STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

HELENE CAUCHON, EUGENE CARDENAS, ANTONIO BARBOSA, DARRELL LEPKOWSKY AND JORGE VARGAS,	)	
Charging Parties,	)	Case No. S-CE-187-S
v.	)	PERB Decision No. 431-S
STATE OF CALIFORNIA (AGRICULTURAL LABOR RELATIONS BOARD),	)	November 13, 1984
Respondent.	)	

Appearances: Eugene E. Cardenas for Charging Parties; Christine A. Bologna, Attorney for State of California (Agricultural Labor Relations Board).

Before Hesse, Chairperson; Tovar, Jaeger and Morgenstern, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on the basis of an appeal filed by Helene Cauchon et al. (Charging Parties) of the dismissal of their charge against the State of California (Agricultural Labor Relations Board) (ALRB). For the reasons set forth below, the Board affirms the regional attorney's (RA) dismissal of the charge attached hereto.

FACTUAL SUMMARY

On June 23, 1983, five trial attorneys employed in regional offices of the ALRB filed a charge objecting to a new "mandatory advisory procedure" announced by the ALRB general

counsel by memorandum on February 4, 1983. The memorandum amended the ALRB Unfair Labor Practice Manual so as to require trial attorneys to obtain the approval of the general counsel in Sacramento before issuing unfair labor practice complaints or amendments to those complaints and before filing exceptions to an administrative law judge's (ALJ) decision. Prior to the change, the practice had been to permit these decisions to be made by the regional director and regional attorney without the approval of the general counsel.

The initial charge alleged that the change "had a serious impact on [Charging Parties'] working conditions as attorneys" and was not discussed with the exclusive representative, Association of California State Attorneys and Hearing Officers (ACSA), prior to implementation.[1] Attachments to the charge further alleged that the change interfered with the employees' exercise of their professional judgment, caused delay and curtailed available research support assistance.

In a first amended charge, filed on August 8, 1983, Charging Parties described cases in which the new procedures allegedly materially affected working conditions. Specifically, Charging Parties alleged as follows:

(1) Because of a one-day delay in obtaining approval to file an interim appeal of a procedural ruling during hearing,

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[1]In light of our conclusion in the instant case, it is unnecessary to address the ALRB's contention that the Charging Parties are "not aligned" with ACSA.

the hearing may have to be reopened, in which case the attorneys will have to relocate and re-subpoena witnesses and the judge and interpreter will have to return, resulting in inconvenience and an extra expenditure of time and money.

(2) Because the Sacramento ULP Litigation Unit is now required to provide the advice decisions, it is unable to provide research assistance requested by a region as it had in the past.

(3) Because of a one-day delay in obtaining approval to amend a complaint during hearing, the attorney was required to re-contact witnesses, incurring unnecessary expenditure of time and money.

(4) An attorney was denied approval to except to an ALJ's decision denying attorney's fees, thereby denying the attorney's "opportunity to fully exercise her professional discretion and judgment," undermining her professional integrity and interfering with her professional judgment.

In addition to these specific instances of alleged harm, the amended charge generally alleged that the new policy affected their workloads by requiring them to "spend extra time educating, arguing, and convincing people in Sacramento" and "writing legal memoranda to Sacramento" in order to get prior approval for legal decisions which they are experienced and trained to make themselves.

DISCUSSION

At the time the RA issued his dismissal letter, the Board had not yet reviewed the scope of representation section of the State Employer-Employee Relations Act (SEERA).[2] Since then, however, two Board decisions have addressed the meaning of section 3516, including the "organization of any service or activity" proviso.[3]

In State of California (Department of Transportation) (8/18/83) PERB Decision No. 333-S, the Board first reviewed the scope of representation language of SEERA section 3516 and found that employee transfers, employee opportunity for overtime and use of a state vehicle were all negotiable subjects.

In State of California (Department of Transportation) (11/28/83) PERB Decision No. 361-S, the Board again considered the scope of representation question and specifically reviewed the proviso language of section 3516. It relied on the decision in Fire Fighters v. City of Vallejo (1974) 12 Cal.3d 608 interpreting identical language found in the scope of representation provision of the Meyers-Milias-Brown Act

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[2]SEERA is codified at Government Code section 3512 et seq. All statutory references herein are to the Government Code unless otherwise indicated.

[3]Section 3516 provides as follows:

> The scope of representation shall be limited to wages, hours, and other terms and conditions of employment, except, however,

(MMB).[4] In that case, the Supreme Court held that the MMB proviso language was meant only to forestall the expansion of wages, hours and working conditions to include more general managerial policy decisions that would deprive an employer of legitimate managerial prerogatives. Given this interpretation, the Board found the proviso of section 3516 to be essentially a codification of that portion of the Board's scope test which removed from the bargaining process essential managerial prerogatives. See Anaheim Union High School District (10/28/81) PERB Decision No. 177.

