STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, SEIU, LOCAL 1000,	)	
Charging Party,	)	Case No. S-CE-643-S
v.	)	PERB Decision No. 1056-S
STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS),	)	September 14, 1994
Respondent.	)	

Appearances: California State Employees Association by Howard Schwartz, Attorney, for California State Employees Association, SEIU, Local 1000; State of California (Department of Personnel Administration) by Roy J. Chastain, Labor Relations Counsel, for State of California (Department of Corrections).

Before Blair, Chair; Caffrey and Garcia, Members.

DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California State Employees Association, SEIU, Local 1000 (CSEA) of a proposed decision (attached hereto) of a PERB administrative law judge (ALJ). In the proposed decision, the ALJ dismissed CSEA's charge that the State of California (Department of Corrections) (Department) violated section 3519(a), (b) and (c) of the Ralph C. Dills Act (Dills Act)[1] when it changed the

[1]The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519 states, in pertinent part:

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

student/teacher ratio in the Department's education programs without negotiating with CSEA, and when it failed to provide CSEA with information which was necessary and relevant to the representation of its members.

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript and the parties' filings. The Board adopts the proposed decision as the decision of the Board itself in accordance with the following discussion.

DISCUSSION

An employer commits a unilateral change and violates Dills Act section 3519 if the following criteria are met: (1) the employer breaches or alters the parties' written agreement or established past practice; (2) such action is taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy (i.e., has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the

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> (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.

change in policy concerns a matter within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196; Glendora Unified School District (1991) PERB Decision No. 876.)

In considering the alleged unilateral change, the ALJ first notes that while notification of the class size increase occurred on October 29, 1992, prior to ratification of the successor CBA, the increase was effective in December 1992, after the successor CBA had gone into effect.[2] Referring to the class size provision of the CBA, which states that "final class size determinations shall be within the authority and discretion of management," the ALJ concludes that "the Department was given the authority to increase the student/teacher classroom ratio by the parties' MOU" and, therefore, did not violate the Dills Act when it did so.

CSEA's appeal turns on the assertion that the ALJ erred in concluding that the change in class size occurred in December 1992 when it became effective, and when the successor CBA was in effect. CSEA argues that the increase in class size actually occurred in October 1992 during a period when no CBA was in effect between the parties, thereby requiring the Department to negotiate over the subject of class size before changing the status quo. Since it failed to do so, CSEA argues that the

[2]The parties' prior CBA expired in June 1991. Protracted negotiations over a successor CBA resulted in the parties reaching a tentative agreement subject to ratification on October 7, 1992. The successor CBA was ratified on November 16, 1992, and the agreement was retroactively effective on November 1, 1992.

Department's action constitutes a per se violation of its duty to negotiate in good faith pursuant to Pajaro Valley Unified School District (1978) PERB Decision No. 51 (Pajaro Valley USD).[3]

The Board has held that a unilateral change occurs when an official action has been taken, not at a subsequent date when that action becomes effective. (Anaheim Union High School District (1982) PERB Decision No. 201; Eureka City School District (1992) PERB Decision No. 955.) In this case, the Department clearly indicates in its October 29, 1992, letter to CSEA that it has made the decision to increase class size. Therefore, the ALJ's conclusion that the alleged unilateral change occurred in December is incorrect. As a result, the Board must analyze the Department's conduct in light of the fact that the negotiated term of the parties' CBA had expired at the time of the alleged unlawful conduct on October 29, 1992, and the successor CBA was not yet in effect.

The Board has held that when the parties' CBA expires an employer must maintain certain terms contained within it until such time as bargaining over a successor agreement has been completed either by reaching agreement or impasse. (Pajaro Valley USD; San Mateo County Community College District (1979) PERB Decision No. 94; NLRB v. Katz (1962) 369 U.S. 736

[3]CSEA does not except to the ALJ's finding that the Department did not violate the Dills Act by failing to provide CSEA with information necessary and relevant to its representation of its members. The Board affirms this finding by the ALJ.

[50 LRRM 2177]; Department of Personnel Administration v. Superior Court (1992) 5 Cal.App.4th 155 [6 Cal.Rptr.2d 714].) Therefore, while CSEA's assertion that no CBA was in effect at the time of the alleged unlawful conduct on October 29, 1992, is correct, certain terms of the expired CBA remained in effect at that time since the successor agreement had not yet been ratified. Among those terms was a provision concerning class size.

