STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Charging Party, v. CALIFORNIA STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 1000, Respondent.	Case No. SA-CO-237-S PERB Decision No. 1601-S February 24, 2004

Appearances: Howard L. Schwartz, Chief Counsel, for State of California (Department of Personnel Administration); Steven B. Bassoff, Attorney, for California State Employees Association, SEIU Local 1000.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California State Employees Association, SEIU Local 1000 (CSEA) to a proposed decision (attached) of an administrative law judge (ALJ). The ALJ found that CSEA violated the Ralph C. Dills Act (Dills Act)[1] by unilaterally changing its past practice for authorizing its members to be on union leave. Specifically, the ALJ found that CSEA failed to meet and confer in good faith with the State of California (Department of Personnel Administration) (DPA) when on January 29, 2001, it advised DPA that henceforth only the general manager of CSEA was authorized to request permission for a CSEA member to go on union leave.

[1]The Dills Act is codified at Government Code section 3512 et seq.

The Board has reviewed the entire record, including the proposed decision, CSEA's exceptions and DPA's response. Subject to the discussion below, the Board finds the proposed decision to be free of prejudicial error and adopts it as the decision of the Board itself.

BACKGROUND

DPA and CSEA are parties to nine memoranda of understanding (MOU) each containing a provision for union leave. The union leave provision in all the relevant MOUs provides that, "A Union leave may . . . be granted during the term of this Contract at the discretion of the affected department head or designee in accordance with" certain specifically listed conditions. Among the conditions is a requirement that CSEA:

> . . . reimburse the affected department(s) for the full amount of the affected employee's salary, plus an additional amount equal to 35 percent (35%) of the affected employee's salary, for all the time the employee is off on a Union leave. [DPA Ex. 1.]

The MOUs do not identify which CSEA officer(s) is authorized to make requests for union leave on behalf of a member. It states only that "[t]he Union shall have the choice of requesting an unpaid leave of absence or a paid leave of absence. . . ." The word "Union" is not defined in the contract other than in the recognition clause. Over the years, CSEA officers at different levels of authority have signed requests for members to receive union leave. These have included the director and deputy director of the civil service division and the general manager of CSEA. Historically, there has been no practice of restricting to only one person within CSEA, the authority to make requests for union leave on behalf of members.

On or about January 29, 2001, Steven Bassoff (Bassoff), an attorney representing CSEA, wrote to DPA Director, Marty Morgenstern (Morgenstern) and advised him that henceforth only the general manager of CSEA would have the authority to make a union leave

request on behalf of CSEA. Bassoff stated that CSEA would not reimburse DPA for union leaves not requested by the general manager. The letter specifically stated that Jim Hard (Hard) and Cathy Hackett (Hackett) were not authorized to request union leave for members. Hard is the Director and Hackett is the Deputy Director of CSEA's civil service division, the division of CSEA that represents rank and file bargaining unit employees of the state. They are the two highest ranking officers of the civil service division.

By letter of February 6, 2001, DPA General Counsel, Howard Schwartz (Schwartz) asked Hard for his "reaction" to the assertion that he had no authority to approve union leave requests. In relevant part, Schwartz wrote:

> If you have concerns, please let us know. If you anticipate requesting union leave without the approval of the CSEA General Manager, please specify what procedures you will follow to ensure that the State is reimbursed for this time. [CSEA Ex. A.]

In his reply of February 8, 2001, Hard asserted that the civil service division director and deputy director are:

> . . . the only two individuals with authority to request Union leave for CSEA/SEIU Local 1000 members of the Civil Service Division. That authority is in no way limited by the CSEA General Manager.
>
> Review of managements' records for the past 18 years will verify this fact. . . . .
>
> Furthermore, the Bylaws of CSEA state that the Director and Deputy Director constitute the Civil Service Division Committee of the CSEA Board of Directors with final authority to act on behalf of CSEA in all matters within the scope of representation. There is no provision within any CSEA Bylaws or Policy giving the CSEA General Manager any authority over actions of the CSD Director or Deputy Director in regard to Union leave requests.