Although the RA's dismissal issued without benefit of the Board decisions interpreting SEERA, we believe he correctly concluded that the ALRB general counsel was free to unilaterally adopt the new case processing procedures. Thus, while the subject of case processing procedures may well

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> that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

[4]MMB is codified at Government Code section 3500 et seq. Section 3504 provides as follows:

> The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

satisfy the first two prongs of the Anaheim test, we conclude that, by requiring the ALRB attorneys to get prior approval before issuing complaints and amendments and before submitting exceptions to ALJ decisions, the general counsel was exercising his managerial prerogative to direct his staff and to exercise his statutory control over the agency's complaint processing procedures.[5]

Beyond the subject of the processing procedures themselves, the RA appropriately considered whether the allegations in this charge otherwise demonstrate that the nonnegotiable managerial decision had an impact on items within the scope of representation. We find that the RA appropriately concluded that no logical or reasonable relationship to negotiable items appears from these allegations. Anaheim, supra. While delays in case processing and decreased availability of research assistance could impact on an employee's hours, Charging Parties made no such allegation herein.

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[5]Labor Code section 1149 provides as follows:

> The general counsel of the board shall exercise general supervision over all attorneys employed by the board (other than administrative law officers and legal assistants to board members), and over the officers and employees in the regional offices. He shall have final authority, on behalf of the board, with respect to the investigation of charges and issuance of complaints under Chapter 6 (commencing with Section 1160) of this part, and with respect to the prosecution of such complaints before the board. (Emphasis added.)

The final paragraph of the amended charge reads as follows:

> (5) Workload: The new mandatory advice policy has directly affected the attorneys' workloads. We must now spend extra time educating, arguing, and convincing people in Sacramento before we can make legal decisions which we are experienced and trained in making ourselves. We must spend extra time writing legal memoranda to Sacramento in order to convince them that a prima facie case exists on a given charge. . . .

In his dismissal letter, the RA found the allegation that the change affected workload to be deficient

> for it does not present clear and concise facts indicating that the change has caused field attorneys to increase their hours beyond the limits of their workweek specification and past practice. (Emphasis supplied.)

In accordance with the RA's analysis of the allegations, we agree that the Charging Parties have failed to allege sufficient facts to establish that the general counsel's directive mandated these ALRB attorneys to work more hours per day or per week than they had prior to the advisory procedure. While it is conceivable that an otherwise permissible managerial directive could impact on a negotiable subject by virtue of an employee's need to adhere to a code of professional responsibility or ethics, the allegations in the instant case do not support such an assertion.

ORDER

Based on the foregoing, the PERB regional attorney's dismissal of this charge is AFFIRMED.

Chairperson Hesse joined in this Decision.

Tovar, Member, concurring: I agree with my colleagues that the regional attorney properly concluded that the ALRB general counsel was free to unilaterally adopt the case processing procedures. The subject of case processing procedures does satisfy the first two prongs of the Anaheim test; however, the general counsel exercised his managerial prerogative to direct his staff and to exercise his statutory control over the complaint processing procedure of the agency when he instituted the policy requiring his staff attorneys to get prior approval before issuing complaints and amendments and before submitting exceptions to ALJ decisions.

I concur with my colleagues that, in the instant case, charging parties have failed to establish a prima facie case. However, I arrive at this conclusion based on the standard of workload set out in Davis Joint Unified School District

(8/2/84) PERB Decision No. 393. Perhaps the author here fails to make this analysis since he was in the minority position in the Davis case.

As the Board said in Davis;

> Plainly, hours, in its strict sense, is an incomplete standard for the measurement of work. Equally as important as the concept of time in measuring the amount of labor rendered by an employee is the intensity of effort expended. . . . Thus, the term "hours," . . . has never been restricted to its literal definition, but is recognized as authorizing the negotiability of the amount of labor, however quantified, which will be provided to the employer by the employees as their obligation under the bargain. Davis, pp. 13-14, emphasis in the original.

Here, the charging party impliedly attempted to make a workload claim. However, it failed to make clear what the measurement of work was before the policy change and how the change affected the workload. Thus, there is no demonstrable impact brought about by the change, making dismissal appropriate in this instance.

Member Jaeger joined in this Concurrence.

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

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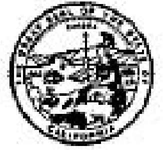

August 18, 1983

Eugene Cardenas

Re: Cauchon et al. v. State of California, ALRB
Charge No. S-CE-187-S, 1st Amended Charge

Dear Mr. Cardenas:

On July 26, 1983 I wrote to you that the above-referenced charge did not state a prima facie case and that unless you amended it or withdrew it, the charge would be dismissed. On August 8, you filed a first amended charge which added factual examples of the alleged change outlined in the original charge. After reviewing the amended charge as well as authority (Los Angeles County Employees Association, Local 660 v. County of Los Angeles (1973) 33 Cal.App.3d 1) cited by the charging party during telephone conversations, I am of the opinion that the charge as amended still does not state a prima facie case as explained below.

