STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF TRANSPORTATION), Respondent.	)	Case No. LA-CE-105-S PERB Decision No. 333-S August 18, 1983

Appearances: Robert W. Feinstein, Attorney for California State Employees' Association; Barbara T. Stuart, Attorney (Department of Personnel Administration) for State of California (Department of Transportation).

Before Gluck, Chairperson; Tovar and Burt, Members.

DECISION

BURT, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal filed by the California State Employees' Association (CSEA) of the regional attorney's attached Notice of Refusal to Issue Complaint and Dismissal Without Leave to Amend pursuant to PERB regulation section 32630.[1]

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[1]PERB rules and regulations are codified at California Administrative Code, title 8, section 31001 et. seq.; section 32630 states:

> 32630. Dismissal/Refusal to Issue Complaint.
>
> If the Board agent concludes that the charge or the evidence is insufficient to establish

The charge alleges that the State of California (Caltrans) violated subsection 3519(a), (b) and (c) of the State Employer-Employee Relations Act (SEERA) by unilaterally transferring two maintenance supervisors from highway maintenance crews to landscape maintenance crews, with the effect of altering their wages and working conditions, specifically overtime opportunities and privilege to use a State vehicle for commuting purposes.[2]

The regional attorney found that the evidence was insufficient to establish a prima facie case. Upon review of

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> a prima facie case, the Board agent shall refuse to issue complaint, in whole or in part. The refusal shall constitute a dismissal of the charge. The refusal, including a statement of the grounds for refusal, shall be in writing and shall be served on the charging party and respondent.

[2]SEERA is codified at Government Code section 3512 et seq. All statutory references herein are to SEERA unless otherwise noted. Subsections 3519(a), (b) and (c) provide as follows:

> It shall be unlawful for the state to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and confer in good faith with a recognized employee organization.
>
> * * *

her basis for dismissal, CSEA's appeal, Caltrans' response thereto, and the entire record, we conclude that the regional attorney erred in refusing to issue a complaint, for the reasons discussed below.

DISCUSSION

In considering an appeal of dismissal of an unfair practice charge, all facts alleged in the charge must be deemed true. State of California (Department of General Services) (4/8/83) PERB Decision No. 302-S. In any event, the critical facts are not in dispute in this case. CSEA alleges, and Caltrans does not deny, that it unilaterally transferred two maintenance supervisors from highway maintenance to landscape maintenance crews. It further alleges that this transfer had the effect on the employees of reducing opportunities for overtime and depriving them of a Home Use Permit which allowed them to drive their State cars to and from work.

In addition to the factual allegations contained in the charge, the regional attorney's investigation in this case produced additional facts. Thus, it appears from judicially noticeable documents that prior to July 17, 1979, two separate and distinct job classifications, "highway maintenance supervisor" and "landscape maintenance supervisor," existed. On that date, the State Personnel Board (SPB) consolidated the positions under the general classification of "maintenance supervisor." Separate "highway" and "landscape"

classifications continued to exist for the Caltrans worker and leadworker series.[3]

Caltrans contends that, as a matter of law, it must be free to unilaterally transfer employees within the merged classification created by the SPB. To hold that such transfers are within scope and must be negotiated, contends Caltrans, would impermissibly curtail the SPB's authority to establish classifications for civil service employment, in contravention of Article VII, section 3 of the California Constitution, and the facilitating provisions of Government Code section 18800 et seq.[4]

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[3]The motivation for the change in classification is not in evidence at this stage of the case. Caltrans contends that the consolidation was intended to allow Caltrans flexibility in making assignments, and that it was anticipated that incumbents of the formerly distinct maintenance supervisor classification would henceforth be assigned interchangeably to landscape or highway crews.

[4]Article VII, section 3 provides as follows:

> [Enforcement and administration]
>
> (a) The board shall enforce the civil service statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions.
>
> (b) The executive officer shall administer the civil service statutes under rules of the board.

Government Code section 18801 provides as follows:

> Allocation of position to appropriate class.

