STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CAL FIRE LOCAL 2881, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF FORESTRY AND FIRE PROTECTION), Respondent.	Case No. SA-CE-2042-S PERB Decision No. 2546-S January 29, 2018

Appearances: Messing Adam & Jasmine by Gary M. Messing and Jason H. Jasmine, Attorneys, for CAL FIRE Local 2881; California Department of Human Resources by Christopher E. Thomas and Tawni O. Parr, Attorneys, for State of California (Department of Forestry and Fire Protection).

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions and cross-exceptions to a proposed decision by a PERB administrative law judge (ALJ). The complaint alleged that the State of California (Department of Forestry and Fire Protection) (CAL FIRE) violated the Ralph C. Dills Act (Dills Act)[1] by unilaterally changing a policy that provided "*Skelly* officers"[2] with the authority to amend, modify, or revoke a proposed disciplinary action, without giving CAL FIRE Local 2881 (Local 2881) notice or an opportunity to bargain. The ALJ dismissed the

[1] The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise noted, all statutory references herein are to the Government Code.

[2] Under *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 (*Skelly*), public employees have a constitutional due process right to predisciplinary notice and an opportunity to respond to the appointing authority.

complaint on the grounds that CAL FIRE's actions were consistent with the parties' memorandum of understanding (MOU), and were an isolated occurrence rather than a change in policy. Local 2881 excepts to both conclusions. CAL FIRE's cross-exceptions urge alternate grounds for affirming the proposed decision.

The Board itself has reviewed the record in its entirety and considered the parties' exceptions, cross-exceptions, and responses thereto. Based on that review, we affirm the dismissal of the complaint and underlying unfair practice charge for the reasons that follow.

PROCEDURAL HISTORY

On June 5, 2015, Local 2881 filed the underlying unfair practice charge in this case, and on August 27, 2015, PERB's Office of the General Counsel issued the complaint.

CAL FIRE answered the complaint on September 16, 2015, denying the complaint's substantive allegations and asserting affirmative defenses. An October 6, 2015 informal settlement conference did not resolve the dispute.

A formal hearing was held on February 9 and 10, 2016, before the ALJ. After receiving post-hearing briefs, the ALJ issued the proposed decision on June 10, 2016.

Local 2881 filed timely exceptions. CAL FIRE filed timely cross-exceptions and a response to Local 2881's exceptions. Local 2881 filed a timely response to CAL FIRE's cross-exceptions.

FINDINGS OF FACT

Local 2881 is a recognized employee organization of State Bargaining Unit 8, which is an appropriate unit of employees under Dills Act section 3513, subdivision (b). CAL FIRE is the appointing authority of employees in that unit.

The Memorandum of Understanding and Its Bargaining History

The parties' MOU, effective from July 1, 2010 through July 1, 2017, included the following provision regarding predisciplinary procedures:

> **Section 19.3 Informal (Skelly) Grievance Meeting**
>
> **19.3.1** Employees shall be given an opportunity to respond, either orally or in writing, to the appointing power prior to the effective date of the action.
>
> **19.3.2** The representative of the appointing power shall have the authority to amend, modify or revoke the proposed action or make recommendations regarding the same to the appointing power.
>
> **19.3.3** A final decision regarding imposition of the discipline shall be served on the employee within seven (7) calendar days following the employee's oral response, or within seven (7) calendar days following receipt of the employee's written response, whichever is applicable.

This language was added to the MOU in 1998, with only non-substantive differences made in subsequent versions in the numbering of the section and paragraphs.[3] Also added at that time was a procedure for employees to challenge final disciplinary actions through a Board of Adjustment, rather than through the State Personnel Board (SPB). The Board of Adjustment process was later held unconstitutional in *State Personnel Board v. Department of Personnel Administration* (2005) 37 Cal.4th 512, but there has been no legal challenge to the predisciplinary process set forth in section 19.3 of the MOU.

Both parties' lead negotiators from that round of bargaining, Laurence Crabtree (Crabtree) for Local 2881 and Tim Mahoney (Mahoney) for CAL FIRE, testified that

[3] This provision was originally numbered Article XIX, section III, with paragraphs A, B, and C. For convenience, it is referred to throughout this decision as section 19.3.

section 19.3 of the MOU was intended as an acknowledgment of employees' existing constitutional due process rights to predisciplinary notice and an opportunity to respond to the appointing authority under *Skelly*, not as a change in those rights or in the level of authority of the *Skelly* officer. Crabtree more specifically testified that it was not Local 2881's intent to change the level of authority that a *Skelly* officer would have under the law, and that it was also not Local 2881's intent to ensure "the ability of the [*Skelly*] officer to establish the parameters of their own authority." (Reporter's Transcript, Vol. II, p. 53:12-15.)