To determine whether a unilateral change occurred in this case, we must consider the Department's action in light of the still-in-effeet class size provision of the expired CBA.[4] That provision (Article 21.3a) states:

> It is the policy of the State that the educational needs of its students are of primary importance taking into consideration needs of the staff, available facilities, equipment, financial resources and other operational needs. In adhering to this policy, the State agrees to meet and confer with the Union over the impact of management proposed changes to existing class size criteria. It is recognized that final class size determinations shall be within the authority and discretion of management.

This still-in-effect provision clearly assigns to management the authority and discretion to determine class size. In doing so, it obligates management to meet and confer with CSEA over the impact of changes in class size. There is no requirement placed

[4]This provision is identical to the class size provision of the successor CBA. Accordingly, the ALJ's conclusion that the successor CBA was in effect at the time of the alleged unlawful conduct is essentially irrelevant to the consideration of that conduct in relation to this provision, and does not constitute a prejudicial error.

on the Department by this provision to negotiate "final class size determinations."

The record clearly indicates that the Department notified CSEA of its intention to exercise its discretion to increase class size in its October 29, 1992, letter. The Department also extended to CSEA the opportunity to meet and confer over the impact of the class size increase.[5] At the resulting meet and confer session on December 18, 1992, CSEA demanded to negotiate over the decision to increase class size and not merely its impact. When the Department refused to do so, the meeting was terminated by CSEA. The Board concludes that the Department acted in accordance with the still-in-effect class size provision of the expired CBA when it extended to CSEA the opportunity to bargain over the impact of its decision to increase class size.[6]

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[5]In the October 29, 1992, letter, the Department indicates that it is notifying and providing CSEA the opportunity to negotiate over the impact of the class size increase in accordance with the "Entire Agreement" provision of the CBA. The expired CBA contained an "Entire Agreement" or waiver provision (Article 23) under which the parties had specifically waived or limited their rights to negotiate over certain matters. However, the "Entire Agreement" provision of the expired CBA specifically provided that it was in effect only for the duration of the contract, and was, therefore, not in effect in October 1992. (State of California (Department of Forestry and Fire Protection) (1993) PERB Decision No. 999-S.) As noted above, the still-in-effect class size provision of the expired CBA required the Department to meet and confer with CSEA over the impact of a class size increase. Therefore, the Department's actions were in compliance with this provision even though the October 29 letter refers to the "Entire Agreement" provision.

[6]In its exceptions, CSEA briefly refers to the argument it made to the ALJ that the contract provision concerning class size, if in effect, does not clearly and unmistakably waive CSEA's right to bargain over the subject of an increase in class size. The ALJ correctly rejected CSEA's strained interpretation concluding that the language of the provision "is not ambiguous."

Therefore, the Department did not commit a unilateral change in violation of the Dills Act when it acted in compliance with that provision.[7]

ORDER

The complaint and unfair practice charge in Case No. S-CE-643-S is hereby DISMISSED.

Chair Blair joined in this Decision.

Member Garcia's dissent begins on page 8.

[7]PERB's jurisdiction in this case is clear. In Lake Elsinore School District (1987) PERB Decision No. 646, the Board enunciated the jurisdictional standard under which charges are dismissed and deferred to the grievance and arbitration process contained in the parties' CBA. In State of California, Department of Youth Authority (1992) PERB Decision No. 962-S, the Board enunciated the standard under which arbitration clauses continue in effect after the expiration of a CBA. These standards are not met in this case. Therefore, this case is properly before the Board.

GARCIA, Member, dissenting: I dissent. Public Employment Relations Board (PERB or Board) jurisdiction was an issue brought to the attention of PERB agents early and at various points in the process of this case; the issue was never addressed or resolved by PERB agents. PERB failed to meet its obligation to establish jurisdiction before proceeding.[1]

The original unfair practice charge face sheet indicates that a grievance procedure exists that culminates in binding arbitration, but that the procedure was not invoked. Yet the charge itself states that:

> On November 19, 1992, CSEA filed a grievance for bad faith bargaining. . . .
>
> The grievance has not been responded to and there has been no request by the Department of Corrections for an extension of timelines.
>
> . . . . . .
>
> Prior to the grievance response . . . the Department has unilaterally impl[e]mented the increase in class size.

