STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA UNION OF SAFETY EMPLOYEES,	)	
Charging Party,	)	Case No. SA-CE-1038-S
v.	)	PERB Decision No. 1296-S
STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION),	)	October 22, 1998
Respondent.	)	

Appearances; James P. Whalen, Attorney, for California Union of Safety Employees; Christopher E. Thomas, Legal Counsel, for State of California (Department of Personnel Administration).

Before Caffrey, Chairman; Dyer and Jackson, Members.

DECISION

JACKSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the State of California (Department of Personnel Administration) (State) to a PERB administrative law judge's (ALJ) proposed decision (attached). The ALJ found that the State violated section 3519(a), (b) and (c) of the Ralph C. Dills Act (Dills Act)[1] when

[1]The Dills Act is codified at Government Code section 3512 et seq. Section 3519 provides, 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 employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

it unilaterally rescinded its past practice of providing increases in travel and mileage reimbursement to unit 7 members when it provided such increases to non-represented employees.

The Board has reviewed the entire record in this case, including the unfair practice charge, the ALJ's proposed decision, the State's appeal and California Union of Safety Employees' (CAUSE) response. The Board finds the ALJ's proposed decision to be free from prejudicial error and adopts it as the decision of the Board itself, consistent with the following discussion.

DISCUSSION

The parties dispute whether the "parity clause" at section 12.1(n)[2] of the memorandum of understanding (MOU) between them survived the expiration of the MOU. The State argues that the language of section 12.1(n) limits it to the "duration of the agreement," and thus, the obligation to pay CAUSE'S represented employees expired with the agreement.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and confer in good faith with a recognized employee organization.

[2]Section 12.1(n) of the MOU reads:

> During the term of this agreement, the State agrees to apply any future changes in the method of payment and increases to business and travel expenses to Unit employees at the same time the changes are effective for excluded employees.

CAUSE argues that the obligation of section 12.1(n) lives beyond expiration of the agreement and thus, the State's failure to apply the increase in travel reimbursement to unit 7 employees at the same time as it was given to excluded employees constitutes an unlawful unilateral change.

The decision of the Court of Appeal in California State Employees Association v. Public Employment Relations Bd. (1996) 51 Cal.App.4th 923 [59 Cal.Rptr. 2d 488], leads to the conclusion that the State committed an unlawful unilateral change in this case. The court held that an employer may only make a unilateral change upon expiration of a contract when there is intentional waiver of the union's right to bargain over the subject of the change. (Id.) The court held that "for the duration of this agreement" language within a specific contractual provision was insufficient to constitute such a waiver as a matter of law. (Id,)

Other than pointing to the duration language, the State was unable to show that CAUSE somehow waived its right to bargain over the subject of travel reimbursement rates. Therefore, the State's change in the past practice embodied in the terms of MOU section 12.1(n) was unlawful. Upon this basis, we adopt the proposed decision of the ALJ as the decision of the Board itself.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the State of California (Department of Personnel Administration) (State)

violated section 3519(a), (b) and (c) of the Ralph C. Dills Act (Dills Act). The State violated the Dills Act when it unilaterally rescinded a contractually established practice requiring the State to provide increases in business and travel expenses to members of unit 7 at the same time as they were provided to excluded employees. By rescinding the practice without first meeting and conferring with the California Union of Safety Employees (CAUSE), the State failed to meet and confer in good faith. Because this action had the additional effect of interfering with the right of CAUSE to represent its members, the failure to meet and confer in good faith also violated section 3519(b). Because the action had the further effect of denying unit 7 members travel rate reimbursement increases to which they were entitled, the State's action violated section 3519(a).

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

A. CEASE AND DESIST FROM:

1. Unilaterally rescinding the contractually established practice that required the State to provide members of unit 7 with all increases in travel and mileage reimbursement rates given to excluded employees;

2. Interfering with the right of CAUSE to represent its members; and

3. By the same conduct, interfering with the right of members of unit 7 to participate in the activities of an employee organization.

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

1. Effective immediately upon service of a final decision in this matter, reinstate the contractually established practice of increases in business and travel expenses to unit 7 members at the same time as they are provided to excluded employees.

2. Within thirty (30) days following the date that this decision is no longer subject to appeal, make whole any unit 7 member who incurred financial loss as a result of the unilateral rescission of the contractually established practice requiring parity for business and travel expense reimbursement, including mileage. This reimbursement shall be augmented by interest at the rate of seven (7) percent per year.

3. Within ten (10) days following date no longer subject to appeal, post at all work locations where notices to members of unit 7 customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the State, indicating that the State 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 ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional

Director of the Public Employment Relations Board in accord with the director's instructions.

Chairman Caffrey and Member Dyer 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. SA-CE-1038-S, California Union of Safety Employees v. State of California (Department of Personnel Administration), in which all parties had the right to participate, it has been found that the State of California (Department of Personnel Administration) (State) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519(a), (b) and (c). The State violated the Dills Act when it unilaterally rescinded a contractually established practice requiring the State to provide increases in business and travel expenses to members of unit 7 at the same time as they were provided to excluded employees. By rescinding the practice without first meeting and conferring with the California Union of Safety Employees (CAUSE), the State failed to meet and confer in good faith. Because this action had the additional effect of interfering with the right of CAUSE to represent its members, the failure to meet and confer in good faith also violated section 3519(b). Because the action had the further effect of denying unit 7 members travel rate reimbursement increases to which they were entitled, the State's action violated section 3519(a).

