STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 1000, AFL-CIO,	)	
Charging Party,	)	Case No. SA-CE-947-S
v.	)	PERB Decision No. 1313-S
STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION),	)	January 29, 1999
Respondent.	)	

Appearances: Harry J. Gibbons, Attorney, for California State Employees Association, SEIU Local 1000, AFL-CIO; State of California (Department of Personnel Administration) by Paul M. Starkey, Labor Relations Counsel, for State of California (Department of Personnel Administration).

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California State Employees Association, SEIU Local 1000, AFL-CIO (CSEA) and the State of California (Department of Personnel Administration) (DPA) to a proposed decision (attached) by a PERB administrative law judge (ALJ). In his proposed decision, the ALJ dismissed the unfair practice charge and complaint in which it was alleged that DPA unilaterally changed a policy concerning union leave and interfered with the exercise of protected rights

in violation of section 3519(a), (b) and (c) of the Ralph C. Dills Act (Dills Act).[1]

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript and the filings of the parties. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself in accordance with the following discussion.

DISCUSSION

CSEA's Exceptions

To prevail in a unilateral change case, the charging party must establish that the employer, without providing the exclusive representative with notice or the opportunity to bargain, breached or altered the parties' written agreement or established

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

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

past practice concerning a matter within the scope of representation, and that the change had a generalized effect or continuing impact on the terms and conditions of employment of bargaining unit members. (Pajaro Valley Unified School District (1978) PERB Decision No. 51 at p. 5; Grant Joint Union High School District (1982) PERB Decision No. 196 at p. 9.)

CSEA's exceptions are based primarily on the assertion that the ALJ incorrectly concluded that DPA did not breach the parties' July 1995 agreement regarding union leave. The relevant language of the agreement indicates, in pertinent part, that:

> The Civil Service Division Director and Deputy Civil Service Division officers shall be granted leave. . . .

CSEA argues that this language clearly and explicitly authorizes union leave for one Division Director and multiple Deputy Division officers. Thus, when DPA indicated that only the Division Director and a single Deputy Division officer would be granted union leave, it breached the terms of the agreement in violation of the Dills Act.

In interpreting contractual provisions, it is unnecessary to look beyond the plain language of the contract when that language is clear and unambiguous. (Marysville Joint Unified School District (1983) PERB Decision 314 at p. 9.) When contract language is found to be ambiguous, the Board looks to bargaining history and the past practice of the parties to ascertain the meaning of the language. (Barstow Unified School District (1996) PERB Decision No. 1138 at p. 13.)

The pertinent contract provision in this case is susceptible to differing interpretations. The word "officers" can be read to refer to both the "Civil Service Division Director" and "Deputy Civil Service Division" positions, leading to the conclusion that a total of two people are authorized to receive union leave, as DPA claims. The word "officers" can also be read to refer only to the "Deputy Civil Service Division" positions, leading to the conclusion that the Division Director and at least two Deputy Division officers are authorized to receive union leave, as CSEA asserts. Because both interpretations are plausible, the language cannot be considered to be clear and unambiguous. As a result, the bargaining history and the practice of the parties must be reviewed to ascertain the meaning of the provision.

The ALJ reviewed this history and practice and concluded that the contractual provision should be interpreted to mean that only two people were entitled to union leave, as DPA asserts. CSEA has presented no exceptions which call the ALJ's determination into question.

CSEA also excepts to the ALJ's finding that DPA did not unlawfully discriminate against CSEA members, or interfere with their exercise of protected rights, when it refused to grant union leave to more than two officers under the terms of the disputed contractual provision. However, since the disputed contract language has been found to provide for union leave for only two CSEA officers, DPA's insistence on strictly applying that contractual provision cannot be considered unlawful

discrimination or interference under the standards adopted by the Board. (Novato Unified School District (1982) PERB Decision No. 210 at pp. 6-9; Carlsbad Unified School District (1979) PERB Decision No. 89 at p. 11.) Moreover, as noted by the ALJ, CSEA has failed to demonstrate that DPA's conduct was unlawfully motivated. CSEA's exception is without merit.