A grievance form is attached to the charge that alleges a violation of sections "48, 5.6, 23.1a, Ralph C. Dills Act, and any other Articles and Sections that may apply." The relief sought was that the department "shall not attempt to implement an

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[1]**See** Lake Elsinore School District (1987) PERB Decision No. 646, citing cases which establish that this Board has only such jurisdiction as have been conferred upon it by statute; that the Board acts in excess of its jurisdiction if it violates the statutes conferring and/or limiting its jurisdiction and powers; that where the Board is without jurisdiction with respect to a matter before it, it must dismiss the matter on its own motion, regardless of whether the jurisdictional issue has been raised by the parties; and that where the Board is without jurisdiction, it cannot acquire jurisdiction by the parties' consent, agreement, stipulation or acquiescence, nor by waiver or estoppel.

increase in class size for the duration of this contract." After investigation of the charge,[2] PERB issued a complaint on December 30, 1992 that contains no discussion of the jurisdiction issue.

In its answer to the complaint, the State of California (Department of Corrections) (Department) refers to a November 19, 1992 letter from the California State Employees Association, SEIU, Local 1000 (CSEA) (also attached to the charge) objecting to the proposed change, and noting CSEA's position in that letter that "the grievance procedure is the appropriate forum for this issue." Furthermore, the Department raised lack of PERB jurisdiction as an affirmative defense, urging PERB to dismiss the complaint and defer the charge to the Memorandum of Understanding grievance procedure "which concludes in binding arbitration."[3]

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[2]The file also contains what appears to be a form letter dated December 16, 1992 from the Regional Attorney to the parties, informing them of PERB's procedure for investigating the charge. The letter contains no information regarding the deferrability of the conduct underlying the charge.

[3]The reason stated for asserting this defense is:

> Respondent AFFIRMATIVELY ALLEGES that the matters contained in the unfair [practice charge] are matters negotiated by the parties in §21.3 [] and §23.1 of the Unit 3 Collective Bargaining Agreement. Pursuant to Government Code [section] 3514.5 and PERB precedent, (Lake Elsinore School District (1987) PERB Decision No. 646), PERB lacks jurisdiction in this matter. Accordingly, PERB must dismiss the instant complaint and defer the unfair practice charge to the Unit 3 MOU grievance procedure which concludes in binding arbitration.

On the face sheet of the amended complaint filed by CSEA, however, the grievance procedure section is left blank and the file does not show that the Board agents complied with their duty to make further inquiry. Although the ALJ's proposed decision mentions affirmative defenses generally, there is no discussion of the November 19 grievance and its possible effect on the deferral defense.[4]

Furthermore, testimony from the hearings[5] indicates that CSEA sought a meeting with Department representatives to discuss both the grievance and the unfair practice charge whereas, in CSEA's words, the Department "wanted to discuss only the impact of the existing changes."[6]

The majority opinion in this case ignores this fundamental issue. Even if the respondent had not raised the defense of lack of jurisdiction based on deferral, there were inconsistencies in CSEA's approach to the issue of grievability at various stages of the case. Since it is our obligation[7] to establish jurisdiction of a case before ruling on the merits,

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[4]The proposed decision contains a "Jurisdiction" section consisting of a recitation of the parties' stipulations that "CSEA is a recognized employee organization and the Respondent is a state employer within the meaning of section 3513." There is no statement establishing PERB jurisdiction under section 3514.5(a)(2).

[5]R.T., Volume I, page 22, lines 4-6; see also Volume I, pages 56 and 142-143; Volume II, pages 127 and 134-135.

[6]CSEA's Reply to Respondent's Closing Brief, page 4.

[7]See footnote 1, supra.

PERB is duty bound to ascertain at the earliest possible stage whether or not the disputed conduct is grievable. Especially when one party specifically raises the issue, the Board agents, the ALJ and the Board majority should have paid more attention to the jurisdiction question.[8]

CONCLUSION

For the reasons stated above, I would remand this case for a ruling on the jurisdictional issue and, if necessary, for deferral to the contractual grievance process.

