STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION,	)	
Charging Party,	)	Case No. LA-CE-418-S
v.	)	PERB Decision No. 1291-S
STATE OF CALIFORNIA (DEPARTMENT OF MOTOR VEHICLES),	)	October 9, 1998
Respondent.	)	

Appearances; Brian K. Taylor, Attorney, for California State Employees Association; State of California (Department of Personnel Administration) by Michael E. Gash, Labor Relations Counsel, for State of California (Department of Motor Vehicles).

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (Board) on appeal by the State of California (Department of Motor Vehicles) (State) from a Board administrative law judge's (ALJ) proposed decision (attached). In the proposed decision, the ALJ held that the State violated section 3519(a), (b) and (c) of the Ralph C. Dills Act (Dills Act)[1] when it established new performance standards without

[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:
>
> (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

complying with the provisions of the expired memorandum of understanding (MOU) between the State and the California State Employees Association (CSEA).

The Board has reviewed the entire record in this case, including the hearing transcript, the proposed decision, the State's exceptions and CSEA's response thereto. The Board finds that the ALJ's findings of fact and conclusions of law are free from prejudicial error and adopts them as the decision of the Board itself consistent with the following discussion.

DISCUSSION

As the ALJ noted, the State and CSEA were parties to an MOU which was effective from July 1, 1992 through June 30, 1995. Section 13.2 of the MOU states, in relevant part:

> a. The employer shall, in developing performance/work standards, adhere to the following: employee performance/work standards shall be based upon valid work-related criteria, which insofar as practicable, include qualitative, as well as quantitative measures. Such standards shall, insofar as practicable, reflect the amount of work which the average trained person can reasonably turn out in a day. This paragraph is not subject to the arbitration process.
>
> b. Employee performance/work standards shall be established in accordance with the

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> 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.

following guidelines:

> (1) When a department intends to establish new performance/work standards or add to or alter existing performance/work standards, the Union will be notified and given an opportunity to meet to discuss the proposed standards with the departments. The Union shall respond and meet with the department within thirty (30) calendar days of notice unless an extension is mutually agreed to. No response indicates an agreement.
>
> (2) Normally, new performance/work standards or changes in existing performance/work standards shall not be implemented until they have been tested for an appropriate period. During the test period, employees will not be held accountable to the proposed standards. Following any test period, the State may implement the standards and, upon request, shall meet with the Union to discuss the findings.

While the provisions of the MOU permit the State to develop work/performance standards, the State violated section 13.2 of the MOU when it established work/performance standards at the Westminster Central Cashiering and Registration Unit without complying with the provisions of the expired MOU.[2] (Grant Joint Union High School District (1982) PERB Decision No. 196 at pp. 9-10 (noting that, absent a valid defense, the breach of a collective bargaining agreement which has a continuing impact on

[2]Although the MOU expired on June 30, 1995, the Board has long held that certain terms contained in an expired MOU remain in effect until such time as bargaining over a successor agreement has been completed by either reaching agreement or concluding impasse proceedings. (See State of California (Department of Corrections) (1996) PERB Decision No. 1149-S at fn. 2, p. 2.) Accordingly, the MOU provisions regarding the development and establishment of performance standards survived the expiration of the MOU. The parties do not dispute this.

a matter within the scope of representation without giving the exclusive representative notice and an opportunity to bargain is an unlawful unilateral change); Pajaro Valley Unified School District (1978) PERB Decision No. 51 at p. 5.)

ORDER

Upon the findings of fact, conclusions of law, and the entire record in this case, it is found that the State of California (Department of Motor Vehicles) (State) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(a), (b) and (c) when it established performance standards in a manner inconsistent with the procedures set forth in the memorandum of understanding between the parties.

Pursuant to Dills Act section 3514.5(c), it is hereby ORDERED that the State, its administrators, and representatives shall:

A. CEASE AND DESIST FROM:

1. Establishing performance/work standards for the employees in its Westminster Central Cashiering and Registration Unit (CRC Unit) in a manner inconsistent with the expired memorandum of understanding.