> Please be assured that Cathy Hackett and I will take all actions within our means to honor the letter and the spirit of the current contract. I hope this again clarifies our position and that no one is able to induce state management into committing an unfair labor practice by refusing to honor Union leave requests authorized by Cathy Hackett or myself. [DPA Ex. 3.]

Hard and Hackett also gave their personal assurances to DPA that the state would be paid for any union leave approved by them. In a March meeting with Morgenstern they assured him "that they were the ones that had the authority to approve the union leave, and that any of the union leave that they approved would be paid," according to DPA Chief of Labor Relations, Gloria Moore Andrews, who attended the meeting.

Faced with these competing demands, DPA advised CSEA that it would continue to follow the past practice on approvals of union leave and it expected CSEA to do the same. Schwartz set out this position by letter of March 20, 2001. In relevant part, Schwartz's letter reads:

> The DPA, for its part, views CSEA and its Civil Service Division as one entity. Director Morgenstern, myself, and others at DPA have repeatedly stated to CSEA officials that the State does not intend to take sides in an internal union dispute. It is for CSEA alone to decide who, within its organization, has the authority to request union leave and to communicate that decision clearly to DPA. Threats that reimbursements will be withheld or unfair practice charges will be filed against the State for siding with one faction against another are inappropriate and are themselves unlawful.
>
> Over the past few weeks the DPA has had several conversations with Mr. Bassoff, Mr. Hard and other CSEA officials. Unfortunately, we find no consensus among CSEA representatives as to whom and how union leave may be requested. Pending receipt from CSEA of a clearly stated position, the State intends to abide by the past practice of honoring union leave requests that are submitted by an authorized CSEA representative, including those authorized by the Civil Division Director or Deputy Director alone.
> (DPA Ex. 7.)

As of the last day of hearing, there were still two employees' union leave where CSEA had refused to reimburse the state. There were at least two others for whom payment had not yet been denied but who had taken leave without the approval of the general manager of CSEA.

DISCUSSION

CSEA first excepts to the ALJ's modification of the test for negotiability set forth in Anaheim Union High School District (1981) PERB Decision No. 177 (Anaheim). In the proposed decision, the ALJ set forth the following test to determine whether a subject is negotiable as to a union:

> [A] subject is negotiable under section 3516 if: (1) it is logically and reasonably related to wages, hours or other terms and conditions of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) obliging the union to negotiate would not specifically abridge the union's freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the union's mission. [Proposed dec., pp. 15-16.]

CSEA notes that in the third prong, the ALJ uses the term "specifically" instead of "significantly." CSEA argues that by using the term "specifically," the ALJ applied a more stringent standard to a union than to an employer.

The Board does not attach any significance to the use of the term "specifically" as opposed to "significantly" in the third prong of Anaheim. In the past, decisions of the Board have used these two terms interchangeably. The modified Anaheim test set forth in the proposed decision was not intended, and does not, apply a different standard to unions versus employers. The test was only modified to recognize that unions also have interests that may be subject to negotiation.

Second, CSEA excepts to the proposed decision as an unnecessary infringement into internal union policies. CSEA argues that DPA should not be able to dictate the internal governance structure of a union. The Board agrees that an employer may not dictate to a union its internal governance structure. However, this decision does not go that far.

The issue here is simply whether the procedures for determining who approves union leave are negotiable. Applying the Anaheim test, the Board agrees with the ALJ that such procedures are negotiable because there is a direct impact on the employment relationship. In this case, DPA cannot obtain monetary reimbursement for state employees on union leave unless such leave is approved by CSEA. Thus, where there is an impact on the employment relationship, as with the unique circumstances of this case, an employer may propose for negotiation a requirement that the union identify those of its officers authorized to act on its behalf. Limited to these unique situations, the majority respectfully disagrees with the dissent that the identity of the individual(s) authorized to approve union leave is solely an internal union matter.