[8]Footnote 7 in the majority opinion, added after the original opinion was signed and ready for issuance, is an afterthought to my original dissent. As my dissent makes clear, neither the majority nor other Board agents inquired into jurisdiction under the Dills Act. It has become apparent to me that the majority ignores statutory requirements and state policy that favor private resolution of disputes, in order to avoid a shrinking caseload. Footnote 7 is a perfunctory cover for that objective. Additionally, the majority's tactical footnote does not meet the requirements of PERB Regulation 32620.

STATE OF CALIFORNIA
PUBLIC EMPLOYEES RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, SEIU, LOCAL 1000,	)	
Charging Party,	)	Unfair Practice Case No. S-CE-643-S
v.	)	
STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS),	)	PROPOSED DECISION (12/24/93)
Respondent.	)	

Appearances; Howard Schwartz, Attorney, for California State Employees Association; Roy J. Chastain, Labor Relations Counsel, Department of Personnel Administration, for the State of California (Department of Corrections).

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On December 14, 1992, the California State Employees Association (Charging Party or CSEA) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the State of California (Department of Corrections) (Respondent or Department). The charge alleged violations of subdivisions (a), (b) and (c) of section 3519, a part of the Ralph C. Dills Act (Act).[1]

[1]The Act is codified at Government Code section 3512 et seq. All section references, unless otherwise noted, are to the Government Code. Subdivisions (a), (b) and (c) of section 3519 state:

> 3519. UNLAWFUL ACTIONS BY STATE
>
> It shall be unlawful for the state to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

On December 30, 1992, the Office of the General Counsel of PERB, after an investigation of the charge, issued a complaint alleging violations of the same subdivisions of section 3519.

On January 20, 1993, the Respondent answered the complaint denying all material allegations and asserting several affirmative defenses.

On January 27, 1993, an informal conference was held in an attempt to reach voluntary settlement. No settlement was reached.

On March 11, 1993, CSEA filed a motion to amend the complaint with an accompanying first amended charge, setting forth additional allegations. After an extensive discussion, the motion was granted, thereby adding five paragraphs to the complaint.[2]

> to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purpose of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (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.

[2]The additional paragraphs are as follows:

15. On or about October 7, 1992, Respondent agreed to "roll over" into a new MOU for Unit 3 preexisting contract language regarding class size maximum limits for academic programs in the Department and the California Youth Authority (CYA). Respondent did so with the knowledge that Charging Party would not agree to an increase in maximum class size limits. Respondent further did so with the knowledge that Charging Party would not have agreed to "roll over" class size language or sign a new MOU for Unit 3

The formal hearing was held on March 16, 17 and 18, 1993, before the undersigned. Both sides filed post-hearing briefs. The last brief was filed on July 6, 1993, and at that time the case was submitted for a proposed decision.

INTRODUCTION

The Department has had a practice of maintaining a 24:1 student/teacher ratio in educational programs in its institutions. During negotiations for a successor Memorandum of Understanding (MOU) CSEA proposed lowering this ratio. The Department preferred to maintain the previous MOU language which gave it the unilateral right to modify this ratio, but required it to meet and confer over the impact any change would have on its employees. The parties eventually agreed to maintain the previous language.

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had it provided for an increase in class size maximum limits.

16. Despite the agreement to roll over preexisting contract language regarding class size maximum limits, on or about October 29, 1992, Respondent unilaterally increased class size maximum limits for Department academic programs to a maximum 27 students.

17. By the acts and conduct described in paragraphs 15 and 16 above, Respondent has engaged in fraudulent and deceptive bargaining, has reneged on its agreements, and has failed and refused to negotiate in good faith in violation of section 3519 (c).

18. By the acts and conduct described in paragraphs 15 and 16 above, Respondent has also denied Charging Party its right to represent bargaining unit members in violation of section 3519(b).

19. By the acts and conduct described in paragraphs 15 and 16 above, Respondent has also interfered with the rights of bargaining unit employees to be represented by Charging Party in violation of section 3519(a).

Shortly after the parties had tentatively agreed to the successor MOU, but before it had been ratified, the Department gave CSEA notice that it was going to increase this ratio to 27:1.