2. Denying to the California State Employees Association (CSEA) the right to represent its members.

3. Interfering with the right of individual employees to be represented by an employee organization of their choice.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE DILLS ACT:

1. Rescind the July 8, 1997, Carole Creekmore letter

entitled "Expectations Statement for Westminster CRC Unit."

2. Within ten (10) workdays following the date that this decision is no longer subject to appeal, post at all CRC units in the state where notices are customarily placed for employees, copies of the notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the State, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

3. Written notice of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on CSEA herein.

It is further Ordered that all other aspects of the charge and complaint are hereby DISMISSED.

Chairman Caffrey and Member Amador joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-418-S, California State Employees Association v. State of California (Department of Motor Vehicles). in which all parties had the right to participate, it has been found that the State of California (Department of Motor Vehicles) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(a), (b) and (c).

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Establishing performance/work standards for the employees in its Westminster Central Cashiering and Registration Unit (CRC Unit) in a manner inconsistent with the expired memorandum of understanding.

2. Denying to the California State Employees Association the right to represent its members.

3. Interfering with the right of individual employees to be represented by an employee organization of their choice.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE DILLS ACT:

1. Rescind the July 8, 1997, Carole Creekmore letter entitled "Expectations Statement for Westminster CRC Unit."

Dated: _____ STATE OF CALIFORNIA
(DEPARTMENT OF MOTOR VEHICLES)

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED, OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF MOTOR VEHICLES), Respondent.	)	Unfair Practice Case No. LA-CE-418-S PROPOSED DECISION (6/26/98)

Appearances: Brian K. Taylor, Attorney, for California State Employees Association; State of California (Department of Personnel Administration) by Michael E. Gash, Labor Relations Counsel, for State of California (Department of Motor Vehicles).

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On July 23, 1997, the California State Employee Association (CSEA) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the State of California (Department of Motor Vehicles) (State or DMV). The charge alleged violations of subdivisions (b) and (c) of section 3519, which is a part of the Ralph C. Dills Act (Dills Act).[1]

[1]All section references, unless otherwise noted, are to the Government Code. The Dills Act is codified at section 3512 et seq. Subdivisions (b) and (c) of section 3519 state, 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.
>
> (c) Refuse or fail to meet and confer in good faith with a recognized employee organization.

On September 22, 1997, the Office of the General Counsel of PERB, after an investigation of the charge, issued a complaint against the State alleging violations of subdivisions (a), (b) and (c) of section 3519.[2]

On October 14, 1997, the State answered the complaint denying all material allegations and asserting affirmative defenses.

On November 6, 1997, an informal conference was held in an unsuccessful attempt to reach voluntary settlement. A formal hearing was held before me on March 24, 1998.

Each side prepared and submitted briefs. With the filing of the last brief on June 18, 1998, the case was submitted for a proposed decision.

INTRODUCTION

CSEA alleges a DMV unit manager unilaterally developed and promulgated performance/work standards which altered working conditions. CSEA and the State had previously entered into a memorandum of understanding (MOU) for Unit 4. This MOU, among other things, required the State, if it decided to promulgate such standards, to do so within specified parameters and to offer

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[2]Subdivision (a) of section 3519 states:

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

CSEA an opportunity to discuss the matter prior to implementation. CSEA alleges the State's standards failed to either stay within the agreed upon parameters or offer CSEA an opportunity to discuss the matter.

DMV insists its manager did not promulgate standards, but rather issued an "expectations statement" which merely set forth the quantitative production levels expected of its employees.

FINDINGS OF FACT

Jurisdiction

The parties stipulated to the charging party being a recognized employee organization and the respondent being a state employer within the meaning of section 3513.