Crabtree had particular familiarity with the subject of *Skelly* rights. In January 1998, Local 2881 published a representation handbook for disciplinary actions that he co-authored, to be used in training seminars by Local 2881. This version of the handbook stated that employees' rights under *Skelly* include the employee's due process right to present his/her side of the controversy before a reasonably impartial and non-involved reviewer, "at least two supervisorial levels above the employee," who is not involved in the adverse action in any way (i.e., planning, recommending), and who " must have the authority to effectively uphold, reject, modify the action or to effectively recommend the final disposition of the matter." (Resp. Ex. 1, p. 6, emphasis added.)[4] Although this summary was drafted before section 19.3 was added to the MOU, the handbook has been updated several times since without change to this language.

CAL FIRE has maintained its own policy regarding the *Skelly* process since at least 1988. The policy requires the *Skelly* officer to explain that upon completion of the *Skelly*

[4] This description of the range of a *Skelly* officer's authority is mirrored in a publication of the State Personnel Board (SPB) entitled, "What You Should Know As a Skelly Officer." The 2009-2010 version of this document states: "In every case, the Skelly officer must make a decision to sustain, modify, or revoke the action taken . . . or make a recommendation that the action be sustained, modified or revoked." (Resp. Ex. 4, p. 22; emphasis in original.)

hearing, he or she will make a recommendation to the appointing authority to sustain, amend, or revoke the adverse action. Around January 2015, CAL FIRE determined that this policy was out-of-date.

Past Practice

Notwithstanding these policy statements, it is undisputed that before January 2015, CAL FIRE *Skelly* officers had the authority to amend, modify, or revoke the proposed discipline, and were not restricted only to making recommendations. Local 2881 introduced a sampling of notices of adverse action from 1998 through 2014, which all stated that the *Skelly* officer "shall have the authority to amend, modify, or revoke" any of the allegations in the notice of adverse action. They did not state that the *Skelly* officer was restricted only to making recommendations regarding discipline, nor that the Skelly officer could, instead of rendering a final determination, make a recommendation to the appointing power.

Testimony from individuals who had served as CAL FIRE *Skelly* officers as far back as 1985, as well as those who had served as Local 2881 representatives in *Skelly* hearings, was generally consistent: the *Skelly* officers had authority to amend, modify, or revoke the proposed discipline, and were not limited to making recommendations.[5] CAL FIRE Deputy Director Anthony Favro (Favro) acknowledged that this was the past practice. Those who had served as *Skelly* officers since 2009 testified that their authority was set by the notice of adverse action, and until 2015 those notices vested in the *Skelly* officer the authority to amend, modify or revoke the proposed discipline.

[5] One of these *Skelly* officers, George Osborne, testified that departmental policy required a dismissal from employment to be approved by the CAL FIRE director.

Events of 2015

In 2014, a Battalion Chief assigned to the CAL FIRE Training Academy (Academy) murdered his girlfriend. Local law enforcement carried out a heavily publicized, intensive manhunt for the employee, who was eventually arrested, tried, convicted, and incarcerated. Around this time, the former employee's estranged wife alleged a number of improprieties at the Academy. These allegations received extensive coverage in state and local media. CAL FIRE Director Kenneth Pimlott retained the California Highway Patrol (CHP) to conduct an investigation into the allegations. CHP's investigation concluded that several Academy personnel had engaged in wrongdoing. CAL FIRE decided to take adverse actions against those employees.

Between January 13 and February 4, 2015, 15 CAL FIRE employees received notices of adverse action arising out of this investigation. These notices stated that the *Skelly* officer "will have the authority to recommend to the appointing power amendment, modification, or revocation of any or all of the foregoing allegations." Favro explained that CAL FIRE limited the authority of the *Skelly* officers in these Academy cases because of the serious nature of the allegations, the notoriety of the investigation following the murder, and the fact that 15 employees from one location were accused of serious wrongdoing: "The director wanted to make sure that we got these right." (Reporter's Transcript, Vol. II, p. 152:8-9.)

Eleven of the 15 employees requested *Skelly* hearings, and the *Skelly* officers recommended upholding the penalties in eight cases and modifying the penalties in three. The recommendations in each case were accepted by CAL FIRE.

