STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION, Charging Party,	)	Case No. SF-CE-77-S
v.	)	PERB Decision No. 690-S
STATE OF CALIFORNIA (DEPARTMENT OF FORESTRY), Respondent.	)	June 30, 1988

Appearances: Robert M. Shames, Labor Relations Representative, for California State Employees' Association; Edumund K. Brehl, Attorney, for State of California (Department of Forestry).

Before Hesse, Chairperson; Craib and Shank, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB) on exceptions filed by the California State Employees' Association (CSEA) to the attached proposed decision of a PERB administrative law judge (ALJ). The ALJ dismissed CSEA's charge that the State of California (Department of Forestry) unlawfully denied union representation to an employee at an investigatory interview which the employee reasonably believed could result in disciplinary action. The ALJ determined that the employee was not denied representation because she did not, in fact, request representation.

We have reviewed the entire record, including the proposed decision, the exceptions thereto and the response to the exceptions. We find the ALJ's findings of fact and conclusions

of law to be free from prejudicial error and we adopt them as our own, with the exception of the ALJ's discussion regarding deferral to arbitration, which we find to be unnecessary to the resolution of this case.

ORDER

Based upon the entire record, the unfair practice charge in Case No. SF-CE-77-S is hereby DISMISSED.

Chairperson Hesse and Member Shank joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF FORESTRY), Respondent.	Unfair Practice Case No. SF-CE-77-S PROPOSED DECISION **(7/24/87)**

Appearances: Robert M. Shames, Representative, for California State Employees Association; Edmund K. Brehl, Attorney, for State of California (Department of Forestry).

Before; Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

This unfair practice charge was filed by the California State Employees' Association (hereafter CSEA or Charging Party) against the State of California (Department of Forestry) (hereafter Respondent or State) on January 22, 1987. The charge alleges that an employee was denied union representation at an investigatory interview which the employee reasonably believed could result in disciplinary action, in violation of section 3519 (a) and (b) of the Ralph C. Dills Act (hereafter Act).[1]

[1]The Act is codified at Government Code section 3512 et.seq. Unless otherwise indicated, all statutory references in this decision are to the Government Code. Section 3519 (a) and (b) provides that it shall be unlawful for the State to:

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

The Public Employment Relations Board (hereafter PERB or Board) General Counsel issued a complaint on February 24, 1987. Respondent filed its answer on March 23, 1987, denying that it violated the Act and offering several affirmative defenses. Denials and defenses will be dealt with below as appropriate. The settlement conference on April 3, 1987 did not resolve the dispute.

A formal hearing was conducted by the undersigned in San Francisco on June 4, 1987. The post-hearing briefing schedule was completed on July 16, 1987.

STATEMENT OF FACTS

The October 31 Meeting

On October 31, 1986, Ms. Delynn Banfill, an employee at the Eel River Conservation Camp in Redway, California, was ordered by Supervisor Carl Vogt to attend an investigatory interview. Present at the meeting in addition to Vogt and Banfill were Fire Captain Wendy Windsor, Supervisor Virgil Harvey and Forestry Department Representative Fred Imhoff. Imhoff was the investigator assigned to lead the questioning. This was his first experience in conducting such interviews.

> (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.

Vogt and Harvey attended as supervisors. Windsor, a rank-and-file employee, attended as a witness.

The purpose of the meeting was to determine if the employer had reason to pursue criminal charges against Banfill for personal use of State postage. At the time she was called Banfill did not know the subject of the meeting.

The meeting on October 31 was recorded and a transcript was received as a joint exhibit. There is no dispute regarding the accuracy of the transcript. The following occurred:

> Imhoff: Hi, why don't you have a seat with us please. Delynn, we want to ask you some questions on a particular matter, and as you can see we have some tapes going. I want you to acknowledge that fact. And, also before we start anything up, just to make it more formal, I'm advised to read you some rights, okay? You have the right to remain silent, anything you say can and will be used against you in a court of law, you have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford him, if you cannot afford to hire a lawyer, one will be appointed for you to represent you before any questioning if you wish.
>
> Banfill: Does that mean . . . direct from my CSEA or does that mean an attorney?
>
> Imhoff: That will be an attorney, okay? Okay, do you understand these rights?
>
> Banfill: Yes Sir.

Immediately thereafter Banfill signed a waiver of her Miranda rights to remain silent or to proceed with the benefit of legal representation, and the interview proceeded.

After a few questions it became clear that the questions were directed at the illegal use of State postage. The

interview lasted about thirty minutes. After the interview ended Banfill was released. However, about fifteen minutes later she returned alone to the meeting room with stamps she had just purchased from the post office. Upon her return she volunteered the following:

> About a week ago, when I took an audit of the postage, it was about $44 too short. Like I said previously, on my time off, I usually turned those over to Virgil and Carl, maybe it didn't get posted or an addition error or something, but here is your $44 in postage I just purchased to make the total valid.