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

A. CEASE AND DESIST FROM:

1. Unilaterally rescinding the contractually established practice that required the State to provide to members of unit 7 with all increases in travel and mileage reimbursement rates given to excluded employees;

2. Interfering with the right of CAUSE to represent its members; and

3. By the same conduct, interfering with the right of members of unit 7 to participate in the activities of an employee organization.

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

1. Effective immediately upon service of a final decision in this matter, reinstate the contractually established practice of increases in business and travel expenses to unit 7 members at the same time as they are provided to excluded employees.

2. Within thirty (30) days following the date that this decision is no longer subject to appeal, make whole any unit

7 member who incurred financial loss as a result of the unilateral rescission of the contractually established practice requiring parity for business and travel expense reimbursement, including mileage. This reimbursement shall be augmented by interest at the rate of seven (7) percent per year.

Dated: _____

STATE OF CALIFORNIA
(DEPARTMENT OF PERSONNEL ADMINISTRATION)

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 BY ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA UNION OF SAFETY EMPLOYEES, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Respondent.	)	Unfair Practice Case No. SA-CE-1038-S PROPOSED DECISION (5/21/98)

Appearances: James P. Whalen, Legal Counsel, for California Union of Safety Employees; Christopher E. Thomas, Legal Counsel, for State of California (Department of Personnel Administration).

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, an exclusive representative challenges the refusal of the State of California (State) to increase travel reimbursement rates for unit members at the same time that the State increased rates for non-represented employees. The exclusive representative contends that the State was so obligated through a past practice established by an expired memorandum of understanding (MOU). The State replies that the obligation to pass on such increases to unit members existed for the duration of the MOU, only. Since the MOU no longer is in force, the State continues, the obligation to raise travel reimbursement rates no longer exists.

The California Union of Safety Employees (CAUSE) commenced this action on October 21, 1997, by filing an unfair practice charge against the State. The Office of the General Counsel of

the Public Employment Relations Board (PERB or Board) followed on November 7, 1997, with a complaint against the State. The State answered the complaint on November 24, 1997.

The complaint alleges that prior to July 1, 1997, it was the policy of the State that travel reimbursement rates for employees in bargaining unit 7 were the same as those of excluded employees. This policy, the complaint alleges, was fixed by section 12.1(n) of the expired MOU. On or about July 1, 1997, the complaint continues, the State changed the policy by failing to reimburse unit 7 members for meals and travel expenses at the new rate which excluded employees received. This action, the complaint alleges, was taken without prior notice to CAUSE and without having afforded CAUSE the opportunity to meet and confer over the decision and/or its effects. By making this change, the complaint alleges, the State violated Ralph C. Dills Act (Dills Act) section 3519(c) and, derivatively, (a) and (b).[1]

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[1]Unless otherwise indicated, all statutory references are to the Government Code. The Dills Act is codified at section 3512 et seq. In relevant part, section 3519 provides as follows:

> 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. 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.

The State filed an answer to the complaint on November 24, 1997, admitting that it was an employer and that CAUSE was a recognized organization but denying all other allegations. The answer also set out various affirmative defenses that will be dealt with herein as necessary. A hearing was conducted in Sacramento on March 17-18, 1998. With the filing of briefs, the case was submitted for decision on May 11, 1998.

FINDINGS OF FACT

The respondent Department of Personnel Administration (DPA) is the representative of the Governor for the purposes of meeting and conferring. The department is the State employer within the meaning of section 3513(j) of the Dills Act. CAUSE is a recognized employee organization within the meaning of section 3513(b) and is the exclusive representative of State employee bargaining unit 7, protective services and public safety.

The collective bargaining agreement covering unit 7 expired on June 30, 1995. Although the parties have been in negotiations continuously since that date, they had not entered a successor agreement as of the completion of the hearing in the present case. All events at issue occurred after the expiration of the agreement.

Effective July 1, 1997, the State increased the rate of travel reimbursement for all employees excluded from collective

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(c) Refuse or fail to meet and confer in good faith with a recognized employee organization.

bargaining and for employees in bargaining unit 5.[2] Under the new schedule, the travel reimbursement rates increased as follows:[3] from $5.50 to $6.00 for breakfast, from $9.50 to $10.00 for lunch, from $17.00 to $18.00 for dinner and from $5.00 to $6.00 for incidentals. The mileage reimbursement rate for use of a personal vehicle increased from 24 cents per mile to 31 cents per mile.

The travel reimbursement schedule and rules put into effect on July 1, 1997, also eliminated reimbursement for "noncommercial" lodging. This is lodging which traveling employees receive from relatives or friends or take in a second residence. Formerly, employees were entitled to a reimbursement of $23 or $24 per day for "noncommercial" lodging.

The changes in travel reimbursement rates were set out in a memorandum issued July 1, 1997, by Rick McWilliam, chief of

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[2]State employee bargaining unit 5 is composed of officers of the California Highway Patrol (CHP). Article 54 of the expired memorandum between the State and the California Association of Highway Patrolmen (CAHP) reads as follows:

> DPA [Department of Personnel Administration] and CAHP agree that unless otherwise specifically covered by this Agreement, the business, travel, and relocation expenses and reimbursements for Unit 5 employees shall be the same as excluded employees.

State witnesses testified that this clause created a practice which extended beyond the expiration of the MOU.

