STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA UNION OF SAFETY ENGINEERS,	)	
Charging Party,	)	Case No. SA-CE-1140-S
v.	)	PERB Decision No. 1330-S
STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION),	)	May 6, 1999
Respondent.	)	

Appearance: Carroll, Burdick & McDonough by Gary M. Messing, Attorney, for California Union of Safety Engineers.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (Board) on appeal from a Board agent's dismissal (attached) of the California Union of Safety Employees' (CAUSE) unfair practice charge. As amended, the charge alleged that the State of California (Department of Personnel Administration) violated section 3519(a), (b) and (c) of the Ralph C. Dills Act (Dills Act)[1] when it indicated that it would not agree to a

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

> It shall be unlawful for the state to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of

successor memorandum of understanding (MOU) unless the MOU included an agreement that CAUSE would support civil service reform legislation required to implement the provisions of the MOU.

The Board has reviewed the entire record in this case, including the warning and dismissal letters, and CAUSE'S appeal. The Board finds the warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. SA-CE-1140-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Amador joined in this Decision.

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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.

STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

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

March 3, 1999

Gary M. Messing
CARROLL, BURDICK & McDONOUGH
400 Capitol Mall, Suite 1400
Sacramento, CA 95814-4407

Re: California Union of Safety Employees v. State of California (Department of Personnel Administration)
Unfair Practice Charge No. SA-CE-1140-S
DISMISSAL LETTER

Dear Mr. Messing:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board on June 11, 1998. The charge alleges that the State of California (Department of Personnel Administration) (DPA) violated the Ralph C. Dills Act, Government Code section 3519(b) and (c), by failing to bargain in good faith with the California Union of Safety Employees (CAUSE).

I indicated to you in the attached letter dated February 1, 1999, that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, the charge should be amended. You were further advised that unless the charge was amended to state a prima facie case or it was withdrawn prior to February 10, 1999, the charge would be dismissed.

On February 2, 1999, you requested an extension of time to file an amended charge. An extension was granted to February 19, 1999, and the amended charge was filed on that date.

In the original charge, CAUSE alleged that the State bargained in bad faith because it insisted to impasse on a nonmandatory or permissive subject of bargaining, that CAUSE agree to support legislation necessary to implement the State's civil service reform proposals. CAUSE argued that despite its objection, the State indicated that any agreement or last, best and final offer must include CAUSE'S support for the State's civil service reform legislation. CAUSE asserted, therefore, that the parties were at impasse in negotiations.

The amended charge essentially restates the factual allegations submitted in the original unfair practice charge. However, the amended charge provides further legal argument in support of its position that the parties were at impasse in negotiations.

CAUSE cites Department of Personnel Administration v. Superior Court 5 Cal.App.4th 155 (1992), asserting, "the parties are at impasse, although neither party may have invoked that precise term. As the courts have explained, 'Having [bargained in good faith in an endeavor to reach agreement], but having failed to reach agreement, the parties are at impasse.'" (Ibid, at p. 176.)

CAUSE'S reliance on Department of Personnel Administration, supra, is misplaced. In that decision, the court reviewed the terms and conditions of employment the State employer was authorized to implement after the parties reached final impasse. The decision did not discuss the standard for determining when the parties had reached impasse in negotiations pursuant to Dills Act section 3518, which requires appointment of a mediator. (PERB Regulation 32793.)

PERB has held that insistence to impasse on a nonmandatory subject of bargaining is a per se violation of the duty to bargain in good faith. (Lake Elsinore School District (1986) PERB Decision No. 603.) As explained in the attached letter, for purposes of determining whether a party has unlawfully insisted to impasse on a permissive subject, PERB will make a determination of impasse after receiving a formal request from one or both parties. PERB Regulation 32793 states, in part:

> (a) The Board shall, within five working days following the receipt of the written request for appointment of a mediator, orally notify the parties that the Board has determined that:
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> (1) An impasse exists and a mediator has been appointed, or
> (2) Impasse has not been reached.
>
> . . . . . .
>
> (c) In determining whether an impasse exists, the Board shall investigate and may consider the number and length of negotiating sessions between the parties, the time period over which the negotiations have occurred, the extent to which the parties have made and discussed counter-proposals to each other, the extent to which the parties have reached tentative agreement on issues during the negotiations, the extent to which unresolved issues remain, and other relevant data.