The interview ended shortly thereafter. At the end Banfill maintained that she did not steal the stamps. She attributed the missing stamps to an error in record keeping, but she did not concede that the error was hers.

Three witnesses testified concerning the events at the October 31 meeting. Banfill's testimony was entirely consistent with the transcript of the meeting described above. Windsor, who testified on behalf of Banfill, did not have a clear recollection of the October 31 meeting. Instead, her testimony was based largely on a statement she gave to Banfill on February 11, 1987, in preparation for this unfair practice hearing. Windsor's statement describes the sequence of events as follows:

1) Imhoff, advised Delynn Banfill OA II of her "Miranda" Rights.

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[2]Banfill was eventually demoted one step. As of the time of the hearing in this matter Banfill's disciplinary action was before the State Personnel Board.

2) She waived them and signed a written waiver.

3) Delynn Banfill asked "What about CSEA?" FPO Imhoff's response was negative, and as I remember stated, "That would be unnecessary.

In response to a question from the ALJ about Imhoff's comment that a CSEA representative would be "unnecessary," Windsor testified "That was not the precise language used. It was just that I remember something stated to that fact." The following exchange accurately captures the extent of Windsor's recollection:

Q. (By Mr. Shames) Okay. Wendy, going to your statement again, not the whole thing, but item 3, is it true that as you say here that it was your understanding that Delynn asked what about CSEA?

A. It was words to that effect. At the time I wrote this on February 11 we would have approximately what, three or four months had passed by and I do have good recall, but as this stands it all happened pretty much simultaneously. Mr. Imhoff read her her rights and when he got through, Delynn asked well, what about CSEA or something to that effect or do you mean an attorney or what? And that's, but he gave a negative response and that's what I recalled three months later, that it was a negative response. I couldn't remember exactly how he said it, it was just that it was a negative response.

Finally, Windsor testified that Banfill was extremely upset when asked to sign the waiver.

Imhoff did not dispute the version of the October 31 meeting as described above in the transcript. He testified that he intended to give Banfill Miranda warnings, and he understood her reference to CSEA representation to be a

request for clarification of the Miranda warnings. If Banfill had asked for a lawyer, Imhoff said, he would have stopped the interview and made arrangements to satisfy her request. Regarding any request for union representation, Imhoff testified as follows.

> Q. (By Mr. Brehl) Now, if Ms. Banfill had asked for a union representative at that time, if she had clearly said I want a CSEA representative in here, what would you have done?
>
> A. I would have stopped the interview.
>
> Q. For what purpose?
>
> A. Not having done this before, it would have been the, just to make things totally legal, I would have had a representative there, seen that she would have wanted, it would have keyed me to think that maybe we should have one there just to make it more kosher.

Based on the foregoing, I conclude that the events as reflected in the transcript of the meeting are accurate. Both Banfill and Imhoff accepted this version. To the extent that Windsor's testimony varies from the transcript, it is discredited because her recollection was not as specific as either Imhoff's or Banfill's, and it was largely based on a written statement she gave to Banfill three months after the meeting and in preparation for this hearing.

THE COLLECTIVE BARGAINING AGREEMENT

The collective bargaining agreement between CSEA and the State contains the following clause.

> 2.1 Steward Designation
>
> a. The State recognizes and agrees to deal with designated stewards, bargaining unit council

members or CSEA staff on the following:

(1) The administration of this contract;
(2) Employee discipline cases;
(3) Informal settlement conferences or formal hearings conducted by the Public Employment Relations Board;
(4) Matters scheduled for hearing by the Board of Control;
(5) Matters pending before the State Personnel Board.

The agreement also contains a binding arbitration provision as the mechanism for resolving disputes under the contract. There was no evidence of bargaining history presented.

CSEA did not timely file a grievance about the denial of representation at the October 31 meeting. The Respondent has refused to waive procedural defenses and proceed to binding arbitration.

ISSUE

Was Banfill unlawfully denied union representation at the investigatory interview on October 31, 1986?

DISCUSSION

In NLRB v. Weingarten, Inc. (1975) 420 U.S. 251, [88 LRRM 2689], the Supreme Court upheld the right of an employee to have a union representative present at an investigatory interview with the employer which the employee reasonably believes may result in discipline. The Board has held that the same right exists in section 3543 of the Educational Employment Relations Act, a section virtually

identical to section 3515.[3] Marin Community College District (1980) PERB Decision No. 145. However, representation is granted under California labor statutes such as the Dills Act, absent the discipline element, only in "highly unusual circumstances." Redwoods Community College District v. PERB (1984) 139 Cal.App.3d 617, 205 Cal.Rptr. 523.

The employer's obligation to honor this representational right must be triggered by an employee request for union representation. As the Supreme Court pointed out, "the right arises only in situations where the employee requests representation. In other words, the employee may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representation." NLRB v. Weingarten. Inc., supra, 420 U.S. 251, 256-257; see also, Lennox Industries. Inc. (1979) 244 NLRB 607, [102 LRRM 1298]. PERB adopted the requirement that an employee must request representation in Regents of the University of California (1983) PERB Decision No. 310-H, ALJ opinion, p. 31.