[3]The new reimbursement rates for excluded employees are set out in charging party exhibit 2. The rates for unit members are set out in joint exhibit 1, section 12.1(a) and section 12.1(i) (1). Prior to July 1, 1997, the rates paid to excluded employees for short-term travel and mileage reimbursement were the same as those set out for unit members in joint exhibit 1.

labor relations, at DPA. State negotiators brought a copy of Mr. McWilliam's memo to the July 31 negotiating session with CAUSE. State negotiators offered the increased reimbursement rates contained in the McWilliam memo as a negotiating proposal to CAUSE. However, CAUSE negotiators replied with an assertion that unit 7 members were entitled to the rate increase, immediately. The CAUSE negotiators based this assertion on section 12.1(n) of the expired MOU. Section 12.1(n), a "me too" or parity clause for travel reimbursement, reads as follows:

> During the term of this agreement, the State agrees to apply any future changes in the method of payment and increases to business and travel expenses to Unit employees at the same time the changes are effective for excluded employees.

The State rejected the contention that section 12.1(n) required the immediate payment of increased travel reimbursement rates to members of unit 7. State negotiators asserted that the section applied only "during the term" of the agreement. Since the MOU had expired, the State negotiators asserted, so had the obligation to pay unit members the increased reimbursement rates provided to excluded employees.

The first unit 7 MOU to contain a me too clause for travel reimbursement rates was the 1988-91 agreement. The relevant provision of that MOU, section 12.1 (j), reads as follows:

> During the Fiscal Years 89/90 and 90/91, the State agrees to give Unit 7 employees the same future business and travel expense increases at the same time the State provides them to excluded employees.

There is no evidence about which party proposed the language or about any discussion which took place concerning it.

The negotiations history is more complete for the round of bargaining that commenced in 1991. The State's opening proposal in 1991 contained no me too provision for travel reimbursement. CAUSE proposed continuation of the prior clause modified only so as to be applicable in the "Fiscal Years 91/92 and 92/93." On May 15, 1992, the State's chief negotiator for unit 7, Michael Navarro, proposed the language that became section 12.1(n). The parties signed a tentative agreement on that language on May 22.

Mr. Navarro testified that he proposed the language that changed the limitation from two specific fiscal years to the phrase "during the term of this agreement" as "a matter of style." He said he did not consider the revision in wording to have changed the meaning because, either way, the clause would not be applicable after the expiration of the MOU. He said it was his intent that "[w]ith respect to this provision, all bets are off" after the expiration of the MOU. "If any changes were made to the managerial rates at that point in time then they wouldn't necessarily be passed on to Unit 7."

Mr. Navarro testified that he could not recall any discussion in negotiations about the meaning of the phrase "during the term of this agreement." The two principal CAUSE negotiators, attorney Gary Messing and Chief Legal Counsel Sam McCall, also testified that they could recall no discussion about the meaning of the phrase.

As noted, the MOU for unit 7, and all other State-union contracts, expired on June 30, 1995. On June 27, 1995, David Tirapelle, director of DPA, sent a memo to certain State managers regarding the effect of the expiration of the contracts. The memo sets out the general principle that terms and conditions of employment for State employees would continue unchanged. The memo also identifies certain aspects of the relationship between the State and the various unions which would be different.

Regarding the continuation of wages, benefits and working conditions, the memo states the following policy:

> The salaries, benefits, and other terms and conditions of employment of represented employees in bargaining units with expired contracts will remain unchanged so long as negotiations continue, except for the following changes. There may be additional departmental policies or contract provisions which are time limiting that may require action. These will be reviewed on an individual basis. . . .

The memo continues by listing eight specific changes in the relationship between the State and the unions. These changes can be summarized as follows:

(1) Employees would no longer be subject to fair share (agency fee) deductions or voluntary fee payer deductions in the one unit that had voluntary deductions;

(2) Maintenance of membership provisions would no longer be applicable and employees could withdraw from union membership at any time by notifying the State Controller and their union;

(3) Union requests for arbitration filed after the expiration of the contracts would be reviewed on a case-by-case basis;

(4) Union-represented employees in classifications subject to the Fair Labor Standards Act would have to be compensated in cash for all overtime worked and use of compensating time off would no longer be permitted;

(5) Union-represented employees would no longer be entitled to use union leave except where agreed to in negotiations ground rules;

(6) All union time banks consisting of State-donated time would be terminated and employees currently using such leave time must return to work;

(7) All union time banks consisting of employee-donated time could not be used and all represented employees using such leave time must return to work;

(8) The entire agreement clauses of all expired collective bargaining contracts are superseded by section 3516.5. This means that any department proposing to change a work rule or policy within the scope of representation must obtain a delegation of authority from DPA to notify exclusive representatives and meet and confer with them.

The Tirapelle memo drew a prompt, negative reaction from CAUSE. The union filed an unfair practice charge challenging portions of the memo. In particular, union leaders were concerned about the changed conditions regarding union leave and

released time. These concerns soon led to a round of negotiations to establish conditions that would be in effect while the parties negotiated over a successor MOU.

On October 30, 1995, the parties entered the first of three, one-year interim agreements. The most recent of these agreements extends through September 30, 1998, unless earlier superseded by a successor to the MOU that expired in 1995. The interim agreements, which are virtually identical, reinstate from the expired MOU certain provisions concerning released time. The agreements also set out conditions under which three named CAUSE officers will receive full released time. The interim agreements provide for the continuation of certain specifically identified side letter agreements which the parties had entered under the expired MOU. CAUSE promises under the interim agreements not to pursue certain unfair practice charges which it earlier had filed with the PERB.

