STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING ENGINEERS, CRAFT-MAINTENANCE DIVISION, UNIT 12,	)	
Charging Party,	)	Case No. S-CE-693-S
v.	)	PERB Decision No. 1049-S
STATE OF CALIFORNIA (DEPARTMENT OF TRANSPORTATION),	)	June 2, 1994
Respondent.	)	

Appearances; Van Bourg, Weinberg, Roger & Rosenfeld by William A. Sokol, Attorney, for International Union of Operating Engineers, Craft-Maintenance Division, Unit 12; State of California (Department of Personnel Administration) by Roy J. Chastain, Labor Relations Counsel, for State of California (Department of Transportation).

Before Blair, Chair; Caffrey, Garcia and Johnson, Members.

DECISION AND ORDER

CAFFREY, Member: This case is before the Public Employment Relations Board (Board) on appeal by the International Union of Operating Engineers, Craft-Maintenance Division, Unit 12 (IUOE) of a Board agent's dismissal (attached hereto) of its unfair practice charge. In its charge, IUOE alleged that the State of California, Department of Transportation (State) violated section 3519(a), (b) and (d) of the Ralph C. Dills Act (Dills Act) by denying to a member of IUOE his right to representation.[1]

[1]The Dills Act is codified at Government Code section 3512 et seq. Section 3519 states, in pertinent part:

> It shall be unlawful for the state to do any of the following:

The Board has reviewed the Board agent's warning and dismissal letters, IUOE's appeal, the State's response and the entire record in this case. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

The unfair practice charge in Case No. S-CE-693-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Blair and Member Johnson joined in this Decision.

Member Garcia's dissent begins on page 3.

(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.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

GARCIA, Member, dissenting: This case should be placed in abeyance pending exhaustion of the contractual grievance machinery. My reasons follow.

In the warning letter, adopted by the majority as the decision of the Public Employment Relations Board (PERB or Board) itself, the Board agent correctly states that section 3514.5(a) of the Ralph C. Dills Act (Dills Act),[1] PERB Regulation 32620(b)(5)[2] and Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore) require this case to be dismissed and deferred to arbitration. (Warning letter, pp. 2 - 3.)

The clear language of Dills Act section 3514.5(a) mandates that PERB has no jurisdiction to issue a complaint until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. The Board has erroneously required the contract to contain binding arbitration as a prerequisite to deferral in numerous cases and misstates Lake Elsinore as

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[1]Dills Act section 3514.5 states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining agreement in effect] between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

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

support.[3] However, in this case it is a harmless error and I agree with the Board agent's conclusion that PERB lacks jurisdiction over allegations which the parties have agreed can be deferred to arbitration.

As the Board agent noted at page 3 of the warning letter, under the Lake Elsinore decision, Dills Act section 3514.5(a) is jurisdictional; thus, having concluded that the case must be dismissed and deferred to arbitration, PERB lacks jurisdiction and has no authority to make a ruling on the merits of the case. The Board is wrong to dismiss "without leave to amend" since it is prejudicial to the rights of the parties and state policy. I would remand the case to be held in abeyance pending exhaustion of the contractual grievance machinery.

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[3]The grievance procedure in Lake Elsinore could have ended in binding arbitration (see p. 20), but it did not expressly make binding arbitration a condition for deferral. At page 28, the Board held:

> . . . EERA proscribes this Board's issuance of a complaint against conduct prohibited by the parties' agreement prior to the exhaustion of the contract's grievance-arbitration machinery. . . .

The word "binding" does not appear in that statement of the Board's opinion, nor does the decision condition deferral on the availability of arbitration in the parties' agreement. See my concurrence in State Center Community College District (1994) PERB Order No. Ad-255, for a more expanded discussion of this issue.

STATE OF CALIFORNIA PETE WILSON. *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198

March 3, 1994

William A. Sokol
VAN BOURG, WEINBERG,
ROGER & ROSENFELD
875 Battery Street
San Francisco, CA 94111

Re: International Union of Operating Engineers, Craft-Maintenance Division v. State of California (Department of Transportation)
Unfair Practice Charge No. S-CE-693-S
DISMISSAL LETTER

Dear Mr. Sokol:

On December 10, 1993 you filed the above-referenced charge on behalf of the International Union of Operating Engineers (IUOE). In your charge you allege violations of Government Code section 3519(a), (b) , and (d). Specifically, you allege that Jimmy Evans was denied his right to representation.

I indicated to you, in my attached letter dated January 24, 1994 that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to January 31, 1994, the charge would be dismissed.

I received your letter of January 31, 1994. In that letter you reiterate that the employer had been told by the IUOE that "only union representative, and not job stewards, may be present at meetings where Weingarten rights are at issue." You point out that the employer directed a steward to be at the meeting. You also state that the meeting was not held for the sole purpose of informing the employee of discipline. Rather, the employer asked the employee whether he had falsified a document.

In my letter of January 24, 1993, I informed you that I was aware of no authority which would entitle an employee to the union representative of choice and that an employer may generally to proceed so long as another union representative is available at the time set for the disciplinary interview. Accordingly I must dismiss this charge.