DPA's Exceptions

Although it supports the ALJ's proposed decision on the merits, DPA offers two exceptions. First, DPA argues that PERB lacks jurisdiction to consider CSEA's charge, as it must be deferred to arbitration. Second, DPA asserts that CSEA waived its right to negotiate over the alleged change in union leave policy and, therefore, is barred from filing the instant unfair practice charge.

Dills Act section 3514.5(a) provides, in pertinent part, that PERB shall not:

> . . . issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore) at pp. 25-28, the Board interpreted identical language included in the Educational Employment Relations Act. The Board held that a charge must be dismissed and deferred if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration; and (2) the conduct

complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties.

DPA notes that the parties agreed in September 1995 to a settlement of a dispute over release time for CSEA President Perry Kenny (Kenny). That agreement specifically states that "disputes arising out of the Settlement Agreement . . . shall be submitted to arbitration." DPA asserts, therefore, that the instant case must be dismissed and deferred to arbitration pursuant to the Lake Elsinore standard.

DPA is incorrect. The referenced settlement agreement covers release time for Kenny only. The instant dispute involves union leave for other CSEA officers under the terms of the parties' July 1995 agreement. Therefore, the conduct complained of in CSEA's unfair practice charge is not covered by the September 1995 settlement agreement, and the charge may not be dismissed and deferred to arbitration under that agreement.

DPA also argues that CSEA waived its right to bargain over the issue of union leave when it cancelled a bargaining session over the subject which had been scheduled for January 22, 1997. This argument also fails. When an employer does not provide notice and the opportunity to bargain over an alleged change, the exclusive representative's failure to pursue bargaining is not considered a waiver. (Beverly Hills Unified School District (1990) PERB Decision No. 789 at pp. 9-10.) Similarly, when an alleged unilateral change has already been implemented, or if the employer has already made a firm decision to implement the

change, the exclusive representative does not waive its right to bargain by not pursuing negotiations. (San Francisco Community College District (1979) PERB Decision No. 105 at p. 17; Arcohe Union School District (1983) PERB Decision No. 360 at p. 11; Morgan Hill Unified School District (1986) PERB Decision No. 554a at p. 6.) It is undisputed in this case that the alleged unilateral change occurred no later than in November 1996, well before the January 22, 1997, bargaining session requested by CSEA. CSEA's cancellation of that session and decision not to pursue bargaining did not constitute a waiver of the right to bargain, and did not bar CSEA from filing an unfair practice charge alleging an unlawful unilateral change.

ORDER

The unfair practice charge and complaint in Case No. SA-CE-947-S are DISMISSED WITHOUT LEAVE TO AMEND.

Member Dyer joined in this Decision.

Member Amador's dissent begins on page 8.

AMADOR, Member, dissenting: I dissent because I disagree with the majority's opinion that this charge should be dismissed at this time. After a careful review of the record, I have decided that more information is necessary to reach a definitive conclusion regarding whether the administrative law judge's (ALJ) decision to dismiss is supportable and correct.

The Public Employment Relations Board (Board) has broad authority to request further evidence or information we deem necessary to assist us in completing our adjudicatory functions. After considering various legal processes available to the Board, I conclude that, in this case, remand is the most appropriate method to acquire information regarding various questions that were not fully addressed by the ALJ. By remanding this case it will give the Board the greatest latitude to accomplish this purpose.

Specifically, prior to making a definitive ruling in this case, the Board should have information with regard to the following issues:

1. Why did the State of California (Department of Personnel Administration) (DPA) memo dated June 27, 1995[1] underline the word "not" rather than the word

[1]On June 27, 1995, DPA issued a collective bargaining agreement status report. It stated in part:

> Represented employees may not receive union leave, except where agreed to in negotiation ground rules for union bargaining teams. This means all pending and future union leave requests may <u>not</u> be approved. All current union leave must be terminated, and all

"may"?

2. What was the actual past practice regarding how specific persons were selected to receive union leave, especially with regard to determination of the exact number who were eligible to receive union leave?

3. What is the typical, or average, number of union representatives who sit at the table during negotiations for a successor CBA?