CSEA insists this increase, in light of the Department's actions during negotiations, manifests a failure to negotiate in good faith. The Department disagrees. It maintains the decision to increase the ratio was made after the negotiations process had been completed and was a necessary fiscal reaction to the recently passed and promulgated state budget.

In addition, CSEA asked for class size statistics at the various institutions, information that was necessary and relevant for it to represent its members. The Department located and compiled such information, but CSEA failed to ask for and accept possession at the time and place it was told the data was available. CSEA insists the Department violated the Act by failing to provide such information.

JURISDICTION

The parties stipulated, and it is therefore found, that CSEA is a recognized employee organization and the Respondent is a state employer within the meaning of section 3513.

FINDINGS OF FACT

CSEA is the exclusive representative for employees in State Bargaining Unit 3 (Unit 3), which includes teachers and educational personnel in various state agencies, including those in the institutions and prisons run by the Department.

CSEA and the Department are parties to a MOU for Unit 3. The first MOU for Unit 3 was signed in 1982. Since 1984, the Unit 3 MOUs have contained a "class size" provision. Originally, this provision required the state to "meet and discuss" changes in class size. In 1988, this provision was changed to a "meet and confer" over the impact of class size changes.[3]

In June 1991, the parties began negotiations on a successor MOU. One of the central concerns of CSEA's bargaining team was departmental class size ratios. *No* MOU language had set specific class size maximum ratios. However, there was a practice that no classroom would have a student/teacher ratio exceeding 24:1. CSEA believes the practice was to enroll a maximum of 24 students so as to achieve an average daily attendance (ADA) of 18. However, administrators at some institutions insisted upon the teachers maintaining 24 students in each classroom. They would not let the natural attrition process reduce the student population in a specific classroom to a number less than 24. The Department insists that a minimum 24 students requirement meant

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[3] 21.3 Class Size

a. It is the policy of the State that the educational needs of its students are of primary importance taking into consideration needs of the staff, available facilities, equipment, financial resources and other operational needs. In adhering to this policy, the State agrees to meet and confer with the Union over the impact of management proposed changes to existing class size criteria. It is recognized that final class size determinations shall be within the authority and discretion of management.

24 students continuously in the classroom and that CSEA's beliefs regarding the effect of attrition are not correct.

The state sought to maintain the existing language in the successor MOU. On July 23, 1991, CSEA submitted a proposal limiting classroom size to a specific number. The state rejected this proposal.

In June 1992, CSEA reformulated its proposal with expanded provisions, once again setting specific class size limits. The state's chief negotiator, Dennis Fujii (Fujii), rejected CSEA's new proposal.

At a June 26 negotiating session, while discussing the parties' class size proposals, Fujii told the CSEA team that the existing MOU language gave the Department the discretion to change class size after it gave notice to the union and met and conferred on the impact. Fujii also stated, at that session, that the state was facing severe fiscal problems, and that class size could be impacted by such problems. He did not state that the Department had any intention of increasing student/teacher ratios in the near future. However, Richard Hawkins, the Department's representative on the state's bargaining team, told CSEA that there was a possibility of an increase in class size during the life of the MOU due to these fiscal problems. CSEA's representative responded by insisting that any such increase would have to be negotiated. Both sides were aware the 1992-93 budget had not yet been enacted and therefore, the extent of any potential budget cuts were not yet known.

In July, CSEA presented another proposal on class size, once again setting forth a specific student/teacher ratio. The state again rejected the proposal and countered with a proposal to maintain the existing language.

The state budget was signed in August of 1992. It contained serious departmental budgetary reductions. In August of 1992, members of CSEA's bargaining team met with the Department's Director, James Gomez (Gomez). He told them that increasing class size was one of the options he was looking at to address his Department's budget problem. He stated that the Department of Finance was telling him to increase student/teacher ratios, as it had fiscal implications.[4] CSEA's representatives told Gomez that this would "mean war" and that any increases would be unacceptable. The teachers believed the Department was already violating the spirit of the existing 24:1 practice, because it was not allowing natural attrition to lower the number of inmates physically in the classroom to 18, as the teachers believed had been the practice in the past. CSEA offered to participate in a joint committee with the Department to explore alternatives to a classroom ratio increase.