In all other cases since the Academy cases, notices of adverse action issued by CAL FIRE have stated that the *Skelly* officer would have the authority to amend, modify, or revoke the proposed discipline.

PROPOSED DECISION

The ALJ framed the issue as whether CAL FIRE unilaterally changed its policy or practice in January 2015 by limiting *Skelly* officers' authority to making recommendations in the Academy cases, and applied the Board's traditional unilateral change test. The ALJ concluded that Local 2881 failed to prove that CAL FIRE's actions were a change in policy, because they were consistent with the terms of section 19.3 of the MOU. The ALJ also concluded that even if there was a departure from existing policy, it did not have a generalized effect on terms and conditions of employment, because it was limited to the 15 cases arising from the investigation of the Academy.

EXCEPTIONS AND CROSS-EXCEPTIONS

Local 2881 excepts to the ALJ's conclusion that CAL FIRE's actions were consistent with the MOU. It argues that section 19.3 is clear and unambiguous that the *Skelly* officer in every case has the authority to amend, modify, or revoke the proposed discipline, and the *Skelly* officer himself determines whether to actually amend, modify or revoke the proposed discipline or, instead, to recommend one of those outcomes. In the alternative, Local 2881 argues that if section 19.3 is ambiguous, the parties' past practice proves that its interpretation is correct.

Local 2881 also excepts to the ALJ's conclusion that CAL FIRE's actions did not have a generalized effect or continuing impact on terms and conditions of employment, arguing that this element of the unilateral change test is established by CAL FIRE's position that it is never

required to provide a *Skelly* officer with authority to amend, modify, or revoke the proposed discipline.

In addition to arguing in favor of the ALJ's decision on both grounds, CAL FIRE's cross-exceptions argue that the type of authority possessed by the *Skelly* officer is not within the scope of representation, and that section 19.3 would be unconstitutional if interpreted as Local 2881 suggests.

DISCUSSION

In order to prevail in a case of alleged unilateral change, a charging party must prove by a preponderance of the evidence each element of the prima facie case, namely, that: (1) the employer took action to change existing policy or implement a new policy; (2) the policy change concerned a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the action has a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9; PERB Reg. 32178.[6])

The dispositive issue in this case is whether CAL FIRE changed its existing policy on the authority of *Skelly* officers. Local 2881 asserts that the policy permits the *Skelly* officer to determine whether he or she will modify, revoke, or amend the proposed discipline or recommend one of those actions to management. CAL FIRE asserts that the existing policy permits it to determine in each instance of proposed adverse action whether the *Skelly* officer determines the adverse action or merely recommends the result.

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

An established policy may be embodied in the terms of the parties' MOU or collective bargaining agreement. (*Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 8; *Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12.) Although PERB lacks authority to enforce contracts, it may interpret contracts when necessary to resolve an alleged unfair practice. (*County of Sonoma* (2011) PERB Decision No. 2173-M, p. 16.) In doing so, the Board applies traditional rules of contract interpretation. (*City of Davis* (2016) PERB Decision No. 2494-M, p. 18; *County of Tulare* (2015) PERB Decision No. 2414-M, p. 17, affd. in relevant part by *County of Tulare* (2016) PERB Decision No. 2414a-M.)

We must first determine whether the language of section 19.3 is clear and unambiguous. (*County of Sonoma*, *supra*, PERB Decision No. 2173-M, p. 16.) Both parties claim that it is. We disagree. Because section 19.3 is written in the passive voice and lacks any reference to CAL FIRE's alleged authority to determine the *Skelly* officer's authority, it is susceptible to Local 2881's interpretation that the *Skelly* officer has the authority to choose between issuing a final determination (upholding, amending, modifying, or revoking the proposed discipline) or making a recommendation to the appointing power. On the other hand, because of its use of the disjunctive ("*or* make recommendations regarding the same to the appointing power," emphasis added), section 19.3 is also susceptible to CAL FIRE's interpretation that the *Skelly* officer must possess *either* final decisionmaking authority *or* recommending authority, but not necessarily both.

Because the contract provision is ambiguous, we turn to extrinsic evidence. (*Regents of the University of California* (2014) PERB Decision No. 2398-H, p. 28.) This may include

evidence of bargaining history and past practice. (*County of Sonoma* (2012) PERB Decision No. 2242-M, p. 17.)

The bargaining history supports CAL FIRE's interpretation. Crabtree admitted that it was not Local 2881's intent to give the *Skelly* officer the ability to establish the parameters of his or her own authority. This undermines Local 2881's contention here that the *Skelly* officer is free to determine the scope of his or her authority, and suggests that CAL FIRE determines the scope of the *Skelly* officer's authority in each proposed disciplinary action.