PERB has not yet determined the scope of representation under SEERA. The statutory scope language of SEERA parallels that of the National Labor Relations Act (NLRA).[5] Section 8(d) of the NLRA requires good faith negotiations regarding ". . . wages, hours, and other terms and conditions of employment. . . ." Similarly, section 3516 of SEERA limits the scope of representation to ". . . wages, hours, and other terms and conditions of employment . . ." with the proviso that " . . . consideration of the merits, necessity, or organization of any service or activity provided by law or executive order" is outside scope.

> Every position in the state civil service shall be allocated to the appropriate class in the classification plan. The allocation of a position to a class shall derive from and be determined by the ascertainment of the duties and responsibilities of the position and shall be based on the principle that all positions shall be included in the same class if:
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> (a) Sufficiently similar in respect to duties and responsibilities that the same descriptive title may be used.
>
> (b) Substantially the same requirements as to education, experience, knowledge and ability are demanded of incumbents.
>
> (c) Substantially the same tests of fitness may be used in choosing qualified appointees.
>
> (d) The same schedule of compensation can be made to apply with equity.

[5]The NLRA is codified at 29 U.S.C. 152 et seq.

In interpreting language of SEERA, cognizance should be taken of the decisions of the National Labor Relations Board (NLRB) interpreting identical or similar language in the NLRA. Fire Fighters v. City of Vallejo (1974) 12 Cal.3d 608. In light of the virtually identical scope language of SEERA and the NLRA, PERB finds private sector precedent regarding scope to be applicable to SEERA cases. In the private sector, transfer of employees has long been held within scope. Continental Insurance Co. v. NLRB (2d Cir. 1974) 495 F.2d 44, 86 LRRM 2003. The Developing Labor Law, Morris (1971) p. 406. See also Metromedia, Inc. (1977) 232 NLRB 486. Caltrans' argument that it can unilaterally transfer employees within classifications established by the SPB is unpersuasive. If Caltrans' argument were accepted, the scheme of collective negotiations established by SEERA would potentially be frustrated. SEERA provides that terms and conditions of employment must be negotiated. In Caltrans' view, however, it may unilaterally move employees around within the classifications set by the SPB without negotiating, even where such transfers materially alter employees' terms and conditions of employment. If this view were accepted, an agency desiring to unilaterally transfer employees could circumvent the negotiating process by seeking and obtaining a consolidation of classifications from the SPB. Such a procedure would be inconsistent with SEERA's mandate of negotiability. The terms

and conditions of a given employee are not established by the job title per se; the reality is that terms and conditions may vary within classifications. Terms and conditions which were different under two different classifications cannot logically be said to have become congruent simply because the classifications are merged.

Requiring negotiations regarding transfer within SPB classifications does not impermissibly usurp the SPB's constitutional authority to establish classifications. There is nothing implicit or explicit in that authority which indicates that varying wages, hours, and working conditions within those classifications are not subject to SEERA's collective negotiating requirements. Caltrans' argument in this regard is similar to that rejected by the California Supreme Court in Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168 [172 Cal.Rptr. 487]. In that case, Pacific Legal Foundation argued that the SPB's Article VII authority to "classify" positions in civil service carried with it the authority to set salaries, which would be interfered with by SEERA's scheme vesting final authority to set wages in the Governor and Legislature pursuant to negotiations with exclusive representatives. The Court held that nothing in the SPB's authority to "classify" positions carried with it the authority to set salaries. Similarly, nothing in that authority provides SPB with authority to set other negotiable

terms and conditions by or within classifications. It is the reality of the workplace, and not the artificial classification title, which is crucial.

Caltrans contends that even if the transfers herein are within scope, it has established a practice of unilateral transfer of incumbents of the merged categories from highway crews to landscape crews, and vice versa, pursuant to the reclassification, and hence no unilateral change has occurred. First, we note that CSEA contends that each example cited by Caltrans involved a voluntary transfer, whereas in the instant case the incumbents were transferred involuntarily. This raises a factual question to be addressed at a hearing. Further, we note that memoranda submitted in support of Caltrans' contention indicate that the practice has varied from district to district.[6] In some districts, it appears that Caltrans has merged the composition of crews, so that each crew is comprised of some highway workers and some landscape workers, and is thus capable of performing all necessary maintenance tasks in its area, "fence-line to fence-line." In other districts, supervisors who formerly had only highway maintenance responsibility have allegedly been unilaterally transferred in such a manner as to add landscape maintenance to their responsibilities. In another district, it appears that

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[6]Caltrans is organized for administrative purposes into geographic districts statewide.

some but not all crews have been merged. In District 7 (in which the transfers complained of occurred), some maintenance supervisors have been allegedly "rotated" from specialized landscape or highway crews to "fence-line to fence-line" crews. However, it appears that some district highway crews and some district landscape crews still exist in District 7.