In September 1992, the joint committee met and prepared a series of recommended alternatives. These alternatives were forwarded to Douglas Boyd (Boyd), the Department's acting chief

[4]Inmates are given time off of their sentences for each day of work they complete. Time in a classroom is considered "work" time. The more "work" time a particular inmate earns, the quicker he is released. Early release dates mean fewer inmates, which lowers expenses for the Department.

of education and a member of the state's Unit 3 bargaining team. Boyd did not discuss the alternatives with Gomez until after the conclusion of contract negotiations.

On September 21, 1992, the parties met to discuss an inmate cell study program which CSEA proposed as an alternative to class size increases. This proposal was rejected by the Department.

On September 23, 1992, CSEA submitted another class size proposal. It was also rejected. Eventually, other than various changes that are not relevant to the subject issue, CSEA agreed to maintain the existing class size language in the successor MOU. Bargaining concluded on October 7, 1992, when the parties agreed, subject to ratification, to a successor MOU.

In mid-October Boyd briefed Director Gomez regarding the September meetings with CSEA and the October 7 negotiating session. At that time Boyd believed Gomez had made no decision regarding an increase in student/teacher ratios.

On October 29, 1992, the Department gave CSEA 30 days notice that it was going to increase its student/teacher ratios to 27:I.[5] The Department offered to meet and confer over the impact such action would have on its employees. At the time the

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[5]The "Entire Agreement" clause, in section 23.1(b) of the MOU contains the following language:

> . . . The parties recognize that it may be necessary for the State to make changes in areas within the scope of negotiations. Where the State finds it necessary to make such changes, the State shall notify the Union of the proposed change 30 days prior to its proposed implementation.

Department took this action, the successor MOU had been tentatively approved but had not yet been ratified by either side.[6] On December 4, 1992, David Tristan, deputy director, institutions division, notified all wardens that the increased student/teacher class size was to be put into effect that date, with full implementation required by December 31, 1992.

CSEA responded to this increased ratio notice by requesting the Department meet and confer with it on the issue. On December 8, 1992, it contacted Rick McWilliams, the Department of Personnel Administration's (DPA's) chief of labor relations, requesting specific class size increase information. In order to compile the requested information, the Department asked each institution to provide specified data regarding the impact of the increased student/teacher ratio on the local program. Janet Waugh (Waugh), one of the Department's labor relations specialists, set up a meeting of the parties for December 18, 1992. She notified CSEA the requested information had been compiled and would be available at this meeting.

On December 14, 1992, CSEA filed this unfair practice charge. It also filed a grievance over the Department's action.

Shortly after the December 18, 1992, meeting commenced, Waugh stated the Department was there to meet and confer regarding the impact of the Department's unilateral increase in

[6]Unit 3 employees completed the ratification process on November 16, 1992. The effective date of this successor MOU was November 1, 1992.

the student/teacher ratio and that the information that CSEA requested was in the room and available for CSEA. Gretchen Seagraves, CSEA's spokesperson stated that they were not there to negotiate class size, but to discuss the unfair practice charge and the grievance. Waugh said that DPA was the Department's legal representative for the unfair practice charge and she and the other departmental representatives were not prepared to discuss it. Seagraves stood up and the meeting came to a halt, although many of the participants remained in the room and engaged in side conversations on a number of subjects.

Despite being informed that the Department would have the requested information available, CSEA's representatives did not, at any time, ask for it. The information was located in a series of black binders on the negotiations table throughout the December 18, 1992, meeting. CSEA never requested another meeting regarding the class size matter, nor did it ever ask the Department for the subject information.

ISSUES

1. Did the Department fail to negotiate in good faith when it increased the student/teacher ratio, thereby violating subdivisions (a), (b) or (c) of section 3519?

2. Did the Department fail to provide to CSEA information that was necessary and relevant for it to represent its members, thereby violating subdivision (c) of section 3519?

CONCLUSIONS OF LAW

Totality of Conduct

The Board in Pajaro Valley Unified School District (1978) PERB Decision No. 51 (Pajaro) required employers to negotiate with a bona fide intent to reach an agreement. It adopted the federal standard of determining whether good faith bargaining has occurred. This standard is called the "totality of conduct" test. The test looks to the entire course of negotiations to determine if the requisite "good faith" is present.

