*** * * OVERRULED IN PART by multiple decisions, as recognized in *State of California (Department of Corrections and Rehabilitation)* (2024) PERB Decision No. 2926-S, p. 18 * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION, SEIU LOCAL 1000, AFL-CIO,	Case No. SF-CE-105-S
Charging Party,	Request for Reconsideration PERB Decision No. 1100-S
v.	
	PERB Decision No. 1100a-S
STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS),	August 30, 1995
Respondent.	

Appearances: California State Employees' Association by Mark DeBoer, Attorney, for California State Employees' Association, SEIU Local 1000, AFL-CIO; State of California (Department of Personnel Administration) by Paul M. Starkey, Attorney, for State of California (Department of Corrections).

Before Carlyle, Garcia and Caffrey, Members.

DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request for reconsideration of the Board's decision in State of California (Department of Corrections) (1995) PERB Decision No. 1100-S (Corrections) filed by the California State Employees' Association, SEIU Local 1000, AFL-CIO (CSEA).

BACKGROUND

The unfair practice charge in this case, originally filed by CSEA in December 1991, alleged that the State of California (State) violated section 3519(a), (b), (c) and (d) of the

Ralph C. Dills Act (Dills Act)[1] by revising and downgrading the performance evaluation of an employee who was a job steward and member of the CSEA negotiating team. After receiving assurances from the State that grievances filed by CSEA in response to the State's actions would be processed through arbitration if necessary, CSEA, in March 1992, withdrew all allegations except the allegation that by issuing the revised evaluation to the employee, the State violated Dills Act section 3519(b).[2]

A PERB administrative law judge (ALJ) denied the State's motion to defer the alleged violation to the parties' contractual grievance and arbitration procedure, and concluded that CSEA failed to prove that the State's action against the employee denied CSEA the right to represent its members in violation of Dills Act section 3519(b). The ALJ dismissed CSEA's unfair practice charge.

The Board reversed the ALJ's jurisdictional determination. In dismissing and deferring the charge to the parties' grievance and arbitration procedure, the Board majority concluded that the alleged unlawful conduct was arguably prohibited by the parties' collective bargaining agreement (CBA), and subject to the CBA's

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[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.

[2]Dills Act section 3519 states, in pertinent part:

> It shall be unlawful for the state to do any of the following:
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

grievance and arbitration procedure. In the lead opinion, Chair Blair and Member Caffrey interpreted Dills Act section 3514.5(a)[3] to conclude that the statutory limitation on the Board's dispute resolution jurisdiction requires it to defer all alleged violations which are based on conduct prohibited by the parties' CBA, if the contractual grievance procedure is applicable to that conduct and ends in binding arbitration. Member Garcia concurred in the deferral of the charge, concluding that the parties clearly intended the dispute to be subject to the grievance and arbitration procedure contained in their CBA. Member Garcia disagreed with the interpretation of PERB's statutory jurisdiction which was included in the lead opinion.

Member Carlyle dissented, finding that the Board had jurisdiction over the subject unfair practice charge, and finding that the State violated Dills Act section 3519(b) by its conduct.

CSEA'S REQUEST FOR RECONSIDERATION

CSEA expressly adopts the dissenting opinion of Member Carlyle, and offers two "Exceptions," as the basis of its request for reconsideration.

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[3]Section 3514.5(a) states, in pertinent part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not . . . issue a complaint against conduct also prohibited by the provisions of the agreement 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.

CSEA's first exception challenges the "implied fact" and "implied finding" of the Board decision that the alleged unlawful conduct in this case is arguably prohibited by the parties' CBA. CSEA asserts that there is nothing in the CBA which prohibits the State from denying CSEA its rights under the Dills Act. The Board's conclusion, therefore, constitutes prejudicial error. CSEA asserts that deferral of this matter deprives it of its independent statutory rights, and is an "abdication of jurisdiction" by which the Board "will have ceded its exclusive, preemptive jurisdiction over these disputes to a private party." Further, CSEA argues that deferral has the effect of denying it the opportunity to seek the extraordinary remedy of injunctive relief from PERB when its rights are violated.

CSEA also excepts to the procedures employed by the Board in the processing of Corrections.

THE STATE'S RESPONSE

The State supports the Board's decision in Corrections, asserting that the complained of conduct in this case is arguably prohibited by various sections of the parties' CBA. The State argues that CSEA's characterization of the Board's deferral of this matter as an "abdication of jurisdiction" is incorrect, because it ignores the statutory preference for arbitration of disputes. Furthermore, CSEA's argument does not recognize the Board's repugnancy review authority or the futility exception to the Board's jurisdictional limitation which is contained in the Dills Act.

The State also opposes CSEA's challenge to the Board's procedures in this case.