At this stage of the proceeding, we cannot hold that Caltrans has conclusively demonstrated that it has an established past practice of unilaterally transferring highway maintenance supervisors to landscape maintenance duties.

Thus, we reject Caltrans' contention that it has conclusively demonstrated a past practice of unilaterally engaging in transfers of the sort complained of here. We further reject its legal argument that it must be free to unilaterally effect such a transfer and reassignment within broad classifications established by the SPB.[7]

Caltrans' remaining contention is that the opportunity for overtime and privilege to commute in a State vehicle are not negotiable effects. We disagree. The right to use a State car in commuting is a negotiable term and condition. The Board has so held pursuant to EERA (Office of the Santa Clara County Superintendent of Schools (8/12/82) PERB Decision No. 233), [vacated on other grounds, (10/26/82) PERB Decision No. 233a]

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[7]The issue of whether the State employer may unilaterally seek reclassification of unit employees by the SPB is not presented by this case.

as have the NLRB and courts pursuant to the NLRA. Wil-Kil (1970) 181 NLRB 749 [73 LRRM 1556], enf'd. (7th Cir. 1971) 440 F.2d 371 [76 LRRM 2735]; Eagle Material Handling (1976) 224 NLRB 1529; George Webel & Pike Transit Company (1975) 217 NLRB 815. As noted in Santa Clara, supra, commuting use of an employer-provided car is a direct economic benefit to the employee, saving, at least, wear and tear on a personal car.

Diminution of overtime opportunity constitutes a change in wages, an enumerated scope item, and is clearly subject to negotiations. Willamette Industries, Inc. (1975) 220 NLRB 707.

SUMMARY

An unfair practice charge shall be dismissed only if the Board agent concludes that the charge or the evidence is insufficient to establish a prima facie case. PERB rule 32630, supra.

The charge alleges, the evidence establishes, and Caltrans does not deny, that Caltrans unilaterally transferred the complainants, and that attendant unilateral changes in working conditions did occur. For the reasons set forth in the discussion section above, we find that the transfer of employees by the State employer is within the scope of representation and that a holding of negotiability of transfers of this sort will not impermissibly interfere with the SPB's constitutional authority to set classifications.

Because the charge and the evidence in support thereof establishes that a unilateral change in matters within scope occurred, the Board finds that CSEA has made out a prima facie case.

We cannot hold at this stage of the case that Caltrans established a past practice which would validate the unilateral changes involved. Rather, a triable issue of fact has been raised as to whether an established past practice exists.

We therefore conclude that the charge should not have been dismissed.

ORDER

Upon the foregoing Decision and the record as a whole, the Public Employment Relations Board ORDERS that the regional attorney's Refusal to Issue Complaint and Dismissal Without Leave to Amend is reversed. The matter is REMANDED to the General Counsel for further proceedings consistent with this Decision.

Chairperson Gluck and Member Tovar joined in this Decision.

STATE OF CALIFORNIA
EDMUND G. BROWN JR., Governor

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Dear Parties:

RE: DISMISSAL OF UNFAIR PRACTICE CHARGE
LA-CE-105-S
CSEA vs. State of Calif. (Department of Transportation)

Pursuant to PERB Regulation section 32630, the above-captioned charge is hereby dismissed. The charge is dismissed because it fails to allege facts sufficient to state a prima facie violation of the State Employer-Employee Relations Act (SEERA).