At the insistence of DPA, the interim agreements make reference to the Tirapelle memo in the following language:

> CAUSE understands that it is the STATE'S position that the June 27, 1995, memo from David J. Tirapelle (See Attachment C) remains in effect except as modified by this agreement. CAUSE reserves the right to seek any remedies available with respect to the legal effect of the memo.

Except for the unfair practice charges CAUSE agreed not to pursue, CAUSE has not attempted to seek any remedies regarding the Tirapelle memo. I find that the reference to the Tirapelle memo incorporated the terms of that document into the interim

agreements. I conclude that the CAUSE reservation of the right to seek remedies was face-saving language and amounts to little more than a grumbling acceptance of the other conditions proclaimed by Mr. Tirapelle.

There was no occasion during the life of the 1988-91 or 1992-95 MOUs that excluded employees received travel reimbursement rate increases different from unit 7 employees. Similarly, excluded employees received no increases in travel reimbursement rates during the one-year period between expiration of the 1988-91 MOU and the signing of the 1992-95 MOU.

On January 1, 1996, however, excluded employees did receive small adjustments in two categories of travel reimbursement that were not passed on to members of unit 7. On that date, the daily travel reimbursement rates for non-commercial lodging and for long-term lodging were both increased by $1 for excluded employees.

State negotiators on September 18, 1995, provided CAUSE with a draft proposal describing these revisions in travel reimbursement rules for excluded employees. Terrie Jordan, the DPA manager in charge of travel reimbursement, explained the proposed changes to the CAUSE team. She also offered the modifications as a negotiating proposal for unit 7. There is no evidence of any further discussion about the issue. The document given to CAUSE was entitled, "1995 Proposed Travel Rule Revisions - Summary." The document sets out no specific date for implementation of the proposed revision. A final version of the

document, which contains an implementation date, was completed in December of 1995 and filed with the Secretary of State.

Mr. McCall testified that at a negotiating session CAUSE did receive a copy of the proposed rules affecting travel for excluded employees. He said the State negotiators described the document as "a proposal." He said CAUSE was never notified that the change was put into effect and he was unaware of the implementation of the change.

The phrase "during the term of this agreement" appears in several clauses of the expired MOU in addition to the section at issue. Section 2.10 provides, "during the term of this Agreement," for the use by CAUSE representatives of up to 2,200 hours of released time to attend CAUSE organizational matters. Mr. McCall testified that this section did not live on because CAUSE representatives had used up the 2,200 hours prior to the expiration of the MOU.

Section 9.6 of the expired MOU set out the rules regarding union leaves of absence "during the term of this agreement." The Tirapelle memorandum explicitly identified contract provisions pertaining to union leaves as provisions that would not continue after expiration of the MOUs. However, the interim agreements reinstate section 9.6 for three named employees which, according to Mr. McCall, effectively reinstated the provision.

Section 12.10(a)(1) of the expired MOU provides that "[d]uring the term of this contract" the State may impose a rent of up to $75 per month to employees previously living rent-free

in State housing. The provision also permits the State to raise rents to fair market value when employees vacate State housing. The parties are in dispute about whether the State has the authority to raise rents since expiration of the MOU. Mr. McCall expressed the belief that the State continued to have such authority. Mr. Navarro, the State's chief negotiator for unit 7, testified that in his view the State no longer has such authority.

Section 5.1 provides that "[d]uring the term of this [c]ontract" CAUSE will not "authorize, institute, aid, condone or engage in a work slowdown, work stoppage, strike" or other job action. Mr. McCall testified that, like the others, this provision also survives the expiration of the MOU as a practice. He testified that in 1997, some unit 7 employees working for the CHP disclosed plans for a job action against the CHP. He said CHP managers became aware of the planned job action. They contacted Mr. McCall and, citing section 5.1, told him of their belief the action would be illegal and asked for his assistance to stop the employee action. Mr. McCall testified that he agreed with the CHP view that the action was prohibited by the expired MOU and succeeded in getting the employees to call it off.

Finally, section 20.1, the "Entire Agreement" provision of the expired MOU, contains a waiver of the right to bargain over matters covered in the MOU "for the duration of the Contract." Section 20.1 also provides that "during the term of this

Contract" the State may make changes in negotiable matters not covered by the MOU subject only to the right of CAUSE to bargain about the "impact of such changes on the employees in Unit 7." Mr. Navarro testified that the entire agreement section expired with the MOU, a position also set out in the Tirapelle memo of June 27, 1995.

The MOU contains a "Duration" clause which, at section 20.2, provides as follows:

> The terms of this agreement shall go into effect July 1, 1992, and shall remain in full force and effect through June 30, 1995.

LEGAL ISSUE

1. Should the underlying unfair practice charge be dismissed as untimely filed?

2. If not, did the State make a unilateral change in a negotiable practice when it refused to pass on to unit 7 members increases in travel expense reimbursement rates provided to excluded employees?

CONCLUSIONS OF LAW

Timeliness

The State argues that the charge must be dismissed because it is untimely. It is the State's contention that if its refusal to honor the parity clause was a change in policy, CAUSE was notified about the change at a negotiating session on September 18, 1995. During that negotiating session, the State advised CAUSE about an impending increase in reimbursement rates

for excluded employees.[4] The State then offered the same increases to unit members as part of a contract settlement.