In summary, the State asserts that CSEA's request fails to meet the Board's standard for reconsideration of a Board decision.

DISCUSSION

PERB Regulation 32410[4] permits any party to a decision of the Board itself to request the Board to reconsider that decision. However, section 32410(a) states that:

> The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

The Board has adopted this strict, narrow standard for reconsideration requests specifically to avoid the use of the reconsideration process to reargue or relitigate issues which have already been decided. In numerous reconsideration cases, the Board has reiterated this policy, declining to reconsider arguments previously offered by parties and rejected in the underlying decision. (California State University (1995) PERB Decision No. 1093a-H; California State Employees Association, Local 1000 (Janowicz) (1994) PERB Decision No. 1043a-S; California Faculty Association (Wang) (1988) PERB Decision

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

No. 692a-H; Tustin Unified School District (1987) PERB Decision No. 626a; Riverside Unified School District (1987) PERB Decision No. 622a.)

CSEA's first exception disagrees with the conclusion of the Board majority that this matter must be deferred to the grievance and arbitration procedure included in the parties' CBA. The parties submitted argument on this issue to the ALJ, and to the Board itself. In considering this issue, both the lead opinion and Member Garcia's concurrence refer to specific articles within the CBA in concluding that the unfair practice charge must be dismissed and deferred. CSEA characterizes this finding as a prejudicial error, apparently choosing this language in an attempt to conform to the Board's reconsideration standard. In fact, the issue of PERB's jurisdiction in this case has been thoroughly litigated by the parties and considered by the Board, and CSEA simply disagrees with the Board's decision. The Board's decision with regard to its jurisdiction does not constitute prejudicial error of fact. Consequently, this exception fails to meet the Board's standard for reconsideration requests.

CSEA is unclear as to how its second exception, involving the Board's processing of this case, supports its request for reconsideration. Accordingly, this exception does not meet the Board's reconsideration standard.

CSEA's request for reconsideration of the Board's decision in Corrections fails to identify any prejudicial error of fact or

new evidence or law as required by PERB Regulation 32410(a), and therefore, is without merit.

ORDER

The request for reconsideration of the Board's decision in State of California (Department of Corrections) (1995) PERB Decision No. 1100-S is hereby DENIED.

Member Garcia's concurrence begins on page 8.

Member Carlyle's dissent begins on page 9.

GARCIA, Member, concurring: I concur in the denial of reconsideration only because the request does not meet the requirements of the Public Employment Relations Board's (PERB or Board) regulation, which does not allow reconsideration for errors of law. However, I write separately to reiterate my belief that the decision in State of California (Department of Corrections) (1995) PERB Decision No. 1100 contains legal error.

Although I agreed with the majority that deferral was appropriate, I dissented from the Board majority's rationale, legal analysis and irregular attempt to change policy. In effect, the majority opinion adopted a mandatory arbitration policy, weakening the statutory rights of employee organizations and overturning sound PERB precedent established in State of California (Department of Forestry and Fire Protection) (1989) PERB Decision Nos. 734-S and 734a-S and its progeny.

It is clear from the facts of this case and the contractual language agreed to that the parties intended to resolve this type of dispute through a grievance procedure. I arrived at that conclusion because the grievance agreement covered the matter at issue. Under Dills Act section 3514.5(a)(2), PERB should have deferred this case, placing it in abeyance pending exhaustion of the grievance process without settlement. Instead, the PERB decision converts the clear language of the arbitration option into a mandate. Unfortunately, our regulation does not permit further review for that error of law.

CARLYLE, Member, dissenting: I dissent and would grant the request for reconsideration filed by the California State Employees Association, SEIU Local 1000, AFL-CIO (CSEA) to the decision of the Public Employment Relations Board (PERB or Board) in State of California (Department of Corrections) (1995) PERB Decision No. 1100-S (Corrections). Further, I would reschedule the matter and hold another oral argument.

As noted in the lead opinion, PERB Regulation 32410 permits any party to a decision of the Board itself to request the Board to reconsider that decision. Section 32410(a) states, in part, that:

> The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

CSEA claims two grounds for reconsideration. It first claims that the Board committed prejudicial error of fact because the State of California (State) is not arguably prohibited by the provisions of the agreement between the parties from violating CSEA's statutory right to represent its members as set forth in section 3519(b) of the Ralph C. Dills Act (Dills Act).[1]

In order for the Board to determine whether or not it has jurisdiction over CSEA's complaint, it must first make a factual

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[1]Dills Act section 3519 states, in pertinent part:

> It shall be unlawful for the state to do any of the following:
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

determination concerning one or more of the provisions of the agreement between the parties, that is, does one or more of the provisions of the agreement arguably prohibit the State from violating CSEA's 3519(b) statutory (Dills Act) rights? If the answer is yes and the contractual grievance procedure ends in binding arbitration, then the matter is deferred. If the answer is no, then the matter is retained and resolved at PERB.