Contrary to CSEA's contentions, having to negotiate over the procedures for authorizing union leave will not abridge its fundamental managerial prerogatives. Indeed, having to negotiate such procedures is no different than requiring an employer to negotiate over procedures for filing a grievance. For example, the MOUs between CSEA and DPA contain a grievance procedure whereby grievances at a certain level are presented to department heads while grievances at another level are presented to the director of DPA. The fact that these procedures are negotiable does not mean that CSEA can dictate to DPA its management structure. Similarly, negotiations over the procedures for union leave will not abridge CSEA's fundamental rights. Accordingly, CSEA's exceptions must be rejected.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found the California State Employees Association, SEIU Local 1000 (CSEA), violated the Ralph C. Dills Act (Dills Act), Government Code section 3519.5(c). CSEA violated the Dills Act when on or about January 29, 2001, CSEA informed the State of California (Department of Personnel Administration) (DPA) that henceforth it would reimburse the state for only those union leave requests that were made by the general manager of CSEA. This policy was a change from the past practice whereby both the director and deputy director of the civil service division of CSEA also had the authority to request union leave. The change resulted in the failure of CSEA to reimburse DPA for union leave approved by officers of the civil division, but not the general manager.

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

A. CEASE AND DESIST FROM:

Unilaterally changing the past practice whereby CSEA officers in addition to the general manager had the authority to make union leave requests on behalf of CSEA members.

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 prior practice whereby CSEA officers in addition to the general manager have the authority to make union leave requests on behalf of CSEA members.

2. Reimburse the State of California for all union leave which DPA granted to CSEA members in accord with the prior practice but whose leave requests were not signed

by the CSEA general manager. The reimbursement shall include interest at the rate of seven (7) percent accrued beginning 30 days after the first date on which DPA submitted invoices to CSEA that were subsequently denied because the union leave request forms had not been signed by the CSEA general manager.

3. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the notice attached hereto as an Appendix.

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 accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on DPA.

Member Whitehead joined in this Decision.

Member Neima's dissent begins on page 9.

NEIMA, Member, dissenting: The majority's decision departs from two fundamental principles of labor law: the internal organization of an employee organization is not a matter for review by the Public Employment Relations Board (PERB or Board) and each party decides the identity of its own representative. It is in support of these two principles that I dissent from the majority's findings.

Each union is empowered to decide the internal structure of its own organization. Whether the union membership desires to have a board of directors, executive board or general manager is determined by them not by the employer. Here, the employer bargained with the California State Employees Association, SEIU Local 1000 (CSEA) to provide union leave to certain employees. Such union leave was conditioned on approval of the employee's department head and reimbursement of the cost by CSEA. The memorandum of understanding does not specify which CSEA officer was responsible for requesting union leave and over the years various CSEA officials signed such requests. There is nothing in the record indicating any problems with this arrangement prior to January 29, 2001. On that date, CSEA informed the State of California (Department of Personnel Administration) that it would reimburse union leave only if it had been approved by the general manager.

The question of who approves CSEA expenditures is a matter for CSEA and its members to decide. These issues are internal to the union and are not to be negotiated at the bargaining table. Although the mechanism for providing union leave may be a negotiable subject, the union alone decides who will request union leave for CSEA members.

This Board has found that an employer may not dictate which union representatives appear at the bargaining table on behalf of the union. (Yolo County Superintendent of Schools

(1990) PERB Decision No. 838.) The majority's decision deviates from this labor law principle by suggesting that the identity of the CSEA officer responsible for approving union leave may be a negotiable matter. I dissent from this possible interpretation and based on the above reasoning would dismiss this unfair practice complaint.

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-CO-237-S, State of California (Department of Personnel Administration) v. California State Employees Association, SEIU Local 1000, in which all parties had the right to participate, it has been found that the California State Employees Association, SEIU Local 1000 (CSEA) violated the Ralph C. Dills Act (Dills Act), Government Code section 3519.5(c). CSEA violated the Dills Act when on or about January 29, 2001, CSEA informed the State of California (Department of Personnel Administration) (DPA) that henceforth it would reimburse DPA for only those union leave requests that were made by the general manager of CSEA. This policy was a change from the past practice whereby both the director and deputy director of the civil service division of CSEA also had the authority to request union leave. The change resulted in the failure of CSEA to reimburse DPA for union leave approved by officers of the civil service division, but not the general manager.

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

A. CEASE AND DESIST FROM:

Unilaterally changing the past practice whereby CSEA officers in addition to the general manager had the authority to make union leave requests on behalf of CSEA members.

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 prior practice whereby CSEA officers in addition to the general manager have the authority to make union leave requests on behalf of CSEA members.

