STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, LOCAL 1000, SEIU, AFL-CIO, CLC,	)	
Charging Party,	)	Case No. SA-CE-1007-S
v.	)	PERB Decision No. 1249-S
STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION),	)	January 28, 1998
Respondent.	)	

Appearances: Anne M. Giese, Attorney, for California State Employees Association, Local 1000, SEIU, AFL-CIO, CLC; Warren C. Stracener, Labor Relations Counsel, for State of California (Department of Personnel Administration).

Before Johnson, Dyer and Amador, Members.

DECISION

AMADOR, Member: This case is before the Public Employment Relations Board (Board) on appeal from a Board agent's dismissal (attached) of the California State Employees Association, Local 1000, SEIU, AFL-CIO, CLC's (Association) unfair practice charge. As amended, the Association's charge alleges that the State of California (Department of Personnel Administration) (State) breached its duty to meet and confer in good faith with the Association, thereby violating section 3519(a), (b) and (c) of the Ralph C. Dills Act (Dills Act).[1]

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

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

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

ORDER

The unfair practice charge in Case No. SA-CE-1007-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Johnson and Dyer joined in this Decision.

(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. 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.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

September 16, 1997

Harry J. Gibbons, Staff Attorney-
Anne M. Giese, Staff Attorney
California State Employees Association
1108 "0" Street, Suite 327
Sacramento, CA 95814

Re: NOTICE OF DISMISSAL AND REFUSAL TO ISSUE COMPLAINT
California State Employees Association, Local 1000, SEIU, AFL-CIO, CLC v. State of California (Department of Personnel Administration)
Unfair Practice Charge No. SA-CE-1007-S

Dear Mr. Gibbons and Ms. Giese:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 9, 1997. The charge alleges that the State of California (State) breached the duty to meet and confer in good faith with the California State Employees Association (CSEA or Union) imposed by Government Code section 3517,[1] in violation of Government Code section 3519, subsections (a), (b) and (c).

I indicated to CSEA, in my attached letter dated August 19, 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 August 26, 1997, the charge would be dismissed. Your subsequent request for additional time to file an amended charge was granted, and a First Amended Charge was filed on September 2, 1997.

The original charge focused exclusively on testimony given by David Tirapelle, Director of the Department of Personnel Administration (DPA),[2] to the State Senate Public Employment and Retirement Committee on April 14, 1997. The State's unlawful conduct was characterized as follows:

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[1]The Ralph C. Dills Act (Dills Act), originally known as the State Employer-Employee Relations Act (SEERA), is codified at Government Code section 3512 et seq.

[2]DPA is the designated representative of the Governor for purposes of collective bargaining.

> [B]y conditioning the Union's economic demands on acceptance of the State's non-economic proposals, by lacking the authority to reach an agreement and mischaracterizing the bargaining and appropriation process and by lacking the financial ability to endeavor to reach agreement.

As amended, the charge relies on the Tirapelle testimony for evidence that the State has offered shifting justifications for its refusal thus far to offer a salary increase in bargaining. CSEA argues that the State first claimed money was not available, even knowing of a $500 million reserve, and later claimed a salary increase could not be offered because it had not been "appropriated," even while DPA and/or the Governor opposed the appropriation of any money for a salary increase.

The amended charge also makes new allegations concerning public statements made by both the Governor himself and his spokesperson as evidence of bad faith bargaining.

CSEA first cites the Governor's statements on July 17 and August 8, 1997, linking the issues of a pay raise for state employees to a proposed income tax proposal he submitted to the Legislature, as evidence of yet a third justification for refusal to offer a salary increase. CSEA also cites the Governor's statements as evidence of unlawful conditioning of a mandatory subject of bargaining on resolution of a non-mandatory subject. Such conduct, argues CSEA, is per se evidence of bad faith under Lake Elsinore School District (1986) PERB Decision No. 603.

Finally, CSEA cites statements made on August 8, 1997 by a spokesperson for the Governor, which it quotes as follows:

> if I were a CSEA member, I'd been (sic) mighty hot [about not receiving a pay raise], and I would run my out-of-touch union leadership out of Dodge --or the DMV -- on a rail.