Factual Background

CSEA is the exclusive representative of state employees in bargaining Unit 4. Employees involved in this case work for DMV in the Westminster Central Cashiering and Registration Unit (CRC unit). This unit deals primarily with automobile dealer registration transactions. The involved employees rarely deal directly with the public. Charging party and respondent were parties to a MOU which was effective from July 1, 1992 through June 30, 1995. In relevant part, section 13.2 of this MOU provides:

> a. The employer shall, in developing performance/work standards, adhere to the following: employee performance/work standards shall be based upon valid work-related criteria, which insofar as practicable, include qualitative, as well as quantitative measures. Such standards shall, insofar as practicable, reflect the amount of

> work which the average trained person can reasonably turn out in a day. This paragraph is not subject to the arbitration process.
>
> b. Employee performance/work standards shall be established in accordance with the following guidelines:
>
> (1) When a department intends to establish new performance/work standards or add to or alter existing performance/ work standards, the Union will be notified and given an opportunity to meet to discuss the proposed standards with the departments. . . .

Roy Fields (Fields) is the regional administrator that supervises the CRC unit. Prior to Carole Creekmore's (Creekmore) appointment as CRC unit manager, Fields temporarily assigned a veteran manager to supervise and evaluate the unit. The manager told Fields that the employees did not appear to know what was expected of them. When he appointed Creekmore to the position, Fields told her to establish employee expectations.

On July 8, 1997, Creekmore authored and caused to be disseminated to all employees a memorandum entitled "Expectations Statement for Westminster CRC Unit." The memorandum set forth eight "expectations" for the CRC unit employees. Number seven stated:

> Rate and cashier at the expected requirements for the appropriate range.
>
> | | | | |
> |---|---|---|---|
> | 1. | Rate Clerk Range (A)
Range (B) Range (B)
Range (C) Range (C) | 16-19 -
18-21 -
20 - | Items per hour
Items per hour
Items per hour and above |
> | 2. | Audit | 220-230 | Items per hour plus other C.C. functions |

3. Cashiering Regular 85-100- Items per hour

" Junks 112-117-Items per hour

4. Set-Up 25-30 - per hour

5. Mastering 27-35 - per hour

The memorandum's text ended with the following comments:

> These expectations reflect or are below the current office average.
>
> Cashiering is normally performed by range C technicians. Adjustments will be made for range A and B.
>
> NOTE: Training and length of time on the job will be considered for all preceding expectations.

At the very bottom of this two page document there was a place for the individual employee to affix his/her signature acknowledging receipt of the statement.

Although all twenty-three unit employees were asked to sign the document, only two employees agreed to do so. Both Fields and Creekmore state that these "expectations" reflect historical numerical averages for the various classifications and routine job responsibilities of the CRC unit employees.

On July 15, 1997, CSEA Labor Relations Representative Helen Leon (Leon) sent a letter to DMV stating that its "Expectations Statement" appeared to be setting

> standards and as such, before you implement or write up any employees for <u>not</u> meeting <u>your</u> expectations, you must Meet and Confer with the Union. Since the State of California and the Union (CSEA) are currently negotiating a successor MOU this issue should be brought to the bargaining table. (Emphasis in original.)

DMV has neither responded to Leon's letter nor agreed to meet and confer on this matter.

Shortly after the "Expectations Statement" was distributed, Creekmore notified the employees that if they did not agree with the standards, or did not want to be bound by them, they would be "out the door." In September she distributed employee voluntary transfer forms. When she personally walked around the unit to each work station to distribute these forms to the employees, Creekmore asked the employees to fill them out, stating she wanted to bring in her own crew.[3] There is no reason for an employee to fill out the form if s/he is not requesting a transfer. She was, in effect, asking each employee to request a transfer out of the CRC unit. Creekmore denies making either the "out the door" or "bring in her own crew" statement.

CSEA representative Leon was told by twenty of the twenty-three CRC unit employees that they believed that if they did not

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[3]DMV has a policy that permits employees, in September and March, to request geographic transfers. Although the forms are made available during those two months, they are not usually distributed en masse to the employees. The usual practice is to remind employees of this option by means of a circulated memo or a note on the bulletin board.

Creekmore states that a package of transfer forms came in the mail and she merely distributed them directly to the employees.