2. Reimburse the State of California for all union leave which DPA granted to CSEA members in accord with the prior practice, but whose leave requests were not signed by the CSEA general manager. The reimbursement shall include interest at the rate of seven

(7) percent accrued beginning 30 days after the first date on which DPA submitted invoices to CSEA that were subsequently denied because the union leave request forms had not been signed by the CSEA general manager.

Dated: _____

CALIFORNIA STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 1000

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Charging Party, v. CALIFORNIA STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 1000, Respondent.	UNFAIR PRACTICE CASE NO. SA-CO-237-S PROPOSED DECISION (4/23/02)

Appearances: Howard L. Schwartz, Chief Counsel, for State of California (Department of Personnel Administration); Steven B. Bassoff, Attorney, for California State Employees Association, SEIU Local 1000.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

This case presents the unusual situation of an employer accusation that an exclusive representative has made a unilateral change. Specifically, the employer contends that the union unilaterally changed the past practice for authorizing its members to be on union leave. This action, the employer contends, has put it in the position of having to choose sides in an internal union fight. The union rejects this contention, asserting that its general manager has the authority to decide who goes on union leave and who does not. In the union's view, the employer has inserted itself into the internal union dispute.

This action was commenced on March 15, 2001, when the State of California (Department of Personnel Administration) (State) filed an unfair practice charge against the California State Employees Association, SEIU Local 1000 (CSEA or Union). The charge alleged that on or about January 30, 2001, Steven Bassoff, an attorney representing CSEA,

notified Marty Morgenstern, director of the Department of Personnel Administration (DPA) that henceforth only CSEA General Manager Frank Guilelmino was authorized to request Union leave for CSEA members. The charge alleged further that on or about February 8, 2001, Jim Hard, director of the CSEA Civil Service Division, asserted in a letter to Mr. Morgenstern that only he and the Civil Service Division deputy director had authority to authorize Union leave. The charge alleged that by putting the State in the position of choosing between the competing positions, CSEA was attempting to cause the State to commit an unfair practice in violation of section 3519.5(a) of the Ralph C. Dills Act (Act).[1] On August 16, 2001, the State withdrew its allegation that the Union had violated section 3519.5(a) and amended its charge to allege a violation of section 3519.5(c).

On August 17, 2001, the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that prior to January 30, 2001, it was CSEA's policy to reimburse the State for the costs of employees on Union leave when the leave "had been granted pursuant to the request of [CSEA]'s officers including the Civil Service Division

[1] Unless otherwise indicated, all statutory references are to the Government Code. The Dills Act is codified at section 3512 et seq. Section 3519.5 provides in relevant part:

> It shall be unlawful for an employee organization to:
>
> (a) Cause or attempt to cause the state to violate Section 3519.
>
> (b) 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.
>
> (c) Refuse or fail to meet and confer in good faith with a state agency employer of any of the employees of which it is the recognized employee organization.

Director, General Manager and others." On or about January 30, 2001, the complaint alleges, CSEA changed this policy by refusing to reimburse the State for the cost of employees on Union leave unless such leave had been authorized by CSEA's general manager. This change, the complaint alleges, was made without prior notice to the State and without affording the State the opportunity to meet and negotiate over the decision. By these acts, the complaint alleges, CSEA failed to bargain in good faith in violation of section 3519.5(c).

The hearing was conducted in Sacramento on January 15 and 16, 2002. With the filing of briefs, the matter was submitted for decision on April 2, 2002.

FINDINGS OF FACT

DPA is the State employer within the meaning of section 3513(j). CSEA is an employee organization within the meaning of section 3513(a) and is the recognized employee organization within the meaning of section 3513(b) of nine appropriate units of State employees. At all times relevant there were collective bargaining agreements in effect between the State and CSEA for all nine units represented by CSEA.

The collective bargaining agreements in effect throughout the relevant period all contain provision for Union leave. The Union leave provisions in all material respects are identical for all nine units. The contracts provide that "A Union leave may . . . be granted during the term of this Contract at the discretion of the affected department head or designee in accordance with" certain specifically listed conditions. Among the conditions is a requirement that the Union:

> . . . reimburse the affected department(s) for the full amount of the affected employee's salary, plus an additional amount equal to 35 percent (35%) of the affected employee's salary, for all the time the employee is off on a Union leave; . . .