CSEA offers the following theory with respect to the quoted statement:

> A reasonable person could infer from this statement that the Governor might offer a pay raise once CSEA is run out "on a rail." In the alternative, a reasonable person could conclude the Governor will continue his refusal to bargain so long as CSEA remains the exclusive representative. Because the statement contains both a threat of reprisal and a promise of benefit, the statement violates the Dills Act. (Rio Hondo Community

College District (1980) PERB Decision No. 128 (Rio Hondo).)

Shifting Justifications

The essence of CSEA's argument, as analyzed more fully in my August 19, 1997 letter, is that the State must be bargaining in bad faith because they have not offered a wage increase in over two years of negotiations. CSEA offers no persuasive legal authority for this theory, and this element of the amended charge shall be dismissed for the reasons set forth in my August 19, 1997 letter.

Linkage of Tax Cut and Pay Raise

CSEA contends that the State, through the Governor himself, has unlawfully linked the question of a negotiated pay raise to his proposal for a general state income tax cut.

CSEA's reliance on Lake Elsinore is misplaced under the facts of this case. In Lake Elsinore, the Board reaffirmed that insisting to impasse on a nonmandatory subject of bargaining is a per se unfair practice. As noted by CSEA in its factual assertions, neither party has declared impasse in the ongoing successor contract negotiations. Thus, the Lake Elsinore standard is not applicable to the facts of this case. It bears noting, as well, that the Board also recognized in Lake Elsinore the right of a party to make proposals on nonmandatory subjects.

The more appropriate analysis here is that applied by the Board in Fremont Unified School District (1980) PERB Decision No. 136 (Fremont). The conduct found unlawful in Fremont involved the employer's conditioning its proposals on a future event, namely the passage of a tax measure in an upcoming election. The Board held that by conditioning proposals on a matter outside the control of the negotiators, the employer "frustrated the negotiations process as surely as if it had refused to negotiate outright. (Fremont.) The Governor's conduct in this case is similar to that of the employer in Fremont.

The Fremont District's conduct, however, was not found to be a per se unfair practice, but was instead analyzed under the totality of circumstances standard described in my August 19, 1997 letter. Thus, even assuming Fremont's findings can be applied,[3] this allegation establishes only one indicia of surface bargaining, and is insufficient on its own to warrant issuance of a complaint. (Fresno County Office of Education (1993) PERB Decision No. 975.)

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[3]The findings against the employer were vacated pursuant to court order in Fremont Unified School District (1982) PERB Decision No. 136a.

Threat of Reprisal/Promise of Benefit

The statement of opinion attributed to a spokesperson for the Governor falls short of conduct which would be held unlawful under relevant precedent. In Rio Hondo, the Board reaffirmed the principle that an employer is entitled to free speech rights on employment related matters. The Board further observed that,

> [w]hile the protection afforded the employer's speech is not without limits, it must necessarily include both favorable and critical speech regarding a union's position provided the communication is not used as a means of violating the [collective bargaining statute]. [Id.; citation omitted.]

Applying this standard in Colusa Unified School District (1983) PERB Decision No. 296, the Board dismissed an interference allegation where the superintendent and a school board member were publicly critical of the union for its advocacy of a holiday pay issue.

Here, while the statement cited by CSEA is understandably considered repugnant and/or inflammatory by CSEA, it does not, under the objective test used by the Board, constitute either a threat or promise. (See Chula Vista City School District (1990) PERB Decision No. 834, pp. 10-14.) This allegation must be dismissed.

Conclusion

Therefore, I am dismissing the charge in its entirety based on the facts and reasons discussed above, as well as those contained in my August 19, 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

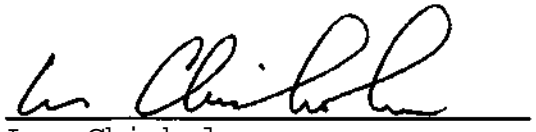
A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. 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 
Les Chisholm
Regional Director

Attachment

cc: Warren C. Stracener

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

August 19, 1997

Gary Reynolds, Chief Counsel
Claire Iandoli, Attorney
California State Employees Association
1108 "0" Street, Suite 327
Sacramento, CA 95814