4. Did DPA approve any unpaid leave requests during the time in question? If not, why not?

5. What is the effect of the California State Employees Association, SEIU Local 1000, AFL-CIO's (CSEA) cancelling the scheduled bargaining session regarding union leave?[2]

In conclusion, I would remand this case to the ALJ and direct him to reopen the record to seek specific evidence regarding the questions listed above. I would then direct the ALJ to reevaluate the proposed decision in light of what the parties offer.

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represented employees currently on union leave must return to work. [Emphasis in original.]

[2]In late 1996, CSEA requested a bargaining session to discuss the matter of union leave for union officials, and a session was scheduled for January 22, 1997. However, CSEA cancelled the session.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 1000, AFL-CIO, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Respondent.	)	Unfair Practice Case No. SA-CE-947-S PROPOSED DECISION (5/11/98)

Appearances: Harry Gibbons, Attorney, for California State Employees Association, SEIU Local 1000, AFL-CIO; Paul Starkey, Attorney, for State of California (Department of Personnel Administration).

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On February 24, 1997, the California State Employees Association, SEIU Local 1000, AFL-CIO (CSEA) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the State of California (Department of Personnel Administration) (DPA). The charge alleged violations of subdivisions (a), (b), (c) and (d) 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 (a), (b), (c) and (d) of section 3519 state, in pertinent part:

> It shall be unlawful for the state to:
>
> (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

On March 27, 1997, the Office of the General Counsel of PERB, after an investigation of the charge, issued a complaint against DPA alleging violations of subdivisions (a), (b) and (c) of section 3519. On April 22, 1997, DPA answered the complaint denying all material allegations and asserting affirmative defenses.

On May 16 and December 5, 1997, informal conferences were held in an attempt to reach voluntary settlement. No settlement was reached. A formal hearing was held before the undersigned on February 11, 1998.

Each side prepared and submitted briefs. With the filing of the last brief on April 27, 1998, the case was submitted for a proposed decision.

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

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

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

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

INTRODUCTION

CSEA complains of DPA's breach of a 1995 agreement to grant union leave[2] to a specified number of its Civil Service Division (CSD) officers. DPA acknowledges the original agreement, but asserts this agreement was modified, per a request from CSEA's general manager. This modification transferred one of these union leave positions to Perry Kenny (Kenny), in his position as CSEA's newly elected president. Once this transfer was completed, DPA has been, and continues to be, willing to grant union leave status to one more position, as designated by CSEA. However, CSEA has never designated which official shall receive such union leave.

CSEA contends that Kenny's union leave was derived from some authority other than the July 1995 agreement and its CSD officers should be granted union leave irrespective of Kenny's status.

FINDINGS OF FACT

Jurisdiction

The parties stipulated to CSEA being a recognized employee organization and DPA being a state employer within the meaning of section 3513.

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[2]Union leave permits an employee, while on leave, to continue his/her employee status with full salary and benefits, including seniority and retirement accruals. The state is reimbursed for such costs by the employee's union.

Unpaid leave, however, permits an employee to go on leave, thereby retaining his/her employment status, but does not permit the payment of salary or crediting of seniority and retirement accruals.

Factual Background

On June 27, 1995, in anticipation of the expiration of various unit collective bargaining agreements (CBAs), David Tirapelle (Tirapelle), director of DPA administration, issued a collective bargaining status report. In it he stated:

> 5. Represented employees may not receive union leave, except where agreed to in negotiation ground rules for union bargaining teams. This means all pending and future union leave requests may not be approved. All current union leave must be terminated, and all represented employees currently on union leave must return to work; [Emphasis in original.]

It was DPA's belief that with the expiration of the CBAs all authority for union leave expired. Therefore, any new union leaves had to be requested from and agreed to by the appointing authorities of the individual employees. However, it was possible to grant such leave as a provision of bargaining ground rules.