The Charging Party, California State Employees Association (CSEA or Association) alleges that Respondent, the State of California Department of Transportation (Department) violated SEERA sections 3519(a)(b) and (c) by involuntarily transferring two unit #12 employees, Ted Jemelian and Al Gallegus, from positions as Maintenance Crew supervisors to positions as Landscape Crew Supervisors. CSEA alleges that the transfers adversely affected the employees' wages, in that Maintenance Supervisors accrue an abundance of overtime on emergency callouts. Maintenance Supervisors are also provided with a Home Storage permit for a state vehicle. They thus enjoy free transportation to and from work, while Landscape Supervisors do not enjoy this benefit. The transfers were effective on January 15 and February 1, 1982. The Department did not notify CSEA prior to notifying the affected employees. It refused to meet and confer with CSEA prior to taking action, despite Association demands that it do so.

My investigation revealed the following:

On July 17, 1979 the State Personnel Board consolidated the job specifications for Caltrans Highway Maintenance Supervisor and Caltrans Landscape Maintenance Supervisor into one job classification, Caltrans Maintenance supervisor. The consolidation, which was vigorously opposed by CSEA, was a compromise between Caltrans' proposal to merge all positions in the Highway landscape and Highway Maintenance series into a single series, and CSEA's opposition to any consolidation of positions from the two classification series. The responsibilities of the new Maintenance Supervisor position encompass duties in either highway maintenance or landscape maintenance. Qualifications for the position include the knowledge and abilities listed for both Caltrans Highway Maintenance Leadworker and Caltrans Maintenance Leadworker.

Since 1979, the Department has re-assigned maintenance supervisors from highway maintenance to landscape duties, from landscape to highway maintenance duties, or to a combination of the two types of duties, consistent with the cross-utilization allowed by the new job specifications. Management jurisdiction over the Department's operations is divided into eleven geographical areas, called "Districts". While the transfers of Jemelian and Gallegus (together with the transfers of four other employees) were the first such rotations to take place in District 7, a similar reassignment had been made in District 4 in July 1981. Furthermore, the Department had consolidated the duties of roadway and landscape maintenance supervision in District 6 during the 1979-1980 fiscal year, in District 5 in February 1980, in District 4 since July 1979 and in District 8 in February 1981. In District 7, three other supervisors were transferred from landscape to road crews and one other supervisor transferred from a road crew to a landscape crew during the period December 1981 - February 1982. At the same time six other Maintenance Supervisors in District 7 were reassigned from specialized landscape or road crews to multipurpose fence line crews with responsibility for all maintenance work within their assigned areas.

An employer commits an unfair practice if it unilaterally implements a change in any term or condition of employment prior to the conclusion of the bilateral negotiations process. Moreno Valley Unified School District (4/30/82) PERB Decision

No. 206. While transfer and reassignment policies are within the scope of representation under SEERA, the Department's action in reassigning Jenelian and Gallegus was consistent with its past practice since 1979 in consolidating the job responsibilities of the two types of supervisors, pursuant to the job descriptions adopted by the State Personnel Board. The use of state vehicles for emergency callouts was not a benefit or form of compensation enjoyed by incumbents of one job classification and not those of another, but a condition that accompanies the job assignment of highway manintnance supervision.

Thus, the factual allegations of the charge do not support an allegation that the Department changed its past practice with respect to reassignment of maintenance supervisors. Therefore, the charge does not state a prima facie unfair practice violation of SEERA.

Pursuant to Public Employment Relations Board regulation 32635 (California Adminsitrative Code, title 8, party III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

You 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 this Notice (section 32635(a). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on November 1, 1982, or sent by telegraph or certified United States mail postmarked not later than November 1, 1982 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal, any other party may file with the executive assistant to the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein except for amendments to the charge must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany the document filed with the Regional Office or the Board itself (see section 32140 for the required contents and a sample form). The documents will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

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 executive assistant to the Board at the previously noted address. A request for an extension in which to file a document with the Regional Office should be addressed to the Regional Attorney. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the subject document. The request must indicate good cause for the position of each other party regarding the extension and shall be accompanied by proof of service of the request upon each party (section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Very truly yours,

Dennis Sullivan
General Counsel

Marjorie Weinzweig
Regional Attorney

MW:djm