Creekmore has been the CRC unit manager for two Marchs and one September. She does not believe she distributed the forms the first March she was at the unit. However, she insists she followed the same "personal distribution" system when she was a Manager I in the Santa Ana field office.

meet Creekmore's "expectations" they could face a reduction in pay or be required to transfer out of the unit.

At some DMV units employees have been given memoranda setting various goals and expectations. These goals were almost always expressed in office-wide, not individual, terms. However, one witness remembered one circumstance, in which a memorandum outlining personal goals was given to an individual.

A previous CRC unit manager, Jan Lucio, distributed a statement similar to Creekmore's "Expectations Statement" in late 1995 or early 1996. Most employees refused to sign that statement, as well. CSEA became involved in the matter and the statement was eventually withdrawn and taken out of the employees' personnel files.

ISSUE

When DMV Manager Creekmore distributed her "Expectations Statement," did she unilaterally alter the status quo by establishing performance/work standards, thereby modifying terms and conditions of employment in violation of subdivision (a), (b) or (c) of section 3519?

CONCLUSIONS OF LAW

A unilateral change in terms and conditions of employment within the scope of negotiations is a per se refusal to negotiate. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) PERB has long recognized this principle. (Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94.)

Under subdivision (c) of section 3519 an employer is obligated to meet and negotiate in good faith with an exclusive representative about matters within the scope of representation. This section precludes an employer from making unilateral changes in the status quo, whether such status quo is evidenced by a collective bargaining agreement or by past practice. (Anaheim City School District (1983) PERB Decision No. 364; Pittsburg Unified School District (1982) PERB Decision No. 199.)

The Dills Act's scope of representation is found in section 3516. It is, in pertinent part, as follows:

> 3516. The scope of representation shall be limited to wages, hours, and other terms and conditions of employment. . . .

Performance/work standards suggest rewards for attaining, and discipline for failure to attain, such standards. Therefore, the issue of standards is related to wages and within the scope of representation.

In Tenneco Chemicals, Inc. v. Oil, Chemical and Atomic Workers International Union (1980) 249 NLRB 1176 [104 LRRM 1347] (Tenneco) an employee work standard was defined as

> a clearly articulated and precise measure to be used as the basis for determining the adequacy of an employee's performance. . . .

In addition, the parties' MOU, in effect, defined performance/work standards in section 13.2.a., when it set forth certain parameters for the employer to follow when, and if, it ever developed such standards. This section requires standards to: (1) be based on valid work-related criteria; (2) insofar as

practicable, include qualitative, as well as quantitative measures; and (3) insofar as practicable, reflect the amount of work which the average trained person can reasonably turn out in a day.

The July 8 expectations letter "clearly articulated a precise measure" which was "to be used as the basis for determining the adequacy of" performance. (See Tenneco.)

These expectations also met the MOU's "definition" in that they articulated levels of production that were (1) based on work-related criteria, (2) included quantitative measures, and (3) reflected the amount of work which the average trained person could reasonably turn out in a day. The only MOU parameter that was not met was the one calling for such standards to include qualitative measures and this was suggested in the statements at the bottom of the letter.

An examination of Creekmore's "expectations" clearly shows that they were not in the nature of a general plea for more and better work, but rather created a specific and measured level of anticipated production.

Respondent argues that it did not establish "standards," it merely explained to the employees what was expected of them. It insists that establishing goals is a management tool, a procedure that ensures efficiency. However, it could have achieved this same objective by merely intensifying its individualized supervision, rather than creating specific and measured "expectations." When it set forth specific standards for the

employees to meet, it went beyond its management prerogative of increasing efficiency and modified a working condition.

The primary impact of the July 8 letter was to communicate what management determined to be an acceptable level of production. Implicit in this communication was a notice to each employee that failure to attain such a level was to fall below management's expectations, with reasonably predictable consequences.

Whether they are called expectations or something else, specific levels of desired performance that are developed and distributed by the employer are performance/work standards.

Whether or not discipline, based on such standards, is imposed is irrelevant. The standards were communicated and the employees clearly understood that they would fail to meet them at their peril. Neither the employees' attainment or failure to meet such standards, nor the presence or absence of discipline, has any effect on whether "standards" actually exist.