Parties may jointly agree they have reached an impasse in negotiations. (Dills Act section 3518.) However, for PERB to find a that a party has bargained in bad faith by insisting to impasse on a permissive subject, PERB must make a determination that the parties are at impasse. In the present case, although the parties have taken firm positions concerning the State's civil service reform proposals, neither party has requested that PERB make a determination of impasse, nor did they mutually declare impasse. Accordingly, the factual allegations fail to demonstrate that the State unlawfully insisted to impasse that CAUSE support legislation necessary to implement the State's civil service reform proposals. Therefore, this allegation must be dismissed.

Furthermore, as discussed in the attached letter, under a pre-impasse conditional bargaining theory, the charge also fails to state a prima facie case. Under the totality of the conduct test, the Board concluded in State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S (DPA), that conditioning agreement on the union's "endorsement" of legislation to implement the State's civil service reform proposals did not rise to the level of bad faith.

The present charge presents the same allegation of conditional bargaining over a proposal to support the State's civil service reform legislation. For the reasons adopted by the Board in DPA, this allegation fails to state a prima facie case under a conditional bargaining theory and must be dismissed.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

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 mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for

filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d)', provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, sec. 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, sec. 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, sec. 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

By _____
Robin Wright Wesley
Regional Attorney

Attachment

cc: Edmund K. Brehl

PUBLIC EMPLOYMENT RELATIONS BOARD

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

February 1, 1999

Gary M. Messing
CARROLL, BURDICK & McDONOUGH
400 Capitol Mall, Suite 1400
Sacramento, CA 95814

Re: California Union of Safety Employees v. State of California (Department of Personnel Administration)
Unfair Practice Charge No. SA-CE-1140-S
WARNING LETTER

Dear Mr. Messing:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board on June 11, 1998. The charge alleges that the State of California (Department of Personnel Administration) (DPA) violated the Ralph C. Dills Act, Government Code section 3519(b) and (c), by failing to bargain in good faith with the California Union of Safety Employees (CAUSE).

CAUSE is the exclusive representative for state employees in State Bargaining Unit 7. The 1992-1995 memorandum of understanding between CAUSE and the State expired on June 30, 1995. On May 30, 1995, CAUSE and the State initiated negotiations for a successor agreement. CAUSE alleges that from the onset of negotiations, DPA proposed that CAUSE support legislation necessary to implement negotiated civil service reforms. Since May 30, 1995, CAUSE and DPA, the Governor's bargaining representative, engaged in negotiations and were able to reach tentative agreement on numerous economic and noneconomic proposals.

On May 6, 1998, Michael Navarro, DPA Labor Relations Officer, sent a letter to CAUSE which contained a "package offer," including specified salary increases and a list of civil service reform proposals. The descriptions of three of the civil service reform proposals included the statement, "Requires union support of statutory changes necessary to implement terms of MOU." Mr. Navarro stated in his letter,

> The enclosed is a package offer which includes the civil service reforms on the attached list. Please recognize that any successor contract would have to include all of the State's civil service reform proposals. In addition to the above, we would expect to include all TAs that have

> been reached to date. Finally, we would of course have to resolve all other issues that remain on the table.

Negotiations between the parties continued at a bargaining session held on May 18, 1998. The bargaining session minutes prepared by CAUSE report that Mr. Navarro stated,

> If we are going to have a successor agreement, we need to get through economics and need you to buy-into all of the civil service reforms. The economics and civil service reforms are first and foremost, and we need to get over that first before we can move on to the others.
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> . . . . . .
>
> You will notice, in the letter that conveyed this offer, I talked in terms of this was the best economic offer we are prepared to make, never used the words "last, best and final" terms, that implies that I have no movement anywhere. I have no movement in economics, no movement in civil service reform, but there are other issues that are out there that we haven't reached agreement on which we can maybe tweak a little bit, but in terms of economics and civil service reforms we have to have this.

At the conclusion of the bargaining session, CAUSE indicated that it could not accept the State's civil service reform proposals.