Under the contract, the State is not responsible for Worker's Compensation expenditures for any employee injured while on Union leave.

Employees who are on Union leave complete monthly time sheets which they turn into their State departments. They declare the number of hours they have worked during the month just as they would have done at their regular State positions, indicating that they were absent on Union leave. They receive their regular State paychecks and the full State benefit package. Union members are absent varying amounts of time on Union leave. Some are absent several days in a month. Others may be on Union leave for several weeks or months. Still others who hold high positions in CSEA may be absent on Union leave for years.

There is no centralized system by which the State secures reimbursement from CSEA for employees on Union leave. Each department with employees on leave bills CSEA according to its own schedule. Bruce Arbuckle, the labor relations officer for the Department of Motor Vehicles, testified that in his department the claims are submitted to CSEA in batches. He said that at times there is a lengthy period between when the employee is absent on Union leave and the claim is submitted to CSEA. David Brubaker, chief of labor relations for the Department of Transportation, testified that the department bills CSEA only once a year for persons such as Civil Service Division Deputy Director Cathy Hackett who has been on CSEA leave for four or five years.

Requests that employees be released to serve on collective bargaining committees are made directly to DPA. All other requests for an employee to be released on Union leave are made to the labor relations officer of the department where the affected employee works. The labor relations officer contacts the employee's immediate supervisor to determine whether work requirements will permit release of the employee for the requested period. If there is no

problem, then the leave is approved. If department work requirements indicate that the employee cannot be released for the requested period, an attempt will be made to find mutually agreeable alternative dates. If the department ultimately denies the request, the Union can appeal the denial to DPA, which has the authority to overrule the department's denial.

Requests for Union leave are made in writing and must identify the employee to be released and the dates. There is no place on the leave request form for the Union to state the purpose of the requested leave or reveal what the employee will be doing when working for the Union. The collective bargaining agreement does not address the question of whether the State can deny requests for Union leave because it does not approve of what the employee will be doing while on leave and it has not been the practice for the State to inquire.

Often, employees go on personal leave and then, after-the-fact, request to have the absence reclassified as Union leave. In such situations, if Union leave is not approved the absence will remain as a charge against the employee's personal leave balances.

The contract between the parties does not identify which CSEA officer is authorized to make requests for Union leave on behalf of a member. It states only that "[t]he Union shall have the choice of requesting an unpaid leave of absence or a paid leave of absence. . . ." The word "Union" is not defined in the contract other than in the recognition clause. Over the years, CSEA officers at different levels of authority have signed requests for members to receive Union leave. These have included the director and deputy director of the Civil Service Division and the general manager of CSEA. At least one former staff employee of CSEA, the late Tut Tate, also has signed requests for Union leave. Historically, there has been no practice of restricting to only one person within CSEA the authority to make requests for Union leave on behalf of members.

In 2001, Ms. Hackett was a candidate to fill a vacant seat on the Sacramento City Council. At a meeting on January 6-7, 2001, the CSEA Governmental Affairs Committee failed to adopt a resolution supporting her candidacy. On January 22, 2001, Steven Bassoff, an attorney representing CSEA, wrote to Ms. Hackett and warned her that as a full-time officer of CSEA her "work-time is supposed to be entirely devoted to fulfilling [her] specific duties to CSEA." The letter continued:

> CSEA must inform you that conducting any campaign-related activities during work hours is prohibited. . . . [¶] This letter is to caution you to monitor carefully your time so that neither you nor CSEA are subjected to any sanctions whatsoever for your activities related to your campaign. . . .

Ms. Hackett did not reply to the letter.