It is not disputed that the interview which has given rise to this case is the type of investigatory interview

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[3]The construction of similar or identical provisions of the NLRA, as amended, 29 U.S.C. 151 et seq., may be used to guide interpretation of the Act. See e.g. San Diego Teachers Association v. Superior Court (1979) 12 Cal.3d 1, 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616. Compare section 3515 of the Act with section 7 of the NLRA concerning representational rights of employees. Rio Hondo Community College District (1982) PERB Decision No. 260.

contemplated by Weingarten. Although Banfill initially did not know why she was called to the meeting, Imhoff gave her Miranda warnings at the start and in the first series of questions the purpose of the investigation (i.e. illegal use of State postage) was explained. Thus, since Banfill was put on notice at the start that she was being investigated regarding a criminal matter, it follows that she was aware that the investigation might lead to disciplinary action. The central question to be answered then is whether Banfill, in fact, requested union representation at the interview on October 31.

Banfill's response to Imhoff after the Miranda warnings were given was confusing and ambiguous at best: "Does that mean . . . direct from my CSEA or does that mean an attorney?" These words do not constitute a request for union representation; they simply ask if Imhoff's statement of the Miranda warnings included a reference to union representation. Imhoff correctly interpreted this as a request for clarification of the Miranda warnings. Since he was concerned only with giving Miranda warnings, having not even considered union representation, Imhoff told Banfill that he meant "an attorney." Banfill told Imhoff that she understood "these rights," and voluntarily signed a waiver of her Miranda rights.

The Charging Party argues that Imhoff should have informed Banfill of her right to CSEA representation. I am aware of no cases under the Weingarten progeny which stand for the

proposition that the employer has the affirmative obligation to inform employees of Weingarten rights. Indeed, the Board has held that there is no "labor relations analogue" to the Miranda warning principle. Regents of the University of California, supra. Although informing employees of all representational rights at investigatory interviews may reflect an enlightened personnel policy, Imhoff had no obligation to give Banfill such notice. See Montgomery Ward and Company, Inc. (1981) 254 NLRB 826, 831, [106 LRRM 1148]. The Miranda warnings he gave were certainly enough to alert her to the seriousness of the investigation and the likely need for representation. See Sears v. Department of Navy (CA 1 1981) 680 F.2d 863, [110 LRRM 2777].

In any event, Banfill obviously was aware that she had a right to union representation since she was the one who raised the matter in the first place, yet she stopped short of requesting such representation, choosing instead to begin the interview unaccompanied by either an attorney or a CSEA representative. As the hearing progressed and the seriousness of the investigation became increasingly clear, Banfill still made no request for union representation. After the interview was over Banfill was released. However, she returned a short time later on her own volition and sought to continue the interview, presenting the recently purchased postage to reimburse the State. Her decision to return to the meeting room unrepresented is further evidence that Banfill chose to

forego representation and proceed on her own. Therefore, it must be concluded that she consciously decided to forego representation entirely.

As further support for the conclusion that Banfill did not request CSEA representation is the finding, based on Imhoff's persuasive testimony at the hearing, that he was not opposed to granting such rights. He was open to such a request, and Banfill would have been afforded the opportunity to secure union representation had she asked. Imhoff testified he was new at conducting investigatory interviews, and the record shows he apparently proceeded with great caution. Although he was unclear as to the extent of Banfill's right to consult a CSEA representative, Imhoff convincingly testified that he would have stopped the interview and acceded to any request for CSEA representation just to make things "totally legal." The request never came.

The collective bargaining agreement places an obligation on the employer to "deal" with CSEA representatives on "employee discipline cases." The Board has no authority to enforce agreements between the parties unless the alleged violation also constitutes a violation of the Act.[4] Assuming that this

[4]Section 3514.5(b) states:

> The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

provision was breached at the meeting on October 31, the appropriate forum to remedy the breach was the negotiated grievance procedure. In this case the charging party has not timely filed a grievance and the respondent has refused to waive procedural defenses and proceed to binding arbitration. Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a; Collyer Insulated Wire (1971) 192 NLRB 837, [77 LRRM 1931]. Under these circumstances, it would be inappropriate in this proceeding to reach any purely contractual violation. To the extent that the Respondent's actions on October 31 might also constitute an unfair practice under the Act, this allegation has been disposed of above.

CONCLUSION AND ORDER

Based on the foregoing, unfair practice charge SF-CE-77-S is dismissed in its entirety.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a timely statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code title 8, part III, section 32300. A document is considered "filed" when actually

received before the close of business (5:00 p.m.) on the last day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300, 32305, and 32140.

Dated: July 24, 1987

Fred D'Orazio
Administrative Law Judge