According to the State's reasoning, CAUSE was put on notice of its refusal to honor the parity clause by the negotiating proposal. By offering the increases as a negotiating proposal, the State argues, it clearly informed CAUSE that unit members would not receive the increases automatically. Thus, CAUSE was on notice of the State's position regarding the status of the parity clause and the statutory period of limitations commenced to run on September 18, 1995. Since the unfair practice charge was not filed until more than two years later, on October 21, 1997, the State asserts that the charge was untimely and must be dismissed.

Moreover, the State continues, CAUSE received constructive notice through the promulgation of administrative regulations that the change actually went into effect on January 1, 1996. The State notes that the regulations were filed with the Secretary of State and published. Therefore, the State reasons, CAUSE had constructive knowledge on or about January 1, 1996, that the change already had been made. CAUSE cannot avoid notice, the State argues, "by failing to review a State regulation it knows might have an impact on collective bargaining rights."

[4]These changes were the $1 per day increase in the reimbursement rates for non-commercial lodging and for long-term lodging.

The PERB is precluded under section 3514.5(a) from issuing a complaint based on conduct that occurred more than six months prior to the filing of the charge.[5] The Board has held that the six-month time period is jurisdictional. (California State University (San Diego) (1989) PERB Decision No. 718-H.) Timeliness cannot be waived either by the parties or the Board itself and need not be plead affirmatively. It is the charging party's burden to show timeliness as part of its prima facie case. (Regents of the University of California (1990) PERB Decision No. 826-H.)

The limitations period "begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to [engage in the prohibited conduct], providing that nothing subsequent to that date evinces a wavering of that intent." (Regents of the University of California, supra, PERB Decision No. 826-H.) Notice of a proposed change must be given to an official of an employee organization who has the authority to act on behalf of the organization, and the notice must clearly inform the recipient of the proposed change. (Victor Valley Union High School District (1986) PERB Decision No. 565; see also State of California (Board of Equalization) (1997) PERB Decision No. 1235-S.) The six-month period is to be

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[5]Section 3514.5(a) provides that the Board:

> . . . shall not . . . (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; . . .

computed by excluding the day the alleged misconduct took place and including the last day, unless the last day is a holiday, and then it also is excluded. (Saddleback Valley Unified School District (1985) PERB Decision No. 558.)

Although the State contends that CAUSE was on notice in September of 1995 about impending changes that would affect excluded employees, I do not find support for this assertion. I find the citations to the record set out in the State's brief to be far more equivocal than the State's characterization of them. The document given to CAUSE negotiators on September 18, 1995, was entitled "1995 Proposed Travel Rule Revisions - Summary."[6] At no place does the document explicitly state that the rules would go into effect on January 1, 1996. At no place in the testimony of Ms. Jordan, cited by the State, is there an explicit statement by her that she told CAUSE negotiators that the "proposed" rules would go into effect on January 1, 1996.

I conclude, therefore, that Ms. Jordan's testimony does not rebut the testimony of Mr. McCall that he was never told that the "1995 Proposed Travel Rule Revisions" were anything but a proposal. Nothing in the record establishes that Mr. McCall was given clear notice of a firm decision, effective January 1, 1996,

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[6]At the meeting of September 18, 1995, CAUSE was given respondent exhibit I. Respondent exhibit K, the document that sets out the proposed effective date of January 1, 1996, was prepared in December of 1995. (See testimony of Ms. Jordan, Reporter's Transcript, Vol. II, p. 65.) This was more than two months after Ms. Jordan's meeting with CAUSE. There is no evidence to establish that CAUSE was ever given respondent exhibit K.

of the State's intent to increase the long-term and noncommercial rates for excluded employees. I do not find it unreasonable that Mr. McCall considered the document a proposal and not notice of a certain change. I conclude that CAUSE was given no actual notice in 1995 of the State's decision not to continue application of the parity clause after expiration of the MOU.

I likewise find no constructive notice in the State's filing of rule changes with the Office of the Secretary of State and subsequent publication by that office. The State acknowledges that there are no PERB cases which charge a party with constructive knowledge through the adoption of a regulation. A union cannot be charged with responsibility to monitor all regulations adopted by the State in order to discover possible rule changes. It is an employer's obligation to provide notice of any negotiable change to an official of the employee organization who has authority to act on behalf of the organization. (Victor Valley Union High School District, supra, PERB Decision No. 565.) The State attempts here to switch the burden so that a union would have to engage in continuous monitoring of regulatory filings to ensure that it did not miss a filing deadline. This would be an unreasonable burden, not required by the Dills Act.

Finally, I would note that the proposed rules presented to CAUSE in September of 1995 affected very minor changes in travel reimbursement rates. They pertained only to the rates for long-term travel and noncommercial lodging. These proposed

changes were not of the type that necessarily would put CAUSE on notice that the State was repudiating all obligation to provide parity to unit members for changes in daily travel reimbursement rates and mileage granted to excluded employees.

CAUSE learned on July 31, 1997, that the State would not be giving unit members increases in travel reimbursement rates that it had given to excluded employees effective July 1, 1997. CAUSE filed the present charge on October 21, 1997, well within the six months filing period set out in section 3514.5(a). Accordingly, I conclude that the unfair practice charge was timely filed.