In response to reports to CSEA that Ms. Hackett and perhaps others were using Union leave to work on her campaign, CSEA directed its attorney to put the State on notice that if CSEA General Manager Frank Guilelmino's signature "was not on the union leave request form that CSEA would not honor it and would not reimburse the State." Accordingly, on January 29, 2001, Mr. Bassoff wrote to DPA Director Marty Morgenstern and advised him that henceforth only the general manager of CSEA would have the authority to make a Union leave request on behalf of CSEA. Mr. Bassoff stated that CSEA would not reimburse the State for Union leaves not requested by the general manager. The letter reads in part as follows:

> . . . Neither Jim Hard nor Cathy Hackett is authorized to request union leave for a member without the approval of CSEA's General Manager. . . . [¶] It is my understanding that Mr. Hard has sought union leave for at least two individuals – Van Evans and Lyle Hintz without the approval of the General Manager. Please be advised that CSEA is not requesting union leave for these individuals and will not reimburse the State for any union leave that was granted by the State without the signature of CSEA's General Manager.

Mr. Hard is the director and Ms. Hackett the deputy director of CSEA's Civil Service Division, the division of CSEA that represents rank and file bargaining unit employees of the State. They are the two highest ranking officers of the Civil Service Division.

By letter of February 6, 2001, DPA General Counsel Howard Schwartz asked Mr. Hard for his "reaction" to the assertion that he had no authority to approve Union leave requests. In relevant part, Mr. Schwartz wrote:

> . . . If you have concerns, please let us know. If you anticipate requesting union leave without the approval of the CSEA General Manager, please specify what procedures you will follow to ensure that the State is reimbursed for this time.

In his reply of February 8, 2001, Mr. Hard asserted that the Civil Service Division Division director and deputy director are

> . . . the only two individuals with authority to request Union leave for CSEA/SEIU Local 1000 members of the Civil Service Division. That authority is in no way limited by the CSEA General Manager.
>
> Review of managements' records for the past 18 years will verify this fact. . . . [¶] Furthermore, the bylaws of CSEA state that the Director and Deputy Director constitute the Civil Service Division Committee of the CSEA Board of Directors with final authority to act on behalf of CSEA in all matters within the scope of representation. There is no provision within any CSEA Bylaws or Policy giving the CSEA General Manager any authority over actions of the CSD Director or Deputy Director in regard to Union leave requests.
>
> Please be assured that Cathy Hackett and I will take all actions within our means to honor the letter and the spirit of the current contract. I hope this again clarifies our position and that no one is able to induce state management into committing an unfair labor practice by refusing to honor Union leave requests authorized by Cathy Hackett or myself.

This exchange of correspondence must be understood in the context of an internal struggle that has gone on within CSEA for a decade. This struggle has resulted in the filing of

numerous unfair practice charges with the PERB.[2] Unlike most unions, CSEA is a non-profit, mutual benefit corporation with four quasi-autonomous divisions. The internal fight for the most part has been waged over the relationship between CSEA, the parent organization, and its Civil Service Division, the largest of the four divisions.[3] The Civil Service Division is composed of active State civil service employees who are represented in the nine State employee bargaining units for which CSEA is the exclusive representative. As is made clear in previous PERB decisions, Mr. Hard and Ms. Hackett are leaders of the faction that favors greater independence for the Civil Service Division. CSEA President Perry Kenny and a majority of the board of directors favor continuation of the existing relationship.

CSEA followed its January letter to Mr. Morgenstern with a February 23, 2001, letter addressed to the labor relations officers of all State departments. The February letter warned that CSEA would not reimburse the State for Union leave not requested by Mr. Guilelmino. The letter advised that "any union leave after January 29, 2001 is not authorized unless approved by CSEA's General Manager, and that CSEA will not honor any invoices from state

[2] A partial listing of cases includes: California State Employees Association (Hackett et al.) (1993) PERB Decision No. 979-S and 979(a)-S; California State Employees Association (Hackett) (1993) PERB Decision No. 1012-S; California State Employees Association (Hackett) (1995) PERB Decision No. 1126-S; California State Employees Association (Hard et al.) (1999) PERB Decision No. 1368-S; State Employee Caucus for A Democratic Union (Kenny et al.) (2000) PERB Decision No. 1399-S; California State Employees Association (Gonzales-Coke et al.) (2000) PERB Decision No. 1411-S; California State Employees Association (Hard et al.) Case No. SA-CO-225-S, currently on appeal to the Board; California State Employees Association (Hackett) (1995) PERB Decision HO-U-599-S; and California State Employees Association (Hard et al.) (2000) PERB Decision HO-U-747-S.