In mid-1995 the state and CSEA, as the recognized employee organization representative of nine bargaining units, were starting to negotiate successor agreements. At some of these sessions discussions arose regarding the leave status of Kenny and Barbara Wilson (Wilson), the CSD alternate deputy director for bargaining. These officials coordinated CSEA's negotiating efforts. To avoid multiple and potentially conflicting leave status decisions from various negotiating tables for these two officials, on July 11, 1995, Rick McWilliam (McWilliam), DPA's chief of labor relations, and Tut Tate (Tate), CSEA's civil

service division administrator, negotiated a leave policy that would apply to all nine bargaining units. During these discussions there was no mention of union leave for anyone other than Kenny and Wilson. The ultimate purpose of the agreement was to permit CSEA's leadership to be available to coordinate the actual bargaining. There was no evidence proffered that the other civil service alternate deputy directors were directly involved in bargaining.

When Tate sent McWilliam a signed copy of the agreement, she copied only Kenny, Wilson and Joan Bryant, CSEA's statewide bargaining manager.

This agreement started off with the following statement:

> A. The Civil Service Division Director and Deputy Civil Service Division officers shall be granted leave only to attend formal bargaining sessions subject to the following conditions:[3]
> (Emphasis added.)

Below this statement were a series of conditions that had to be met in order for such leave to be granted. The conditions concerned such subjects as departmental operational needs, attendance at negotiating sessions, and advance notice to the involved individuals' appointing powers of such attendance.

Attached to the typewritten copy of this agreement was a hand written addendum. It contained seven paragraphs. The first

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[3]McWilliam states the plural "officers" refers only to the CSD director and deputy officer, insisting if the singular were used it would be grammatically incorrect. This interpretation is not credited.

two exclusively concerned Wilson. The third, fourth, and sixth paragraphs exclusively concerned Kenny. Paragraph five concerned the acquisition of and payment for caucus rooms. The seventh and last paragraph stated:

> With this agreement there is no need to mention either Barbara [Wilson] or Perry [Kenny] in any ground rules.

At that time CSEA had two CSD officers in addition to Kenny and Wilson: (1) alternate deputy director for finance, Barbara Glass (Glass); and (2) alternate deputy director for district labor councils, Bernice Rankinas (Rankinas). Tate believed that previous agreements included provisions for all four officers to be released on union leave. Charging party provided no documentation to support this assertion.[4]

Shortly after the agreement was signed a dispute arose regarding release time for Kenny. CSEA filed an unfair practice charge and a request for injunctive relief, Case No. SA-CE-760-S and I.R. No. 370, against DPA on his behalf. On September 13, 1995, the parties signed a settlement agreement, redefining some of their rights and obligations with regard to Kenny's release time. This settlement agreement included CSEA's withdrawal of its charges. It also contained a clause stating that any "disputes arising out of this Settlement Agreement, . . . shall

[4]Shortly after Kenny received his union leave Yolanda Solari, CSEA's president, requested McWilliam grant her union leave. He denied her request, stating that the agreement called for only Kenny and Wilson to receive union leave.

be submitted to arbitration." The attachment to the settlement agreement, in paragraph 1, stated:

> 1. This agreement replaces the July 11, 1995, agreement between the Department of Personnel Administration and the California State Employees Association as it applies to Perry Kenny. The July 11, 1995, agreement continues to be in effect for Barbara Wilson.

The attachment went on to set forth, in detail, conditions under which Kenny would be permitted to receive union leave.

In October 1996, CSEA held its General Council, at which time new officers were elected. The new CSD director was Jim Hard (Hard); the alternate director for bargaining was Salome Ontiveros (Ontiveros); alternate director for finance was Cathy Hackett (Hackett); and the alternate director for District Labor Councils was Nadie Savage (Savage). On October 17, 1996, three days after the election, Tate, on behalf of CSEA, notified McWilliam of these changes.

On October 25, 1996, CSEA's Acting General Manager James W. Milbradt (Milbradt) wrote Tirapelle. In that letter he stated:

> CSEA requests the current agreement between the Department of Personnel Administration and CSEA regarding release time off for Mr. Kenny on union leave be continued. . . .

Milbradt stated that Kenny would "be involved in bargaining in addition to the other duties performed by our president."

DPA agreed with this request, and allocated one of the two existing union leave positions to Kenny. McWilliam interpreted CSEA's request to mean that Kenny, as president, was going to execute some of the duties previously assigned to the CSD

director. He believed that after this modification to its original agreement, CSEA still had a right to designate one more official to receive union leave.