Moreover, Crabtree and Mahoney both testified that the parties' intent in agreeing to section 19.3 was essentially to incorporate the *Skelly* right into the contract. It is undisputed that at the time section 19.3 was negotiated, *Skelly* had been interpreted to require that the *Skelly* officer "possesses authority to recommend a final disposition of the matter," not necessarily to make the final determination. (*Gary Blakely* (1993) SPB No. 93-20, p. 11, emphasis in original, quoting *Titus v. Civil Service Commission* (1982) 130 Cal.App.3d 357, 363.)

The Union's own publication for its representatives who handle discipline cases for members does not contradict the notion that CAL FIRE determines the scope of authority for *Skelly* officers. This language in Local 2881's handbook remained consistent before and after section 19.3 was negotiated, and is similar to the MOU language: "The Skelly officer must have the authority to effectively uphold, reject, modify the action or to effectively recommend the final disposition of the matter." Absent is any suggestion that the *Skelly* officer determines his or her own authority. If Local 2881 believed that section 19.3 secured a new right to a *Skelly* officer with final decisionmaking authority, it is not clear why it would not have publicized that information in its handbook for *Skelly* representatives.

Moreover, the repetition of the phrase "to effectively" after the disjunctive "or," suggests more strongly that the *Skelly* officer must have *either* final decisionmaking authority *or* recommending authority, not necessarily both.

Local 2881 does not dispute this reading of its handbook, but argues that the handbook is not probative of the meaning of section 19.3. Local 2881 relies on Crabtree's testimony that the handbook pre-dated section 19.3, and therefore was a recitation of the law, not a summary of the contract. But it is probative of section 19.3's meaning, in light of Crabtree's testimony that section 19.3 was intended to be an acknowledgment of existing law.

Local 2881 argues that the parties did not need a contract provision to affirm *Skelly* rights. This may be true, but it is not a basis for disregarding the uncontradicted testimony of both sides' negotiators regarding their intent. In fact, it is well settled that the parties may agree to incorporate external law, unchanged, into their collective bargaining agreements. (*Fairfield-Suisun Unified School District*, *supra*, PERB Decision No. 2262, p. 13; *Regents of the University of California* (2010) PERB Decision No. 2094-H, p. 19.)

While it is undisputed that before the 2015 Academy cases, CAL FIRE consistently informed both the *Skelly* officers and the affected employees that the *Skelly* officer would have authority to "amend, modify or revoke any or all of" the allegations, this fact alone does not resolve the issue. Each of the pre-2015 notices give the *Skelly* officer authority to resolve the disciplinary issue, but none of those notices reference an alternative power to recommend. Nor did they state that the *Skelly* officer could alternatively decide on his or her own to make a recommendation. This supports the notion that it is the employer, not the *Skelly* officer, that determines on a case-by-case basis whether final decisionmaking authority or recommending authority vests with the *Skelly* officer.

The fact that CAL FIRE consistently gave its *Skelly* officers final decisionmaking authority does not necessarily establish that the MOU required it to do so. The mere fact that an employer has chosen not to enforce its contractual rights does not mean it is forever precluded from doing so. (*Marysville Joint Unified School District* (1983) PERB Decision No. 314, p. 10.) Where an employer has discretion under a contract provision, it does not forfeit that discretion by failing to exercise it. (*City of Davis, supra,* PERB Decision No. 2494-M, p. 26.) Thus, CAL FIRE did not limit its options under section 19.3 by only exercising one of them in the past.

After weighing this evidence, we conclude that Local 2881 has failed to establish by a preponderance of the evidence that section 19.3 gave the *Skelly* officers the authority to determine whether they would amend, modify or revoke the proposed discipline action or recommend such action. Instead, we conclude that the MOU gives CAL FIRE the discretion on a case-by-case basis to decide whether to give its *Skelly* officers final decisionmaking authority or merely recommending authority. Because Local 2881 failed to establish that CAL FIRE departed from existing policy when it limited *Skelly* officers' authority in the Academy cases to only recommending an action, we affirm the ALJ's dismissal of the complaint and underlying unfair practice charge. In light of this conclusion, it is not necessary to consider CAL FIRE's cross-exceptions.

ORDER

The complaint and underlying unfair practice charge in Case No. SA-CE-2042-S are hereby DISMISSED.

Chair Gregersen and Member Banks joined in this Decision.