Re: WARNING LETTER
California State Employees Association, Local 1000, SEIU, AFL-CIO, CLC v. State of California (Department of Personnel Administration)
Unfair Practice Charge No. SA-CE-1007-S

Dear Mr. Reynolds and Ms. Iandoli:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 9, 1997. The charge alleges that the State of California (State) breached the duty to meet and confer in good faith with the California State Employees Association (CSEA or Union) imposed by Government Code section 3517,[1] in violation of Government Code section 3519, subsections (a), (b) and (c). The State's unlawful conduct is summarized by you as follows:

> [B]y conditioning the Union's economic demands on acceptance of the State's non-economic proposals, by lacking the authority to reach an agreement and mischaracterizing the bargaining and appropriation process and by lacking the financial ability to endeavor to reach agreement.

CSEA is the exclusive representative of State Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20 and 21. The memoranda of understanding for all nine units expired on June 30, 1995, and the parties have been engaged in successor contract negotiations since June 1995. The parties to date have neither reached agreement in any unit nor declared impasse pursuant to Government Code section 3518.

The instant charge relies entirely on excerpts of testimony provided on April 14, 1997, by David Tirapelle, Director of the

[1]The Ralph C. Dills Act (Dills Act), originally known as the State Employer-Employee Relations Act (SEERA), is codified at Government Code section 3512 et seq.

Department of Personnel Administration (DPA),[2] to the State Senate Public Employment and Retirement Committee.[3] The testimony quoted by CSEA,[4] regarding the relationship between the Union's salary demands and civil service reforms proposed by the Governor, reads as follows:

> Senator Schiff: "Has it been implied during the discussions, that absent progress on civil service legislation there will be no money on the table?"
>
> Mr. Tirapelle: "I don't think we've said that there will be no money on the table because we've never had the ability to put money on the table. . . ." [Footnote and argument omitted.]
>
> Senator Schiff: "So, what you're saying is that in DPA's view the two are linked and you won't resolve one without resolving the other?"
>
> Mr. Tirapelle: "I think that, that's correct." [Footnote and argument omitted.]
>
> Senator Schiff: "Do you think that the linkage between the civil service reforms and the pay raise issue is the reason why the pay raise has not been included in the budget, the reason why we cannot use the reserve that we have now to provide the last few weeks of the pay raise for this year?"

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[2]DPA is the designated representative of the Governor for purposes of collective bargaining.

[3]The charge notes the existence of another pending unfair practice charge, filed on April 23, 1997. In that charge, identified as PERB Case No. SF-CE-161-S, CSEA disputes whether the State has engaged in good faith negotiations with CSEA with respect to Bargaining Units 1 and 17. As of this writing, PERB has not issued a complaint with respect to that charge.

*DPA submitted a transcript of additional portions of the testimony, and a copy was provided to you for your review as to its accuracy.

> Mr. Tirapelle: "I don't think there's any linkage whatsoever to date on that because there's been no money appropriated or allocated for salary increases."
>
> Senator Schiff: "What marching orders are the DPA negotiators under during the bargaining process?"
>
> Mr. Tirapelle: "At this point in time, the direction to the bargainers is we have no money in order to put forth an economic package."
>
> Senator Schiff: "So, there really is no collective bargaining going on over the pay raise issue right now?"
>
> Mr. Tirapelle: "No. I think that's a fair conclusion."[5]

Discussion

The Dills Act imposes a duty on the State employer to negotiate with the exclusive representatives of its employees, and the State violates section 3519 (c) if it fails to meet and negotiate in good faith.

The standard generally applied to determine whether good faith negotiations have occurred is called the "totality of conduct" test. This test reviews the entire course of conduct during negotiations to determine whether the parties have negotiated in good faith with the "requisite subjective intention of reaching an agreement." (Pajaro Valley Unified School District (1978) PERB Dec. No. 51.) . There are also certain acts which have such a potential to frustrate negotiations that they are held unlawful without a determination of subjective good faith. For example, the insistence to impasse on a nonmandatory subject of bargaining constitutes a "per se" violation of the duty to bargain in good

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[5]Tirapelle, in answering the question, continued by stating:

> But I think its [sic] been made clear to us from the employee organizations and rightfully so that until there's some economic package to debate that there will be - no collective bargaining agreements.

faith. (Lake Elsinore School District (1986) PERB Decision No. 603.)