Alleged Unilateral Change

If an employer makes a pre-impasse unilateral change in an established, negotiable practice that employer violates its duty to meet and negotiate in good faith. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) Such unilateral changes are inherently destructive of employee rights and are a failure per se of the duty to negotiate in good faith. (Davis Unified School District, et al. (1980) PERB Decision No. 116; State of California (Department of Transportation) (1983) PERB Decision No. 361-S.)

To prevail on a complaint of unilateral change, the exclusive representative must establish by a preponderance of the evidence that (1) the employer breached or altered the parties' written agreement or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the

change was not merely an isolated breach of the contract, but amounts to a change of policy (i.e., has a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members); and (4) the change in policy concerns a matter within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant); State of California (Department of Forestry and Fire Protection) (1993) PERB Decision No. 999-S.)

Here, CAUSE argues, the State made a unilateral change when "DPA arbitrarily decided to increase per diem and travel reimbursement to excluded employees but not for employees in Unit 7." The State made the change, CAUSE continues, without notice to CAUSE. The change had a generalized effect on members of the unit, CAUSE asserts, and it affected a negotiable matter, pay. It is clear in the testimony of all witnesses, CAUSE contends, that section 12.1(n) continued in effect after the expiration of the MOU. This is true because of the interaction of the Tirapelle memo, the expired MOU and the three successive one-year interim agreements. Because section 12.1(n) was not identified in the Tirapelle memo as a working condition that would cease, CAUSE argues, it was effectively continued by the interim agreements. "Common sense dictates that both DPA and CAUSE had intended to continue this Article," CAUSE asserts.

Finally, CAUSE argues, the Court of Appeal resolved the question of whether the phrase "during the term of this agreement" constitutes a waiver of the right to bargain in

California State Employees' Association, CSU Division, SEIU Local 1000, AFL-CIO v. Public Employment Relations Board (1996) 51 Cal.App.4th 923 [59 Cal.Rptr.2d 488] (CSEA). CAUSE notes that in CSEA, the court concluded that a similar phrase, "duration of this agreement," was too vague to constitute a waiver of a union's right to bargain. In the absence of a waiver, CAUSE concludes, it had the right to bargain before the State refused to pass on to unit members the travel rate increases given to excluded employees.

The State characterizes as a "strained interpretation" the CAUSE view that the interim agreements can be read to extend the travel pay parity clause beyond expiration of the MOU. Describing the agreements as "side letters," the State argues that nothing in the text of the side letters even refers to section 12.1(n) much less extends the provision. The plain language of the document contradicts CAUSE'S assertions, the State argues.

There was no unilateral change, the State continues, because the policy on parity in travel reimbursement rates expired with the MOU. There was no practice of parity in travel pay that existed outside the MOU, the State asserts, and when the contract expired the State had no obligation to grant parity. The State argues that CSEA bears nothing but a superficial similarity to the present case. Unlike the present case, the State contends, the employer in CSEA had a long history of providing merit salary increases to employees. In the year the employer denied the

increases, the State reasons, the employer clearly changed what had been done before. Moreover, the State continues, there was an extensive negotiating history that demonstrated an attempt by the union to ensure that unit members would receive merit pay increases. Here, the State asserts, the negotiating history in no manner demonstrates an effort by CAUSE to ensure travel pay parity after expiration of the MOU.

CAUSE asserts, and the State does not dispute, that travel reimbursement rates for food and lodging, and mileage for personal automobile use are negotiable matters under section 3516.[7] Travel and mileage reimbursement rates are related to the enumerated subject of wages and are subjects well-suited to the mediatory influence of negotiations for resolution of disputes. There is no evidence that obliging the State to negotiate about travel reimbursement rates and mileage would significantly abridge the State's ability to exercise its functions. I conclude, therefore, that travel reimbursement and mileage rates are negotiable subjects under section 3516.[8]

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[7]Section 3516 provides that under the Dills Act:

> The scope of representation shall be limited to wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

[8]The test for determining whether a matter is within the scope of representation is set out in Anaheim Union High School District (1981) PERB Decision No. 177. (See also, Compton Community College District (1990) PERB Decision No. 790; State of California (Department of Personnel Administration) (1991) PERB

It is undisputed that the State did not negotiate with CAUSE about its decision not to pass on to unit 7 members the increased travel and mileage reimbursement rates it granted to excluded employees. It also is clear that the decision not to pass on the increased rates affects all members of the bargaining unit and will have a continuing impact, meeting both of the alternative Grant tests. The issue presented by this case is whether the State's action constituted a change in the past practice.

The record reveals no instance where unit 7 members ever have been given an increase in travel and mileage reimbursement rates in order to maintain parity with excluded employees. If such a practice exists, therefore, it is to be found not in past conduct but in section 12.1(n) of the expired MOU. Section 12.1(n) obligates the State to maintain travel reimbursement rate parity for unit members with excluded employees "during the term of this agreement."

The "duration" language must be considered in the context of the three successive one-year interim agreements and the June 27, 1995, Tirapelle memo which they incorporate. Together with the expired MOU, the interim agreements and the Tirapelle memo fix the working conditions during bargaining. The Tirapelle memo identified which working conditions would continue and which would cease after expiration of the MOU. The memo states that except for certain specifically listed conditions, the "salaries, benefits, and other terms and conditions of employment of

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Decision No. 900-S.)

represented employees in bargaining units with expired contracts will remain unchanged so long as negotiations continue."

