STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, Charging Party,	)	Case No. SA-CE-919-S
v.	)	PERB Decision No. 1201-S
STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS), Respondent.	)	June 2, 1997

Appearances: California State Employees Association by Frank H. Pulido, Labor Relations Representative; State of California (Department of Personnel Administration) by Carol A. McConnell, Labor Relations Counsel, for State of California (Department of Corrections).

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION AND ORDER

JOHNSON, Member: This case is before the Public Employment Relations Board (Board) on appeal by the California State Employees Association (Association) to a Board agent's dismissal (attached) of the unfair practice charge and refusal to issue a complaint. The Association alleged that the State of California (Department of Corrections) (State) violated section 3519(a), (b), (c) and (d) of the Ralph C. Dills Act (Dills Act)[1] by (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:
>
> (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

unilaterally changing its practice of allowing employees to trade shifts and hours; and (2) by discriminating against an employee for engaging in protected activity by denying him a merit salary adjustment.

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

The unfair practice charge in Case No. SA-CE-919-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Dyer joined in this Decision.

> employees because of their exercise of rights guaranteed by this chapter. For purposes 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.
>
> (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.

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

February 26, 1997

Frank H. Pulido
CSEA Labor Relations Representative
1943 N. Gateway Blvd., Suite 101
Fresno, CA 93 727

Re: California State Employees Association v. State of California (Department of Corrections)
Unfair Practice Charge No. SA-CE-919-S
DISMISSAL AND REFUSAL TO ISSUE COMPLAINT

Dear Mr. Pulido:

In the above-referenced unfair practice charge, filed December 4, 1996, the California State Employees Association alleges that the Department of Corrections violated the Ralph C. Dills Act, Government Code section 3519, by (1) unilaterally changing its practice of allowing employees to trade shifts and hours, and (2) discriminating against Ignacio Salazar for engaging in protected activity by denying him a merit salary adjustment.

I indicated to you, in my attached letter dated February 11, 1997, 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 February 20, 1997, the charge would be dismissed. At your request, this deadline was extended to February 21, 1997.

I have not received either an amended charge or a request for withdrawal. Therefore, I am dismissing the charge based on the facts and reasons contained in my February 11, 1997 letter.

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 later than the last date set for filing. (Cal. Code of Regs., 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
ROBIN E. Wright
Regional Attorney

Attachment

cc: Peter C. Olson

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

February 11, 1997

Frank H. Pulido
CSEA Labor Relations Representative
1943 N. Gateway Blvd., Suite 101
Fresno, CA 93727

Re: California State Employees Association v. State of California (Department of Corrections)
Unfair Practice Charge No. SA-CE-919-S
WARNING LETTER

Dear Mr. Pulido:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board on December 4, 1996. The charge alleges that the Department of Corrections (CDC) violated the Ralph C. Dills Act, Government Code section 3519, by (1) unilaterally changing its practice of allowing employees to trade shifts and hours, and (2) discriminating against Ignacio Salazar for engaging in protected activity by denying him a merit salary adjustment (MSA).

Investigation of the charge revealed the following relevant information. CSEA and the State are parties to a memorandum of understanding which expired June 30, 1995. Article 20 of the MOU addresses hours of work and overtime. Article 20.3, Change in Shift Assignment, provides, in pertinent part:

> An employee may submit a written request to alter his/her shift assignment.

Article 20.10, Exchange of Days Off/Shift Assignment, provides, in pertinent part:

> (a) Permanent Unit 15 employees at . . . Department of Corrections, . . . may be permitted to exchange hours of work with other employees in the same classification or level (determined by the Supervisor), performing the same type of duties in the same work area, provided:
>
> (1) The employees make a written request to their supervisor(s), at least twenty-four (24) hours prior to the exchange;

(2) The supervisor(s) approves the exchange; and

(3) The employees exchanging hours of work shall not be entitled to any additional compensation (e.g., overtime or overtime meals, holiday credit-pay, shift differential) which they would not have otherwise received.