With regard to the issue of totality of conduct the record in this case shows the following relevant factors: (1) CSEA made various modifications to its student/teacher ratio proposals, whereas the state continued to propose maintaining the previous MOU language, (2) DPA negotiator Fujii mentioned at the table, that the existing MOU language gave the Department full discretion to unilaterally modify class size, although it did have to negotiate the impact of such modification, (3) Fujii made it clear that due to the ongoing budgetary crisis, class size could be impacted in the future, (4) Departmental negotiator Hawkins told CSEA, at the table, that there was a possibility of an increase in class size during the life of the MOU, due to these fiscal problems, (5) Departmental Director Gomez explained to two CSEA negotiators he was being told by the Department of Finance to increase class size ratios, (6) the Department rejected several CSEA alternatives to increased class size, (7) on October 29, 1992, the Department told CSEA of an impending

class size increase, and (8) on December 4, 1992, the Department implemented the class size increase.

With regard to evidentiary factor (1), supra, though the employer did not change its position on the class size issue during the negotiations process, it was only one of many issues the parties were negotiating in their attempt to reach a successor MOU. It is not necessary for a party to periodically change its position on a particular issue in order to negotiate in good faith. (Oakland Unified School District (1982) PERB Decision No. 275.)

With regard to evidentiary factors (2) through (5), the Department gave CSEA notice that there was a possibility of an increase in the class size ratio. There was no convincing evidence proffered by the Charging Party that the Department had made a decision to increase class size prior to the time it told CSEA of the impending increase. Boyd specifically stated that he discussed the issue with Gomez in the middle of October, and at that time he believed that no decision had been made. Granted, Boyd's position with the Department makes him other than an unbiased chronicler of events. However, other than an inference drawn from the chronology of events, there is no evidence in the record to rebut Boyd's statements.

Even the chronological inference has to be examined in light of the total budgetary chaos state government was in during the fall of 1992. The budget had been signed over a month late. Salaries and bills were being paid with warrants instead of

checks. Every day brought new disasters, both real and imagined, to newspapers and water coolers alike. Even after the budget was enacted, and the extent of the deficit was known, each Department had to internally examine a myriad of draconian possibilities, all of which were disastrous to program credibility. A department as large as Corrections is not an autocratic oligarchy in which one person arbitrarily wields unfettered discretion over all aspects of the agency. Below the directorship level there are various competing interests, all attempting to get their personal agendas recognized by the higher decision-makers. Each of these interests is entitled to an appropriate level of input into the eventual decision. The budgetary decision-making process requires interpersonal contacts. It requires persuasion and counter persuasion. And most of all it requires time.

It is certainly within possible that the Department did not make a decision until near the end of October to increase class size ratios. And, more importantly, there was no evidence presented to prove otherwise.

The fact that the Department rejected both a comprehensive cell study proposal, as well as a number of other proffered alternatives, does not, in and of itself, create an inference that it was bargaining in bad faith over the issue of class size. There could be a lot of reasons why a cell study proposal would be rejected. There was no credible evidence proffered by CSEA that the proposal was rejected as a part of a pattern of bad faith negotiating on the part of the Department.

Nor does the fact that the Department did not attempt to modify the MOU to reflect a higher student/teacher ratio suggest some sort of bad faith bargaining. In the existing MOU the Department had language that stated that class size determinations were within its authority. It was not necessary for it to get something new to increase class size ratios, it already had all the authority it needed. In addition, there was insufficient evidence to prove that the Department knew it was going to increase class size when negotiations were taking place.

Based on all of the foregoing, it is determined that there is insufficient evidence upon which to find that the Department, with regard to its conduct when evaluated vis-a-vis the totality of conduct test, has violated the Act.

Unilateral Change is Per Se Bad Faith Negotiating

In Pajaro, the Board stated that there

> are certain acts, however, which have such a potential to frustrate negotiations and to undermine the exclusivity of the bargaining agent that they are held unlawful without any determination of subjective bad faith on the part of the employer. See NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].

In the present case, the employer has admitted that it unilaterally increased the student/teacher ratio to 27:1. However, the MOU permitted the Department to unilaterally modify this ratio. The Charging Party makes much of the fact that the parties were without a MOU from July 1 through November 1, and it was informed of the impending increase by the Department on October 29, 1992. It insists that this prevented the Department

from using the MOU as justification for such unilateral modification. However, this argument ignores the fact that the modification was not implemented until December 4, some 34 days after the new MOU came into effect.