Conditional Bargaining

CSEA first argues that Tirapelle's testimony proves that the State has unlawfully engaged in conditional bargaining. CSEA contends that the

> State has proposed that in exchange for the Union's economic demands, CSEA must endorse future legislation supporting the State's non-economic demands (i.e., civil service proposals).

CSEA relies on Fremont Unified School District (1980) PERB Decision No. 136 (Fremont) as authority for its contention that this linkage of economic proposals to civil service reform legislation is indicative of bad faith.

As noted above, it is unlawful to insist to impasse on a nonmandatory subject of bargaining. (Lake Elsinore School District, supra.) Neither Fremont nor other relevant precedent, however, holds that either party is barred from "packaging" proposals. The conduct found unlawful in Fremont[6] involved the employer's conditioning its proposals on a future event, namely the passage of a tax measure in an upcoming election. The Board held that conditioning proposals on a matter outside the control of the negotiators equated with an outright refusal to bargain. (Fremont.) The facts of the instant case are quite different, as it is alleged that the State has "linked" economic proposals with a proposal that the Union agree to support certain future legislation. Unlike the situation in Fremont, where the union had no control over the outcome of the tax measure, CSEA can determine whether -- or not -- to agree to support legislation.

Relevant federal precedent also does not support the Union's theory. Cases where conditional bargaining has been found to be evidence of bad faith involve quite different facts than are present here. For example, in NLRB v. Patent Trader, Inc. (2d Cir. 1969) 415 F.2d 190 [71 LRRM 3086]; Federal Mogul Corp. (1974) 212 NLRB 950 [87 LRRM 1105], *enforcd* (6th Cir. 1975) 524 F.2d 37 [91 LRRM 2207]; and Adrian Daily Telegram (1974) 214 NLRB 1103 [88 LRRM 1310], the courts and National Labor Relations

[6]The findings against the employer were vacated pursuant to court order in Fremont Unified School District (1982) PERB Decision No. 136a.

Board found evidence of bad faith bargaining where an employer refused to bargain or submit proposals concerning monetary issues until complete agreement had been reached on non-economic issues.[7]

In the instant charge, it is alleged that the State is linking or "packaging" agreement on wages with agreement on a non-monetary subject.[8] This conduct does not rise to the level found to evidence bad faith in the cases cited above, nor is this conduct equivalent to demanding that the union waive any statutory right. (Modesto City Schools (1983) PERB Decision No. 291; Lake Elsinore School District, supra.) This portion of the charge must therefore be dismissed.

Lack of Authority

CSEA next cites Tirapelle's testimony as proof that DPA lacks authority to enter into an agreement. The statements relied on by CSEA ("we've never had the ability to put money on the table" and "the direction to the bargainers is we have no money in order to put forth an economic package") do not, however, mean what CSEA says they mean. There is a difference between lacking the authority to reach an agreement, and lacking the authority to offer a salary increase. The statements quoted by CSEA demonstrate on their face that DPA did not have, at that time, authority to offer a salary increase, but they fall short of demonstrating that DPA lacked authority to enter into a tentative agreement.

The facts of this case are thus distinguished from a situation where an employer sends negotiators to the table who have no authority to enter into a contract or advance binding contract proposals. (See Cablevision Industries (1987) 283 NLRB 22 [126 LRRM 1102] (negotiator misled union to believe he had authority to conclude agreement); S-B Mfg. Co. (1984) 270 NLRB 485 [116 LRRM 1334] (negotiators served as mere conduit for proposals and lacked authority even to reach tentative agreement); Bedford Farmers COOP. (1982) 259 NLRB 1226 [109 LRRM 1113 (negotiator lacked authority even to advance binding contract proposals); see *also* Professional Eye Care (1988) 289 NLRB 1376 [131 LRRM 1185] (negotiator uninformed as to present terms and conditions of employment and lacked authority to propose changes); Penntech

[7]These and similar cases were cited by the Board in Fremont.