At approximately the same time, or shortly thereafter, Tate requested union leave for Hard and Hackett. McWilliam inquired as to what would happen to Kenny if he granted her request. He said he only had authority for union leave for two employees, not three. She could have her choice, but could only have two on union leave at one time. He said any different arrangement would have to be negotiated.

Tate insists DPA, prior to mid-1997, never told her the agreement only applied to two CSD officers. She states that in November of 1996, McWilliam merely denied union leave to the CSD officers, stating she would have to talk to their individual departments about obtaining some sort of leave for them. She remembers citing the July 1995 agreement in support of her request, stating the new officers were entitled to the same union leave status as their predecessors. She insists that at the time there was no discussion of Kenny's leave status by either side.

On October 17, 1996, Tate notified the appointing powers for Hard and Ontiveros that they would periodically be taking "union leave" in order to meet their CSEA obligations. She simultaneously contacted the appointing powers for Hackett and Savage, explaining that these employees would periodically be taking "unpaid leave" in order to meet their CSEA obligations.

McWilliam insists that the first time he heard CSEA request union leave for all four of its CSD officers was at the formal hearing in this case. His previous discussions with Tate were limited to whether two or three CSEA officials were entitled to union leave. He admits Tate kept insisting Kenny was a separate matter and she was only requesting leave for Hard and Hackett. He countered with a statement that Kenny could not be excluded from their discussion as his union leave status derived from the same document and he only had authority to permit two, and not three, CSEA officials to have union leave.

CSEA requested a bargaining session to discuss the matter of union leave for union officials. It was scheduled for January 22, 1997. However, CSEA ultimately cancelled the session and filed its charge on February 24, 1997.

McWilliam has never received a notification from CSEA as to which official should receive the remaining union-leave slot.

ISSUES

1. Did DPA, when it failed to grant union leave status to Hard and Hackett, refuse or fail to meet and confer in good faith, thereby violating subdivision (c) of section 3519?

2. Did DPA, when it failed to grant union leave status to Hard and Hackett, discriminate against them and/or interfere with their exercise of protected rights, thereby violating subdivision (a) of section 3519?

CONCLUSIONS OF LAW

ISSUE NO. 1 Did DPA, when it failed to grant union leave status to Hard and Hackett refuse or fail to meet and confer in good faith, thereby violating subdivision (c) of section 3519?

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 the state 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 CBA or by past practice. (Anaheim City School District (1983) PERB Decision No. 364; Pittsburg Unified School District (1982) PERB Decision No. 199.)

CSEA alleges that DPA reneged on an agreement to provide union leave to its CSD officers when it refused to provide such leave to Hard and Hackett. DPA agrees it entered into the original agreement, but insists its terms were changed when it agreed to a CSEA requested modification.

CSEA contends that both Hard and Hackett are entitled to union leave because the July 1995 agreement granted such leave to all CSD officers. There are two facts that support this contention. First, the agreement used the plural when it stated

that "officers shall be granted leave." Second, the uncorroborated statement by Tate that all four CSD officers received union leave in the past, which could reasonably lead her to believe that DPA was covering them in this new agreement.

There are, however, a series of incidents that support DPA's position:

(1) The very essence of the agreement was to provide CSEA leadership with time off to assist its bargainers. This is apparent from the evidence showing the reason for the agreement was to avoid multiplicity of leave decisions throughout the nine units represented by CSEA. There was no evidence that alternate CSD directors for finance or district labor councils had any direct involvement with bargaining.

(2) There was no mention, by either side, of any CSD officer other than Kenny or Wilson during negotiations of the July 1995 agreement.

(3) When Tate sent McWilliam the signed July 1995 agreement she failed to send a copy to any CSD officer other than Kenny and Wilson. If this agreement was to define each CSD officer's right to union leave, it is logical to expect her to send a copy to every person to whom the agreement granted specified rights.

(4) In the addendum to the agreement a specific provision was included that neither Wilson nor Kenny need be mentioned in any ground rules. This provision did not reference CSD officers, in general, but only Wilson and Kenny.

(5) When the parties entered into a settlement agreement in September 1995 with regard to Kenny's circumstances, they specifically stated that the original agreement would still apply to Wilson, not all CSD officers.