Prior to Creekmore's arrival a letter similar to her July 8 "expectations" letter had been disseminated to the employees. After some discussion it was withdrawn. Therefore, the status quo prior to July 1997 was that there were no specifically articulated standards in the CRC unit.

When Creekmore and Fields caused the July 8 "Expectations Statement" to be issued, it modified that status quo by unilaterally setting performance/work standards for the Westminster CRC unit, which affected matters within the scope of

representation. Therefore, when Creekmore issued her "Expectations Statement" the respondent violated subdivision (c) of section 3519.

CSEA's Rights Were Violated

When DMV unilaterally established employee performance/work standards, it effectively diminished CSEA's ability to represent the members of its bargaining unit. Therefore, when DMV took the charged action, it interfered with CSEA's ability to properly represent its members in their labor relations with the state employer, a violation of subdivision (b) of section 3519.

Individual Employees' Rights Were Violated

When DMV unilaterally established employee performance/work standards, it interfered with the rights of the employees in the Westminster CRC unit to "participate in the activities of employee organizations. . . for the purpose of representation on all matters of employer-employee relations." (See sec. 3515.) Therefore, such action violated subdivision (a) of section 3519.

SUMMARY

After an examination of the foregoing findings of fact and conclusions of law, and the entire record in this case, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the parties, it is found that when DMV issued its July 8, 1997, "Expectations Statement" for its Westminster CRC unit employees, it unilaterally established employee performance/work standards. Such standards affected matters within the scope of representation and were,

therefore in violation of subdivisions (a), (b) and (c) of section 3519.

REMEDY

PERB, in section 3514.4(c), is empowered to

> . . . issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

In order to remedy the unfair practice of the State and prevent it from benefiting from its unlawful conduct and effectuate the purposes of the Dills Act, it is appropriate to order the State to cease and desist from (1) unilaterally establishing performance/work standards for the Westminster CRC unit, (2) denying to CSEA rights guaranteed to it by the Dills Act, and (3) interfering with individual employees' right to be represented by an employee organization on all matters of employer-employee relations.

It is also appropriate that the State be required to post a notice incorporating the terms of this Order at all DMV CRC unit sites in the state where notices are customarily placed for employees. This notice should be subscribed by an authorized agent of DMV, indicating that it will comply with the terms therein. The notice shall not be reduced in size, defaced altered or covered by any other material. Posting such a notice will provide employees with notice the State has acted in an unlawful manner and is being required to cease and desist from

this activity. It effectuates the purposes of the Dills Act that employees be informed of the resolution of the controversy and will announce DMV's readiness to comply with the ordered remedy. (See Placerville Union School District (1978) PERB Decision No. 69.) In Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587 [159 Cal.Rptr. 584], the California District Court of Appeals approved a similar posting requirement. (See also National Labor Relations Board v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].)

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the State of California (Department of Motor Vehicles) (DMV) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(a), (b) and (c). Therefore, it is hereby ORDERED that DMV, its administrators, and representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally issuing performance/work standards for the employees in its Westminster Central Cashiering and Registration Unit (CRC unit).

2. Denying to the California State Employees Association the right to represent its members.

3. Interfering with the right of individual employees to be represented by an employee organization of their choice.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE DILLS ACT:

1. Withdraw and destroy all copies of the July 8, 1997, Carole Creekmore letter entitled "Expectations Statement for Westminster CRC Unit."

2. Within ten (10) workdays of service or a final decision in this matter, post at all CRC units in the state where notices are customarily placed for employees, copies of the notice attached hereto as an Appendix. The notice must be signed by an authorized agent of DMV, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the Sacramento Regional Director of the Public Employment Relations Board in accordance with his instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the charging party herein.

It is further Ordered that all other aspects of the charge and complaint 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 Decision. In accordance with PERB regulations, the 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 Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5 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 Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 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 Regs., tit. 8, secs. 32300, 32305 and 32140.)

ALLEN R. LINK
Administrative Law Judge