[8]Tirapelle also stated that while, in his view, the economic and non-economic issues were linked by both DPA and the unions, the State had not established a "quid pro quo" sort of linkage.

Papers (1982) 263 NLRB 264 [111 LRRM 1622] (negotiator had very little authority and adopted take-it-or-leave-it approach), *enforced,* (1st Cir. 1983) 706 F.2d 18 [113 LRRM 2219], *cert, denied,* 464 US 892 [114 LRRM 2648] (1983).)

Tirapelle also testified that DPA's discretion in current negotiations is not more limited than in the past, and further stated:

> I think that we need an economic package in order to move forward. And I think the Governor, when he proposed the budget, indicated that some funds in that $500 million plus reserve when it was identified in January, would be used for collective bargaining agreements. I think as we move forward, as [the Legislature moves] forward through the budget debate toward the passage of a budget, it will become clear that there's agreement between the legislature and the executive branch, that there will be money for collective bargaining, salary increases, economic items, then we'll move forward and put funds on the table.

The latter statement is not reflective of a take-it-or-leave-it approach and does not support the proposed finding of a violation. (Penntech Papers, supra.) This allegation must also be dismissed.

Putting the Appropriations Cart before the Bargaining Horse

Finally, CSEA cites Tirapelle's testimonial statements to the effect that bargaining is not proceeding, and that DPA is awaiting an economic package from the legislative appropriation process, as evidence that the State is not bargaining in good faith.

CSEA relies here on the language of Dills Act sections 3517, 3517.5 and 3517.6. CSEA calls particular attention to the definition of "meet and confer in good faith" found in section 3517 which states that the parties will "endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year." (Emphasis added.) CSEA also notes that both section 3517.5 and 3517.6 address the requirement to seek legislative approval of any agreement (3517.5) and conditions the effect of "any provision of the memorandum of understanding [which]

requires the expenditure of funds" on approval "by the Legislature in the annual Budget Act" (3517.6).

By acknowledging that the State cannot "endeavor to reach agreement" without the Governor and Legislature providing funds for economic items through the appropriations process, CSEA argues that Tirapelle has admitted that the State is not meeting and conferring in good faith.

CSEA's argument on this point is at odds with PERB precedent. In State of California (Department of Personnel Administration) (1990) PERB Decision No. 823-S (ACSA III). the Board cited and reaffirmed its earlier conclusions from State of California (Department of Personnel Administration) (1986) PERB Decision No. 569-S (ACSA I). Observing that the charging party was attempting to link the negotiation process to the timelines imposed for adoption of a state budget, the Board noted in ACSA III that it had

> previously recognized that the state's obligation to meet and confer in good faith does not bind the collective bargaining process to the budget. (State of California (Department of Personnel Administration) (1988) PERB Decision No. 706-S.) Moreover, section 3517 merely establishes the budget as a "point of reference" and not a statutory deadline for negotiations. (ACSA I, p. 7.)

The Board continued by quoting ACSA I as follows:

> . . . the language of section 3517 imposing an obligation "to endeavor" exhorts the parties to attempt or to strive in earnest to attain a certain end. Thus, the statutory mandate is violated where either party's conduct fails to demonstrate such effort. However, the statutorily imposed obligation "to endeavor" can by no means be interpreted to create an absolute standard pursuant to which a failure to present proposals by June 15 must be judged a per se violation.
>
> . . . . . .
>
> In sum. SEERA's statutory provisions do not specifically mandate that negotiations with the employee organization must precede or

> follow final legislative action. [ACSA III, emphasis in original.]

The Board thus concluded that

> it is not necessarily inappropriate for the Governor's representative, as a part of his bargaining strategy, to delay making a firm proposal until he has had an opportunity to review the final budget in good faith in order to determine the funds potentially available for salary increases. (ACSA III.)

Thus, the delay in making a firm salary proposal until after adoption of the final budget was determined to be neither evidence of a per se violation nor, by itself, an indicia of bad faith bargaining under a totality standard. (Id.)

As CSEA's theory in the instant case is indistinguishable from that considered in ACSA III, this allegation must also be dismissed.

Conclusion

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 August 26, 1997, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198, ext. 359.

Sincerely,

Les Chisholm
Regional Director