(6) In October 1996 Tate requested union leave for Hard and Ontiveros and unpaid leave for Hackett and Savage. This comports with McWilliam's testimony that he consistently told CSEA that only two CSD officers were entitled to union leave and is contrary to Tate's contention that McWilliam, prior to mid-1997, never told her that the agreement only applied to two CSD officers.

These six independent circumstances support DPA's position that it did not agree in July 1995 to grant union leave to all four CSD officers. They are sufficiently persuasive to outweigh the two facts supporting CSEA's contention.

Once it has been determined that only two CSD officers were granted union leave, it becomes clear that DPA did not renege on its agreement, but rather complied with it, as modified by a request from CSEA.[5] Such compliance does not constitute a failure "to meet and confer in good faith with a recognized employee organization." Therefore, it is determined that when

[5]When Milbradt requested union leave for Kenny he requested the "current agreement" between DPA and CSEA regarding union leave be continued. He did not ask for a new agreement or an additional union leave position be added to the existing ones, he merely asked that the current union leave for Kenny be continued, regardless of his new position.

DPA declined to grant union leave to Hard and Hackett, it did not violate subdivision (c) of section 3519.

ISSUE NO. 2 Did DPA, when it failed to grant union leave status to Hard and Hackett, discriminate against them and/or interfere with their exercise of protected rights, thereby violating subdivision (a) of section 3519?

Applicable Test

The Board in Carlsbad Unified School District (1979) PERB Decision No. 89 (Carlsbad), set forth the following test for alleged violations of an employer's duty regarding discrimination against or interference with employees:[6]

> 1. A single test shall be applicable in all instances in which violations of section 3543.5(a) are alleged;
>
> 2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
>
> 3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
>
> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
>
> 5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the

[6]Although this decision was issued in an Educational Employment Relations Act (EERA) case, the language is identical to that in the Dills Act and the precedents are controlling. (EERA is codified at section 3540 et seq.)

> complained of conduct but for an unlawful motivation, purpose or intent. [Emphasis added.]

In Novato Unified School District (1982) PERB Decision No. 210 (Novato), the Board set forth the test for retaliation or discrimination in light of the National Labor Relations Board decision in Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] enforced in part (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513]. Under Novato, unlawful motivation must be proven in order to find a violation.

In both cases, a nexus or connection must be demonstrated between the employer's conduct and the exercise of a protected right, resulting in harm or potential harm to that right.

In order to establish a prima facie case, charging party must first prove that the subject employee engaged in protected activity.[7] Next it must prove that the person(s) who made the decision that resulted in the harm was aware of such activity. Lastly, it must prove that the subject adverse action was taken, in whole or in part, as a result of such protected activity.

Proving the existence of unlawful motivation can be difficult. PERB acknowledged that when it stated the following in Carlsbad:

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[7]Section 3515 states that:

> . . . state employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . .

> Unlawful motivation, purpose or intent is essentially a state of mind, a subjective condition generally known only to the charged party. Direct and affirmative proof is not always available or possible. However, following generally accepted legal principles the presence of such unlawful motivation, purpose or intent may be established by inference from the entire record. [Fn. omitted.]

In addition, the Board in Novato set forth examples of the types of circumstances to be examined in a determination of whether union animus is present and a motivating factor in the employer's action(s). These circumstances are: (1) the presence of any disparate treatment of charging party; (2) the proximity of time between the participation in protected activity and the adverse action; (3) any inconsistent, contradictory or vague explanation of the employer's action(s); (4) any departure from established procedures or standards; and (5) any inadequate investigation. (See also Baldwin Park Unified School District (1982) PERB Decision No. 221.)

Unlawful Motivation

Hard and Hackett are the two CSD officers/employees directly affected by DPA's allegedly improper action. Therefore, the elements of the test will be examined as they affect these two individuals.

The first element of the charge, the employees' participation in protected activity, is not disputed by DPA. Their status as officers of a recognized employee organization fulfills this requirement. The second element, DPA's knowledge of such participation is also not disputed by DPA. The evidence

clearly shows that DPA was notified of their new leadership status shortly after the election.