Employees in the Supervising Cook I position prepare meals for inmates in the various kitchens located at the Central California Women's Facility (CCWF). Work shifts are assigned on a monthly basis. For example, an employee may be assigned to work in Kitchen 1, Monday - Friday, 6:00 a.m. to 2:00 p.m. The following month, the same employee may be assigned to another kitchen, working an afternoon shift.

For several years, employees in this classification have been able to trade monthly shifts or a single day's shift by informally notifying their supervisor that they intend to swap shifts with another employee.

In July 1996, a meeting was scheduled between CSEA and CDC to discuss concerns about the preferential assignment of shifts. Prior to the meeting, on or about July 11, Joe Barrett, CCWF Food Manager, telephoned Salazar and D. Johnson, Supervising Cook I's, and informed them that he had their MSA authorization forms. He asked each of them "Do you think you deserve an MSA?" On July 11, Barrett denied Salazar's MSA with a promise to review the matter in 45 days.

At the July 15 meeting, employees in the supervising cook positions raised concerns that some employees were not being rotated among the various kitchens and that shifts were not being fairly assigned. Salazar in particular was critical of Barrett's management style. CSEA also questioned whether Barrett's comments to Salazar and Johnson concerning their MSAs were appropriate.

At the meeting, the Department realized that Barrett's method of allowing employees to trade work shifts was inconsistent with the parties' agreement. Barrett was informed by Department representatives that single day trades were covered under Article 20.10 and full shift change requests should be handled under Article 20.3.

In the days following the meeting, as employees were notifying their supervisors of shift trades they had arranged

with co-workers, Barrett informed them that monthly shift trades were no longer permitted.

On September 10, Salazar was notified by Barrett that his MSA had again been denied.

CSEA alleges that CDC unilaterally changed its practice of allowing employees to trade shifts.

In determining whether a party has violated Dills Act section 3519(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Unified High School District (1982) PERB Decision No. 196; State of California (Department of Transportation) (1983) PERB Decision No. 361-S.) However, an employer does not make an unlawful change if its actions conform to the terms of the parties' agreement. (Marysville Joint Union School District (1983) PERB Decision No. 314.)

In Marysville, the Board found that the plain meaning of the agreement, which provided lunch breaks of "no less than 30 minutes," was not superseded by a consistent past practice of 55 minute lunch breaks. The Board stated, "The mere fact that an employer has not chosen to enforce its contractual rights in the past does not mean that, ipso facto, it is forever precluded from doing so." (At p. 10, citation omitted).

In the present case, as in Marysville, the MOU clearly sets out the procedures for employee trading of monthly and daily shifts. The plain meaning of the agreement, that shifts cannot be traded without the supervisor's approval, is not superseded by the past practice of allowing employees to informally arrange their own shift changes. Therefore, CSEA has failed to demonstrate an unlawful unilateral change of policy.

CSEA also alleges that CDC discriminated against Salazar for expressing concerns about Barrett's management style at the July 15 meeting.

To demonstrate a violation of Dills Act section 3519(a), the charging party must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89; Department of Developmental Services (1982) PERB Decision No. 228-S; California State University (Sacramento) (1982) PERB Decision No. 211-H.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor, it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee; (2) the employer's departure from established procedures and standards when dealing with the employee; (3) the employer's inconsistent or contradictory justifications for its actions; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; or (6) any other facts which might demonstrate the employer's unlawful motive. (Novato Unified School District, supra; North Sacramento School District (1982) PERB Decision No. 264.)

CSEA established that Salazar engaged in protected activity when he expressed concerns about shift assignments at the July 15 meeting. Salazar was adversely affected when Barrett again denied his MSA on September 10. However, CSEA has failed to demonstrate a connection between the adverse action and the protected conduct. Therefore, as presently written, this charge does not state a prima facie violation of Dills Act section 3519(a).

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies 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 must be filed with PERB. If I do not receive an amended charge or withdrawal from you before February 20. 1997. I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198.

Sincerely,

Robin E. Wright
Regional Attorney