Right to Appeal: Pursuant to Public Employment Relations Board regulations, 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. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. 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 copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code of Regs., tit. 8, sec. 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 each copy of a document served upon a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, sec. 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. (Cal. Code of Regs., tit. 8, sec. 32132.)

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

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

By
Bernard McMonigle
Regional Attorney

Attachment
cc: Roy J. Chastain, DPA

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916)322-3198

January 24, 1994

Mr. William A. Sokol
VAN BOURG, WEINBERG,
ROGER & ROSENFELD
875 Battery Street
San Francisco, CA 94111

Re: International Union of Operating Engineers. Craft-Maintenance Division v. State of California (Department of Transportation)
Unfair Practice Charge No. S-CE-693-S
WARNING LETTER

Dear Mr. Sokol:

On December 10, 1993 you filed the above-referenced charge on behalf of the International Union of Operating Engineers (IUOE). In your charge you allege violations of Government Code section 3519(a), (b), and (d). Specifically, you allege that Jimmy Evans was denied his right to representation.

Investigation reveals the following. Your charge states, "At a meeting on September 29, 1993, Supervisor John Eaves gave Jimmy Evans, a memorandum entitled 'Review of Leave Verification' dated the same day." You state that this meeting was held over the protest of IUOE Business Representative Stephanie Allen who had requested that the meeting be put over to the next day, September 30, 1993, because she had a scheduling conflict. IUOE Steward, Michelle Delgado was present at the meeting between Eaves and Evans. You further state however, Mr. Eaves and the Paint Region of Cal Trans, District 4, had been specifically advised in writing that "the stewards cannot provide such representation." According to the employer representative, the meeting was very brief and was held only to inform Eaves that he was to be docked three days pay.

The right to representation attaches at an employer-conducted interview where an employee reasonably anticipates and fears that the interview may lead to disciplinary action. Rio Hondo Community College (1982) PERB Dec. No. 260. Where a meeting is held merely to inform the employee of previously pre-determined discipline, no right to representation exists. Rio Hondo Community College District, supra. From the information provided, it appears that the meeting of September 29, 1993 was held merely to notify Evans of the previously determined discipline. There are no facts presented which indicate that there was an interview which might lead to a disciplinary action. Accordingly, you have not demonstrated either a violation of the

employee's right to union representation or the IUOE's right to represent.[1]

The IUOE and the State of California are currently parties to a collective bargaining agreement covering the Craft-Maintenance employees. The current agreement is effective July 1, 1992 through June 30, 1995. Section 21.3 of the agreement is entitled "Reprisals" and states:

> The state and IUOE shall be prohibited from imposing or threatening to impose reprisals from discriminating or threatening to discriminate against employees, or otherwise interfering with, restraining, or coercing employees because of the exercise of their rights under the Dills Act or any right given by this agreement.

The collective bargaining agreement also contains a grievance and arbitration procedure in Article 14. That procedure ends in binding arbitration.

Section 3514.5(a) of the Ralph C. Dills Act (Dills Act) states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining agreement in effect] between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

[1] In your charge you also state that while Mr. Evans was not represented by the IUOE business representative that he had requested, Evans was represented by an IUOE shop steward. I am aware of no authority which would entitle Mr. Evans the union representative of his choice. As stated in The Developing Labor Law. (ABA Section of Labor and Employment Law, 3d ed. 1992 at p. 156), "Weingarten does not require an employer to postpone an interview because a specific union representative the employee requested is absent, so long as another union representative is available at the time set for the interview. Nor is the employer obliged to suggest or secure alternative representation for the employee." (citations omitted)

In Lake Elsinore School District (1987) PERB Decision No. 646, PERB held that section 3541.5(a) of the Educational Employment Relations Act, which contains language identical to section 3514.5(a) of the Dills Act, established a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and, (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties. PERB Regulation 32620(b)(5) (Cal. Code of Regs., tit. 8, sec. 32620(b)(5)) also requires the investigating Board agent to dismiss a charge where the allegations are properly deferred to binding arbitration.

These standards are met with respect to this case. First, the grievance machinery of the agreement/MOU covers the dispute raised by the unfair practice charge and culminates in binding arbitration. Second, the conduct complained of in this charge, that the employer interfered with the representation rights of Jimmy Evans, is arguably prohibited by Section 21.3 of the MOU. That section prohibits such interference.

Accordingly, the alleged interference with employee rights must also be deferred to arbitration and will be dismissed. Such dismissal is without prejudice to the Charging Party's right, after arbitration, to seek a repugnancy review by PERB of the arbitrator's decision under the Dry Creek criteria. (See PERB Reg. 32661 [Cal. Code of Regs., tit. 8, sec. 32661]; Los Angeles Unified School District (1982) PERB Decision No. 218; Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a.)

If there are any factual inaccuracies in this letter or any additional facts which would require a different conclusion than the one explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the Charging Party. The amended charge must be served on the Respondent and the original proof of service filed with PERB. If I do not receive an amended charge or withdrawal from you before January 31. 1994, I shall dismiss your charge without leave to amend. If you have any questions, please call me at (916) 322-3198.

Sincerely,

Bernard McMonigle
Regional Attorney