The third element, that DPA's failure to grant them union leave status was due, in whole or in part, to their protected activity, is the primary issue of contention with regard to an unlawful motivation charge.

The first circumstance to be examined is the presence of any disparate treatment. The fact that Kenny and Wilson, the previous incumbents in the subject offices were granted union leave, while Hard and Hackett were not, would seem to support an initial determination of disparate treatment. However, there was no evidence that DPA rejected either Hard or Hackett, as individuals. Nor was there any evidence that DPA harbored any animus toward either of these individuals.

To the contrary, the evidence shows that DPA expressed no opinions as to who received union leave. It merely expressed an unwillingness to permit more than two CSEA officers/employees to receive union leave. Therefore, the treatment received by Hard and Hackett was not disparate due to their protected activities, but rather due to DPA's refusal to increase the number of union leave recipients. In other words, there was no evidence showing a nexus between Hard and Hackett's exercise of protected rights and the employer's conduct. Therefore, this type of employer action is not "disparate treatment", as the term is used in a labor relation sense, and does not support an inference of unlawful motivation.

Similarly, the evidence with regard to the timing of the employer's action, initially supports a determination that discrimination was present. It is clear that shortly after Hard and Hackett were elected the actual number of CSEA officers on union leave were reduced from two to one. However, the reasoning set forth, supra, regarding disparate treatment is equally applicable to the timing circumstance. There was no evidence proffered showing that DPA had a negative reaction to the election of Hard and Hackett and/or that such reaction was the proximate cause for the reduction in union leaves. It is possible the timing of the election and the union leave diminution could infer such a negative motivation.

However, the Board has determined that timing alone cannot support an inference of unlawful motivation. (Moreland Elementary School District (1982) PERB Decision No. 227.)

There was no evidence proffered regarding (1) inconsistent explanations of the employer's action(s), (2) departure from established procedures or standards, or (3) inadequate investigation(s).

The above analysis leads to an inescapable conclusion that DPA's failure to provide union leave for Hard and Hackett was not the result of unlawful motivation.

Interference

CSEA contends that irrespective of the presence or absence of DPA's motivation, its actions interfered with its right to select negotiating representatives of its choice, i.e., Hard and

Hackett. Granted its failure to obtain union leave for two of its negotiators would constitute harm to the individuals' employment status. However, the issue is whether the two employees were entitled to union leave - not whether they would receive any type of leave. Assuming Hard and Hackett were able to receive unpaid leave to execute their duties, CSEA would still receive the benefit of these employees in their bargaining efforts. The only harm would be to the employees' employment status. Such harm could be offset by an increased allocation of CSEA's resources to the employees to make them whole. The harm, therefore, would be slight. This harm is more than offset by the employer's legitimate right to preserve its position of allowing no more than two officials to receive union leave.

Therefore, based on the above analysis, it is determined that DPA's failure to provide union leaves to Hard and Hackett did not interfere with such employees because of their exercise of protected rights.

Based on the above analyses, it is concluded that DPA's failure to grant union leave to Hard and Hackett did not violate subdivision (a) of section 3519.

Allegation Regarding Employee Organization Rights

The evidence failed to support CSEA's allegations regarding violations of subdivisions (a) and (c) of section 3519. Therefore, there is insufficient evidence to support for its contention that rights guaranteed to it by the Dills Act were

denied. Consequently, it is determined that there was no violation of subdivision (b) of section 3519.

SUMMARY

Based on the foregoing findings of fact, conclusions of law and a thorough examination of the entire record, it is determined that there is insufficient evidence upon which to find that DPA has violated the Dills Act. Therefore, the charges and their accompanying complaint must be dismissed.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, it is ordered that the unfair practice charge in Case No. SA-CE-947-S, California State Employees Association, SEIU Local 1000, AFL-CIO v. State of California (Department of Personnel Administration), and its companion 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 Proposed Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page, citation or exhibit number the portions of the records, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300) . A document is considered "filed" when actually received before the close of business (5:00 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 of Regs., tit. 8, sec. 323135; Code of 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 of Regs., tit. 8, secs. 32300, 32305, and 32410.)

Allen R. Link
Administrative Law Judge