The above-referenced charge as amended alleges that the State of California, Agricultural Labor Relations Board (ALRB) through its General Counsel unilaterally changed internal procedural requirements for the issuance of complaint or amendments to the complaint and the filing of exceptions to the decision of an administrative law judge. This conduct is alleged to violate section 3519(c) of the State Employer-Employee Relations Act (SEERA).

My investigation revealed the following: On February 4, 1983, the General Counsel of the ALRB issued a memorandum which immediately amended Part 2, sections 2120 through 2160 of the Unfair Labor Practice Manual. As amended, the sections required the trial attorney to seek the General Counsel's advice before filing exceptions to an administrative law judge's decision and before issuing unfair labor practice complaints or amendments to these complaints. State Labor Code section 1149 states in pertinent part:

> The general counsel of the board shall exercise general supervision over all attorneys employed by the board (other than administrative law officers and legal assistants to board members), and over the officers and employees in the regional offices. He shall have final authority, on behalf of the board, with respect to the investigation of charges and issuance of complaints under Chapter 6 (commencing with Section 1160) of this part, and with respect to the prosecution of such complaints before the board. (Emphasis added.).

Based on the facts stated above, this charge does not make out a prima facie violation of the SEERA for the reasons explained below.

Although the Public Employment Relations Board (PERB) has not issued a case which involves a unilateral change under the SEERA, it is reasonable to assume because of the similarity in language between section 3519(c) of the SEERA and 3543.5(c) of the Educational Employment Relations Act (EERA) that the PERB would use the EERA test.

In determining whether a party has violated section 3543.5(c) of EERA, the Public Employment Relations Board utilizes either the "per se" or the "totality of the conduct" test, depending on the specific conduct involving and the effect of such conduct on the negotiating process. Stockton Unified School District (11/3/80) PERB Decision No. 143. Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer has implemented a change in policy concerning a matter within the scope of representation, (2) the change is implemented prior to the employer notifying the exclusive representative and giving it an opportunity to request negotiations. Walnut Valley Unified School District (3/30/81) PERB Decision No. 160, Grant Joint Union High School District (2/26/82) PERB Decision No. 196.

The instant case raises the issue of whether the General Counsel's change concerns a matter within the scope of representation, Government Code section 3516, which reads:

> The scope of representation shall be limited to wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

The boundaries of the scope of representation under the SEERA have yet to be examined by the PERB, but similar scope language in the Meyers-Milias-Brown Act has been examined by the state courts.[1] In San Jose Peace Officers Association v. City of San Jose (1978) 78 Cal.App.3d 935, the Court of Appeal held that before managerial decisions are within the scope of representation, they must have a significant or material relationship to working conditions. Under this test, the change in the instant case falls outside the scope of representation.

First, the change primarily concerns a managerial decision over the "organization of any service or activity provided by law" (Gov. Code section 3516). Labor Code section 1149 provides that the General Counsel shall the "final authority" with respect to issuance of complaints and prosecution of them before the board; the General Counsel's determination to

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[1]The scope of representation for the Meyers-Milias-Brown Act is contained in Government Code section 3504 which reads:

> The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

Although not identical to section 3516, this language, if anything, is broader than its counterpart in the SEERA.

require an "advice" session before issuance of an amended complaint or appeal of adverse ALJ determinations is an aspect of the organization of the service and activity provided by section 1149 of the ALRA, and thus is not, standing alone, negotiable under section 3516.

Second, neither the amended charge nor the investigation revealed that the change had a significant of material relationship to working conditions (San Jose Peace Officer's Association, supra.) The amended charge alleges that the change has (a) caused some time delays in prosecuting cases, e.g., when the attorney assigned a case believes that amendment during a hearing is appropriate; (b) altered the responsibilities of the General Counsel's headquarters staff by requiring them to review the new "advice" matters, and that the headquarters staff consequently has not been available, as in the past, to do research for the prosecuting attorneys in the field; and (c) "directly affected the attorneys' workloads" because, under that policy, the field attorneys must "spend extra time educating, arguing and convincing people in Sacramento before we can make legal decisions which we are experienced and trained at making ourselves."

The allegations concerning delays and diminution in research help reflect minor time delays in processing cases and an unspecified reduction in unspecified research support services; they do not reflect that the delays or unspecified reduction of research service relate materially and substantially to any negotiable issue. The allegation that the change has "affected" workloads is deficient, for it does not present clear and concise facts indicating that the change has caused field attorneys to increase their hours beyond the limits of their workweek specification and past practice. The charge thus fails to present a clear and concise statement of facts constituting a prima facie case of unilateral change, and the evidence uncovered in the investigation fails to cure that deficiency. The charge therefore is dismissed.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part 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 dismissal (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 September 7, 1983, or sent by telegraph or certified United States mail postmarked not later than September 7, 1983 (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 to issue a complaint, any other party may file with 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 must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany the document filed with the Board itself (see section 32140 for the required contents and a sample form). The document 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 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 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 M. SULLIVAN
General Counsel

By
Robert Thompson
Regional Attorney