[3] The other CSEA divisions are: the California State University Division which represents university employees and whose members are all active university workers; the Supervisors' Division which through the Association of California State Supervisors represents State supervisory members in a non-collective-bargaining relationship with the State; and the Retiree Division with members retired from State or university employment.

departments for any unauthorized leaves." The CSEA letter was signed by CSEA Controller Patrick Haagensen and displayed a sample signature of Mr. Guilelmino.

In a letter dated March 9, 2001, Christopher W. Katzenbach, an attorney representing Mr. Hard and Ms. Hackett, asserted to Mr. Morgenstern that CSEA bylaws do indeed grant to Civil Service Division officers authority to approve Union leave. He asserted further that the division bylaws give division officers the authority to withdraw money from division bank accounts to pay budgeted expenses such as Union leave. If necessary, Mr. Katzenbach wrote, "Mr. Hard and Ms. Hackett can exercise this authority to ensure that the State is reimbursed for Union leave as the contract requires."

Mr. Hard and Ms. Hackett also gave their personal assurances to DPA that the State would be paid for any Union leave approved by them. In a March meeting with Mr. Morgenstern they assured him "that they were the ones that had the authority to approve the union leave, and that any of the union leave that they approved would be paid," according to Gloria Moore Andrews, State chief of labor relations who attended the meeting.

Faced with these competing demands, DPA advised CSEA that it would continue to follow the past practice on approvals of Union leave and it expected CSEA to do the same. Mr. Schwartz set out this position by letter of March 20, 2001. In relevant part, Mr. Schwartz's letter reads:

> The DPA, for its part, views CSEA and its Civil Service Division as one entity. Director Morgenstern, myself, and others at DPA have repeatedly stated to CSEA officials that the State does not intend to take sides in an internal union dispute. It is for CSEA alone to decide who, within its organization, has the authority to request union leave and to communicate that decision clearly to DPA. Threats that reimbursements will be withheld or unfair practice charges will be filed against the State for siding with one faction against another are inappropriate and are themselves unlawful.

> Over the past few weeks, the DPA has had several conversations with Mr. Bassoff, Mr. Hard and other CSEA officials. Unfortunately, we find no consensus among CSEA representatives as to whom and how union leave may be requested. Pending receipt from CSEA of a clearly stated position, the State intends to abide by the past practice of honoring union leave requests that are submitted by an authorized CSEA representative, including those authorized by the Civil Service Division Director or Deputy Director alone.

On March 22, 2001, Ms. Andrews sent to all State employee relations officers a copy of Mr. Schwartz's letter to CSEA. In an attached memo, she notes the possible problem of securing reimbursement for wages paid to employees on Union leave. She suggests that the departments might seek payment for requested Union leave prior to the commencement of the requested leave. This advice left the Department of Motor Vehicle's Mr. Arbuckle unclear about what the departments were to do. "We were looking for a positive, straightforward direction from DPA," he testified. "Either . . . we approve it or we don't, and they tended not to go in that direction."

Despite Mr. Bassoff's warning to Ms. Hackett that she should not engage in campaign activities during hours covered by her Union leave, Mr. Guilelmino continued to receive reports regarding the use of Union leave for campaign activity. These reports pertained not only Ms. Hackett but to others on Union leave. Mr. Guilelmino asked Mr. Bassoff to "find out if there was any truth to the rumor that there were people actively campaigning for Cathy Hackett while on union leave." Pursuant to this request, Mr. Bassoff hired a private detective agency to investigate whether any of the persons working in Ms. Hackett's campaign were State employees on Union leave. Mr. Guilelmino testified that reports prepared by the detective agency established to his satisfaction that Ms. Hackett and three CSEA members on Union leave were all working on her campaign during business hours.

Mr. Guilelmino testified that his purpose in requiring that his signature be on all requests for Union leave was to ensure that leave was used properly.

> We felt it was our obligation, to ensure that the members' dues are used for representation and for the purpose of strictly governance work within CSEA. And that we had a fiduciary responsibility to make sure that this was what was occurring.

