2009 did not violate the Dills Act.

On January 10, 2011, the Board agent dismissed the instant charge based upon the decision of the California Supreme Court in *Professional Engineers* and the Board's decision in *Department of Personnel Administration.*

UAPD appealed the dismissal of the charge on January 25, 2011. The State filed an opposition to the appeal on February 15, 2011.

On May 16, 2011, while this matter was pending before the Board, the California Court of Appeal for the First Appellate District issued a published decision in *Union of American Physicians and Dentists v. Brown* (2011) 195 Cal.App.4th 691 (*UAPD v. Brown*), holding that, based on *Professional Engineers*, the Governor could lawfully furlough state employees who are paid by the federal government. Thus, the Court of Appeal stated:

> In *Professional Engineers,* our high court ruled the Legislature's 2009 revisions to the 2008 Budget Act operated to validate the "then existing furlough program" (*Professional Engineers*, *supra*, 50 Cal.4th at p. 1047), and the "then existing furlough program" was the program that had been implemented by the Governor on December 19, 2008, and that called for a mandatory furlough of represented state employees "*regardless of funding source.*" (*Id.* at p. 1003, italics added.) It is not our place to question our Supreme Court's rulings on this point. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Based on *Professional Engineers*, we conclude the Governor could validly furlough state employees who are paid by the federal government.

(*UAPD v. Brown*, at p. 700.)[5]

On July 27, 2011, the California Supreme Court denied review of the Court of Appeal's decision in *UAPD v. Brown*.

DISCUSSION

On appeal, UAPD requested that the charge be placed in abeyance pending the decision of the First District Court of Appeal in *UAPD v. Brown*. In the alternative, UAPD incorporated by reference its arguments before the First District Court of Appeal, in which it

[5] The court also rejected arguments that the furlough of federally funded employees violated Government Code section 19851 (governing eligibility for overtime compensation, an argument rejected by the Supreme Court in *Professional Engineers*) and Government Code section 16310, subdivision (a) (prohibiting the transfer of monies from special fund agencies to the general fund where to do so would interfere with the object for which a special fund was created). (*UAPD v. Brown*, at pp. 697-699.) In addition, the court rejected arguments that the third furlough day, which was not specifically addressed in *Professional Engineers*, was unauthorized, holding that, because the Legislature used the same language in the revised 2009 Budget Act as it had used in the 2009 revisions to the 2008 Budget Act, it intended the same result. (*Id.*, at pp. 703-704.)

asserted that the Legislature lacked the authority to approve furloughs for special fund agencies.

Given that the First District Court of Appeal has issued its decision in *UAPD v. Brown* and that decision has become final, UAPD's request to place the instant charge in abeyance is now moot. Moreover, given that the First District Court of Appeal rejected UAPD's substantive arguments on the same facts and legal issues, that decision is dispositive on the issues before the Board in this case. As determined by the Courts in both *Professional Engineers* and *UAPD v. Brown*, and by the Board in *Department of Personnel Administration*, the Dills Act does not limit the Legislature's authority to enact unilateral changes to terms and conditions of employment. In *UAPD v. Brown*, the Court rejected UAPD's argument that an exception to this rule exists for federally funded employees. Accordingly, the charge must be dismissed.

UAPD also asserted on appeal that it was denied due process when the Board agent dismissed the charge for reasons other than those set forth in the Board agent's December 16, 2009 warning letter. Given our disposition of this case, we need not address this issue.

ORDER

The unfair practice charge in Case No. SA-CE-1754-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member McKeag joined in this Decision.