On May 22, 1998, CAUSE sent a letter to Mr. Navarro reiterating its rejection of the State's package offer, which included the requirement that CAUSE support the State's civil service reform legislation. The letter continued,

> CAUSE is unwilling to consider further any proposals which require it to support these nonmandatory subjects of bargaining and will not discuss or negotiate these subjects any further. In light of our position, are you willing to make further proposals that do not include CAUSE supporting the civil service reform legislation and to continue negotiations without this permissive subject of bargaining?

Mr. Navarro responded in a letter dated June 1, 1998. He stated that the subjects which make up the civil service reform proposals are mandatory subjects of bargaining which require statutory authority to implement. Mr. Navarro also stated that the State was unwilling "to make proposals that do not include your support of civil service reform and its requisite legislation."

CAUSE contends that because the State has indicated that any agreement or last, best and final offer must include CAUSE'S support for the State's civil service reform legislation, regardless of any concessions CAUSE may be willing to make, the parties are at impasse in negotiations. Accordingly, CAUSE argues that the State violated its duty to bargain in good faith by insisting to impasse on a nonmandatory subject of bargaining, that CAUSE support the State's civil service reform legislation. CAUSE contends that by insisting that it support the legislation necessary to implement negotiated civil service reforms, the State has unlawfully engaged in conditional bargaining.

Based upon the facts stated above, the charge fails to state a prima facie violation of the Dills Act.

The Dills Act imposes on parties subject to its jurisdiction, a mutual obligation to bargain in good faith. The standard generally applied to determine whether good faith bargaining has occurred is called the "totality of conduct" test. This test reviews the entire course of bargaining conduct to determine whether the parties have negotiated in good faith with the "requisite subjective intention of reaching an agreement." (Pajaro Valley Unified School District (1978) PERB Decision No. 51.)

Certain acts, however, have such potential to frustrate negotiations that they are held to be "per se" unlawful without any finding of subjective bad faith. (Ibid.) For example, the Board has held that insistence to impasse on a nonmandatory subject of bargaining is a per se violation of the duty to bargain in good faith. (Lake Elsinore School District (1986) PERB Decision No. 603.)

Parties are free to propose and bargain, over nonmandatory subjects of bargaining. However, once a party makes it clear that it does not wish to bargain further over a nonmandatory subject, the proponent of the nonmandatory proposal violates the Dills Act if it insists to impasse on the inclusion of the nonmandatory subject in the agreement. (Ibid.)

To establish whether parties are at impasse, PERB will make a determination of impasse after receiving a formal request from

one or both parties.[1] PERB Regulation 32792(a) states, in pertinent part:

> After declaring impasse orally or in writing to the other party or after jointly declaring impasse, either or both parties may request the Board to determine that an impasse exists and appoint a mediator.

CAUSE clearly expressed its position in its May 22, 1998 letter to Mr. Navarro that it did not wish to further consider or bargain over proposals requiring it to support the State's civil service reform legislation. However, the alleged facts do not support a claim that the State insisted to impasse over this proposal. The parties are not at impasse. While the factual allegations indicate that DPA has taken a firm position on certain proposals involving economics and civil service reform, PERB has not been requested by the parties to make a determination of impasse. Therefore, this allegation fails to state a prima facie case.

Under the totality of the conduct test, it is an indication of bad faith to impose unlawful conditions during bargaining, such as conditioning agreement of economic matters on agreement of noneconomic matters. (Fremont Unified School District (1980) PERB Decision No. 136.) The Board has previously addressed the issue that the State unlawfully engaged in conditional bargaining prior to impasse by proposing that an exclusive representative support legislation to implement the State's civil service reform proposals. (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S (DPA).)

In DPA, the Board considered the claim that in exchange for the State agreeing to the union's economic demands, the union must "endorse" future legislation to implement the State's civil service reform demands. The Board rejected a claim of unlawful conditional bargaining, concluding that this conduct did not rise to the level of bad faith because such endorsement was not outside the union's control. Since the present charge raises the same claim of conditional bargaining over a proposal to support the State's civil service reform legislation, the charge must be dismissed for failure to state a prima facie violation.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies

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[1]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. See PERB Regulation 32793.

in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before February 10, 1999. I shall dismiss the charge. If you have any questions, please call me at (916) 322-3198, ext. 305.

Sincerely,

Robin Wright Wesley
Regional Attorney