The interim agreements reinstate for unit 7 certain conditions specifically rescinded in the Tirapelle memo while incorporating other terms of the memo. The effect of the interim agreements, therefore, is to continue working conditions set out in the MOU, except as modified by the Tirapelle memo and further modified by the specific provisions of the interim agreements. The Tirapelle memo does not identify travel reimbursement parity as a term and condition of employment that will cease upon expiration of the MOU. Neither do the interim agreements.

I conclude, therefore, that when read together with the Tirapelle memo, the interim agreements continue the parity clause after the expiration of the MOU. This finding, alone, is sufficient for me to conclude that the State failed to negotiate in good faith when it refused to pass onto unit members the travel reimbursement increases granted to excluded employees.

I reach the same result when following the analytical method employed by the Court of Appeal in CSEA. There, the court analyzed the question of whether the phrase, "for the duration of this Agreement," constituted a waiver of a union's right to bargain about a university employer's rescission of merit salary increases after expiration of the MOU.

The court noted that "a collective bargaining agreement is not an ordinary contract. An employer may not change terms or conditions of employment after expiration of such an agreement

until it affords the union an opportunity to bargain over those changes." (CSEA at 936.) Under PERB precedent, the court continued, an employer may make a unilateral change upon contract expiration only when the union has expressly waived its right to negotiate the subject of the change. "However," the court wrote, "a waiver will only be found when there is an intentional relinquishment of the particular right under review, and then only if it is expressed in 'clear and unmistakable' terms in the parties' contract." (Id. at 937.)

The court concluded that the addition of the phrase "for the duration of this Agreement" to the provision on merit salary adjustments was "too general and vague" for a finding that "the parties agreed MSA's would be singled out for termination at the contract termination date." (Id. at 938.) Continuing, the court wrote:

> All the terms of the contract were subject to the same 'duration of this Agreement' clause in the article on 'Duration and Implementation.' The mere repetition of the phrase 'duration of this Agreement' in the provision regarding MSA's added nothing to the content or meaning of the phrase. . . . (Id. at 938.)

Concluding that the phrase "for the duration of this Agreement" did not constitute a clear and unmistakable waiver, the court examined other conduct for signs of a waiver. Finding none, the court concluded that the university's refusal to pay the MSAs was an unlawful unilateral change and reversed the PERB.

As noted by the court, the requirement that any waiver of a union's right to bargain be "clear and unmistakable" is well

established in PERB decisions. A waiver of an exclusive representative's right to bargain will not be lightly inferred. (Oakland Unified School District (1982) PERB Decision No. 236.) For an employer to show that an exclusive representative has waived its right to negotiate, the employer must produce evidence of either "clear and unmistakable" language (Amador Valley Joint Union High School District (1978) PERB Decision No. 74) or demonstrative behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer. (San Mateo County Community College District (1979) PERB Decision No. 94.)

A waiver can be shown by contractual terms, by negotiating history or by inaction on the part of the exclusive representative. (Los Angeles Community College District (1982) PERB Decision No. 252.) By whichever method, however, the evidence must indicate an intentional relinquishment of the union's right to bargain. (San Francisco Community College District (1979) PERB Decision No. 105.) "Contract terms will not justify a unilateral management act on a mandatory subject unless the contract expressly or by necessary implication confers such a right." (Los Angeles Community College District, supra, PERB Decision No. 252.)

The critical phrase here, "during the term of this agreement," first appeared in the 1992-95 MOU. The language was proposed by the State. Under the prior agreement, the travel reimbursement parity clause was limited to two specific fiscal

years, 1989-90 and 1990-91. The revision changed the specific limitation from two fiscal years to a more general limitation to the "term of this agreement." Mr. Navarro, the State negotiator who proposed the change, testified that he wrote the revision for stylistic reasons. Both parties acknowledge that the effect of the change in language was not discussed at the negotiating table.

The expired agreement in the present case, as in CSEA, contained a "duration" clause that set out the specific period for which the contract was to be in effect. The expired agreement in the present case, as in CSEA, added the phrase "for the duration of this Agreement" to a contract provision pertaining to a term and condition of employment. Following the rationale of the court in CSEA, I conclude that the mere repetition of the phrase "for the duration of this Agreement" added nothing to the content or meaning of the parity clause on travel reimbursement rates.

Moreover, despite Mr. Navarro's professed intent, I believe that the 1992 contractual language change had more than a stylistic effect. A very specific contractual limitation to two fiscal years was replaced by language that was more general and vague. The change from the two-year limitation to the "duration" language introduced ambiguity into the travel reimbursement parity clause.

The ambiguity is reflected in Mr. Navarro's testimony about the effect of the "duration" language. The effect of the

language, he testified, was that "all bets are off" after the expiration of the MOU and changes in travel reimbursement for excluded employees "wouldn't necessarily be passed on to Unit 7." "Wouldn't necessarily" is not a description of language that constitutes a clear and unambiguous waiver. I conclude that CAUSE has not waived by contract language its right to bargain over the State's decision not to grant travel reimbursement parity to employees in unit 7.

Neither can I find waiver in the interim agreements through their incorporation of the Tirapelle memo. The Tirapelle memo does state that there "may" be some contract provisions which "may" be set aside at some future time in addition to those that are specifically identified. The State would find waiver in the incorporation of this warning in the interim agreements.