The lead opinion glosses over this critical factual necessity and seems to mischaracterize CSEA's position as one of disagreeing with the Board's decision on the issue of PERB's jurisdiction, concluding that "The Board's decision with regard to its jurisdiction does not constitute prejudicial error of fact." Is that because the lead opinion concludes that jurisdiction is solely a "legal" issue? Or is it because the lead opinion concludes that there are specific articles in the subject agreement which arguably prohibit the State from violating CSEA's 3519(b) statutory rights? If it is the former, it is clearly wrong because of the aforementioned factual determination which must be made before such a jurisdictional decision can be rendered. If it is the latter, it is also wrong because such specific articles simply do not exist.

The lead opinion states that, "both the lead opinion and Member Garcia's concurrence [in Corrections] refer to specific articles within the [collective bargaining agreement] in concluding that the unfair practice charge must be dismissed and deferred." That is, each opinion (lead and concurrence) cite specific articles which contain language arguably prohibiting the

State from violating CSEA's 3519(b) statutory (Dills Act) rights. Let's take each opinion and look at the "specific articles" referenced and see for ourselves.

In Member Garcia's concurrence in Corrections, he refers to only two specific articles. 6.1(a) and 6.2(a). These two articles state as follows:

> Article 6.1(a) states: This grievance procedure shall be used to process and resolve grievances arising under this Contract and employment-related complaints.

> Article 6.2 (a) states: A grievance is a dispute of one or more employees, or a dispute between the State and the Union, involving the interpretation, application, or enforcement of the terms of this contract.

It should be obvious that neither specific article referred to in Member Garcia's concurrence even remotely addresses and resolves the issue of whether or not the State is arguably prohibited from violating CSEA's 3519(b) statutory rights.

The lead opinion in Corrections also refers to only two specific articles, Article 5, section 5.5 and Article 2, section 2.8.

Article 5, "General Provisions," section 5.5 states:

> The State and CSEA Local 1000 shall be prohibited from imposing or threatening to impost reprisals by discriminating or threatening to discriminate against employees, or otherwise interfering with, restraining, or coercing employees because of the exercise of their rights under Ralph C. Dills Act or any right given by this contract. The principles of agency shall be liberally construed. [Emphasis added.]

Article 2, "Union Representation Rights," section 2.8 states:

> The State shall be prohibited from imposing

> or threatening to impose reprisals, from discriminating or threatening to discriminate against Union stewards, or otherwise interfering with, restraining, or coercing Union stewards because of the exercise of any rights given by this contract. [Emphasis added.]

Article 5, section 5.5 protects employees from both the State and CSEA for exercising their (the employees') rights under both the Dills Act or the contract. It has nothing to do with whether or not the State can violate CSEA's 3519(b) statutory (Dills Act) rights.

Article 2, section 2.8 protects union stewards from the State for the "exercise of any rights given by this contract." Once again, it has nothing to do with whether or not the State can violate the CSEA's 3519(b) statutory (Dills Act) rights. In fact, section 2.8 specifically omits any reference to the Dills Act.

None of the four referenced specific articles in the collective bargaining agreement relied upon by the lead opinion and Member Garcia's concurrence in Corrections and now relied upon in denying CSEA's request for reconsideration can support a factual determination that the provisions of said agreement between the State and CSEA arguably prohibit the former from violating the statutory representation rights of the latter. As such, this matter should have been retained and heard and decided on the merits by PERB. Accordingly, CSEA has demonstrated prejudicial errors of fact by the majority in factually concluding to the contrary and CSEA's request for reconsideration should be granted.

The second ground claimed by CSEA involves the processing procedures utilized in rendering the majority opinion in Corrections. These procedures have been well documented (Corrections, fn. 1 of dissent at p. 26) and there is no need to repeat them again.

PERB case law is unclear relative to the definition of "newly discovered evidence . . . which was not previously available and could not have been discovered with the exercise of reasonable diligence." If this standard means that the newly discovered matter in question must have been previously unknown to the parties and the Board deciding the case, then CSEA has failed to meet this test. If this standard applies only to the parties, then CSEA has submitted evidence which meets this test and the question then goes to its persuasiveness.

Since I would grant reconsideration based upon CSEA's identification of prejudicial errors of fact in the majority opinion in Corrections as previously noted herein, it is not necessary to resolve this second ground at this time. However, as a statutorily created independent quasi-judicial appellate body, it is not only crucial that this Board be fair, but that it ensure the appearance of fairness. To that end, I would reschedule this matter and hold another oral argument since the parties are entitled to have their case decided by those who attend the hearing. To do otherwise, in the words of CSEA, means a result which "just does not appear fair."