CSEA based much of its persuasive argument on the horrors of unilateral modifications and the deleterious effect it has on the bargaining relationship. It is correct in its assessment of this type of action. However, in the instant case there was no improper unilateral modification. The Department was given the authority to increase the student/teacher classroom ratio by the parties' MOU. Therefore, it did not improperly modify a term or condition of employment.

CSEA's Interpretation of MOU section 21.3(a)

CSEA argues that the subject MOU language (see fn. 3, p. 5) does not give the employer the right to unilaterally modify class size ratios. Its argument is succinctly set forth in its closing brief, and is, as follows:

> Second, the contract language which CDC [Department] relies upon to support its waiver claim, Section 21.3(a) of the Unit 3 MOU . . . provides no clear and unmistakable language that CSEA waived its right to negotiate. Section 21.3(a) begins by stating that it is the policy of the State that various criteria be considered in determining class size ratios.
>
> The second sentence of section 21.3(a) provides no clear and unmistakable language suggesting that CSEA waived any rights to negotiate. The third sentence of Section 21.3(a) recognizes that final class size determinations shall be within the authority and discretion of management. At best, this sentence has ambiguous language, for it is

> not clear whether the phrase "class size determinations" refers to determinations over the appropriate criteria to consider, or ultimate determinations over class size ratios. At minimum, this language affirms that no determinations will be final until the parties have had an opportunity to negotiate. . . .

The third sentence of section 21.3(a) of the MOU is not ambiguous. It clearly states that although the previous sentence gives CSEA a right to meet and confer over the impact of management proposed changes to existing class size criteria, the "final class size determinations shall be within the authority and discretion of management." If this sentence does not give management the right to unilaterally set class ratios, what does it do? It is clear from the plain meaning of the third sentence of MOU section 21.3(a) that the employee organization at the time it agreed to include such language, was aware it was giving the employer the right to unilaterally set class size ratios.

Under the circumstances set forth above, it is determined that the Department did not unilaterally modify a term or condition of employment. Therefore, it did not violate subdivision (c) of section 3519.

Failure to Provide Information

There are two elements to a "failure to provide information" charge. The first is that it must be determined whether the requested material was necessary and relevant to CSEA's duty to represent its members.

The information requested concerned the Department's class size statistics. The disputed issues between CSEA and the

Department centered on the Department's decision to increase class size in its prisons and institutions. Any information regarding the present status of class size was certainly necessary and relevant to CSEA's duty of representation.

The second necessary element is whether CSEA made a clear and unconditional demand upon the Department for such material. It is undisputed that such a demand was made and received.

We have, in this case, an additional issue that is subsumed within the second element. Once the demand was made and the material made available for presentation, does the Department have a duty to deliver it to CSEA?

The facts show that the information was requested by CSEA on December 8. On December 14 CSEA filed its charge complaining about not having received the subject information. On December 18 the parties met and CSEA was told the material was in the room and ready to be given to them. CSEA left the meeting without requesting or picking up the material. To date it has failed to go back and retrieve the material.

Certainly, a party that has requested specified information, and has been told that it is available on a table in front of it, has an obligation to accept possession of such data. Absent such acceptance, it cannot be heard to complain about not having received such information. The Department is only under an obligation to locate, compile and tender the information. In this case it met this obligation.

Under the circumstances set forth above, it is determined that the Department did not fail to provide CSEA information necessary for it to represent its members. Therefore, it did not violate subdivision (c) of section 3519 with regard to CSEA's request for the specified information.

SUMMARY

Based on the foregoing findings of fact, conclusions of law and a thorough examination of the entire record, it is determined that there is insufficient evidence upon which to find that the Department has violated the Act. Therefore, the charge and its accompanying complaint must be dismissed.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, it is hereby ordered that the complaint and the underlying unfair practice charge are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service, of this Proposed Decision. In accordance with PERB Regulations, this statement of exceptions should identify by page, citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 32135. Code of Civ. Proc, 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 Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

ALLBN R. LINK
Administrative Law Judge