What the Tirapelle memo states, specifically, is that in the expired MOUs " [t]here may be additional departmental policies or contract provisions which are time limiting that may require action." (Emphasis supplied.) The memo does not identify which provisions are "time limiting" and its use of the conditional word "may" does not constitute clear and explicit notice of intent to rescind the travel reimbursement parity clause. I cannot find a clear and explicit waiver of CAUSE'S right to bargain in the incorporation into the interim agreements of the Tirapelle memo's vague warning about "additional . . . contract provisions . . . that may require action."

Nor do I find waiver by conduct. The State places much significance in the failure of CAUSE to protest in January of 1996 when unit 7 members did not receive two minor adjustments in travel rates given to excluded employees. By failing to protest that action, the State asserts, CAUSE waived its right to contest the present change.

The rate increases given to excluded employees in January of 1996 were $1 per day in the travel reimbursement rates for non-commercial lodging and for long-term lodging. State negotiators on September 18, 1995, presented CAUSE negotiators with a proposal for travel rate changes affecting excluded employees. The document given to CAUSE identified the changes as "proposed" and did not identify an implementation date. Mr. McCall testified that he was never informed that the changes went into effect the following January. The State presented no contradictory evidence showing that CAUSE was informed that the "proposed" changes actually went into effect.

If an employer does not provide adequate notice of an impending change, a union's failure to request bargaining is not a waiver.[9] The sum of the union's knowledge about the 1996 change was that the State was considering a modification in two minor reimbursement rates for excluded employees. The union was advised of no projected implementation date. Mr. McCall testified that he did not know the change ever was implemented

[9]California Public Sector Labor Relations, Matthew Bender, 1997, at paragraph 10.07[3].

for excluded employees. Since the State provided no evidence that it actually informed CAUSE of the implementation of the 1996 change in travel rates for excluded employees, the State has not met the burden of proof required to demonstrate waiver. Absent notification by the State, there is no reason that the union should have known that the change actually was put into effect. The evidence, thus, is insufficient to establish waiver by inaction.

I would note, finally, that in their briefs the parties engage in a discussion about other clauses in the expired MOU that contain the "term of this agreement" clause. The most significant of these clauses is the entire agreement provision, Article 20.1, which contains a waiver of the right to bargain "for the duration of the Contract." The Tirapelle memo, however, specifically identified the entire agreement clauses of all expiring contracts as provisions no longer in effect. The three one-year interim agreements between CAUSE and the State do not reinstate the entire agreement provision. The entire agreement provision, therefore, is not in effect and does not constitute a waiver of the right of CAUSE to bargain.

It is unnecessary here to consider whether any of the practices set out in the other provisions containing the "duration" language remain in effect.

For these reasons, and based on the record as a whole, I conclude that the State failed to meet and confer in good faith when it refused to grant members of unit 7 the increase in travel

reimbursement rates it granted to excluded employees on July 1, 1997. By this action, the State violated section 3519(c) of the Dills Act. Because the State's action interfered with the right of CAUSE to represent its members, the State also violated section 3519(b). Finally, because the action had the effect of denying unit 7 members travel rate reimbursement increases to which they were entitled, the State's action also violated section 3519(a).

REMEDY

The PERB in section 3514.5 (c) is given:

> . . . the power 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.

The State has been found in violation of its duty to meet and confer in good faith by unilaterally rescinding a contractually established practice requiring parity in travel reimbursement rates. The practice unilaterally rescinded by the State required the State to provide to members of unit 7 all increases in travel reimbursement rates given to excluded employees.

It is appropriate therefore that the State be directed to cease and desist from making unilateral changes and to reinstate the past practice. It also is appropriate that the State be directed to make whole any members of unit 7 who were affected by

the State's failure to increase travel reimbursement rates for unit members.

It also is appropriate that the State be required to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the State, will provide employees with notice that the State has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the Dills Act that employees be informed of the resolution of this controversy and the State's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the State of California (Department of Personnel Administration) (State) violated section 3519(c), (b) and (a) of the Ralph C. Dills Act (Act). The State violated the Act when it unilaterally rescinded a contractually established practice requiring the State to provide to members of unit 7 increases in business and travel expenses at the same time as increases are provided to excluded employees. By rescinding the practice without first meeting and conferring with the California Union of Safety Employees (CAUSE), the State failed to meet and confer in good faith. Because this action had the additional effect of interfering with the right of CAUSE to represent its members, the failure to meet and confer in

good faith also violated section 3519(b). Because the action had the further effect of denying unit 7 members travel rate reimbursement increases to which they were entitled, the State's action violated section 3519(a).

Pursuant to section 3514.5(c) of the Government Code, it hereby is ORDERED that the State and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally rescinding the contractually established practice that required the State to provide to members of unit 7 all increases in travel and mileage reimbursement rates given to excluded employees;

2. By the same conduct, interfering with the right of CAUSE to represent its members;

3. By the same conduct, interfering with the right of members of unit 7 to participate in the activities of an employee organization.

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

1. Effective immediately upon service of a final decision in this matter, reinstate for unit 7 members the contractually established practice requiring the State to provide to members of unit 7 increases in business and travel expenses at the same time as increases are provided to excluded employees.

2. Within thirty (30) workdays of service of a final decision in this matter, make whole any unit 7 member who incurred financial loss as a result of the unilateral rescission of the contractually established practice requiring parity for

business and travel expense reimbursement, including mileage. This reimbursement shall be augmented by interest at the rate of seven (7) percent per year.

3. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to members of unit 7 customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the State, indicating that the State 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 ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the director's instructions.

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.)

Ronald E. Blubaugh
Administrative Law Judge