On April 2, 2001, Mr. Hard moved to end the impasse within CSEA. In an electronic mail message to Mr. Guilelmino, Mr. Hard wrote:

> To further the interests of our Civil Service Division members in the fight for a good contract, to avoid additional grievances and possible hardships on our volunteer member organizers I am agreeing to allow Union Leave Forms to be signed by you along with myself or Cathy Hackett so as to comply with recent demands made by various departments of the State of California. This in no way resolves the dispute over the proper authority of the CSD Officers and General Manager in regard to Union Leave.

The following day, Mr. Bassoff sent a copy of Mr. Hard's message to DPA Chief Counsel Schwartz. Mr. Bassoff wrote that "Mr. Hard's acknowledgement of the General Manager's authority puts this dispute to rest." Mr. Bassoff also asserted a belief that "this resolution renders DPA's unfair practice charge moot."[4] Ms. Andrews testified, however, that it remained DPA's position that "[w]e wouldn't change our practice, . . ." Therefore, in DPA's view the dispute was not resolved by Mr. Hard's e-mail message.

As of the last day of hearing, there were two employees for whose Union leave CSEA had refused to reimburse the State. There were at least two others for whom payment had not yet been denied but who had taken leave without the approval of Mr. Guilelmino. CSEA requested that the State provide copies of the timesheets submitted by four members who

[4] CSEA does not argue in its brief that the question of who has authority to authorize Union leave was made moot by Mr. Hard's letter and I do not consider that issue.

claimed Union leave. DPA refused to turn over the timesheets, asserting employee rights of privacy. Several timesheets were provided to CSEA by department labor relations officers who apparently were unaware of DPA's position.

LEGAL ISSUE

Did CSEA fail to meet and confer in good faith when on January 29, 2001, it advised the State that henceforth only the General Manager of CSEA was authorized to request permission for a CSEA member to go on Union leave?

CONCLUSIONS OF LAW

Unions, like employers, are obligated by the Dills Act to meet and confer in good faith. It is a violation of section 3519.5(c) for a union to "[r]efuse or fail to meet and confer in good faith with a state agency employer of any of the employees of which it is the recognized employee organization." The contention here is that by failing to bargain with the State prior to changing the practice for seeking Union leave, CSEA made a unilateral change and thereby failed to meet and confer in good faith.

Charges by an employer that a union has made a unilateral change are not common. This apparently is because of the "relative inability [of unions] to effect unilateral changes."[5] The PERB has considered this issue only once, in University Council-American Federation of Teachers (1992) PERB Decision No. 922-H. In that case, the Board applied the same unilateral change analysis that it employs in cases against employers. The Board dismissed the charge and complaint upon a finding that the change at issue did not involve a matter within the scope of representation.

[5] The Developing Labor Law (4th ed., 2001) BNA, Vol. I, Chapter 13, pp. 781-782.

To prevail on a complaint of unilateral change, the charging party must establish by a preponderance of the evidence that (1) the respondent breached or altered the parties' written agreement or own established past practice; (2) such action was taken without giving the other party 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); 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.)

Under the standard the Board has adopted, to be binding a past practice:

> . . . must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. [Citation.] The Board has . . . described a valid past practice as one that is "regular and consistent" or "historic and accepted." . . .[6]

The facts are largely undisputed. Although the negotiated agreement does not specify which agent within CSEA is authorized to request Union leave, the practice has been that several officers and staff employees have had the authority. Among those who in the past could request Union leave were the director and deputy director of the CSD. It is undisputed that on January 29, 2001, CSEA by letter to DPA changed this practice and restricted to the general manager of CSEA the sole authority to request Union leave. It is undisputed that this action was taken unilaterally, without any prior notice to the State. It also is clear from the wording in the correspondence sent by CSEA to the State that this change will be continuing

[6] Hacienda La Puente Unified School District (1997) PERB Decision No. 1186 adopting the administrative law judge decision at p. 13.

and will affect all CSEA members in all nine units represented by the Union. The critical question here, as is made clear in the briefs of the parties, is whether this change affected a matter within the scope of representation.

The State cites PERB cases holding that released time is a mandatory subject of bargaining. The State reasons that Union leave is simply a form of reimbursed released time. Because Union leave involves hours of work, the State contends, it is a negotiable subject. Noting that what specifically is at issue is the procedure under which Union leave is requested, the State applies the analysis adopted by the Board in Anaheim Union High School District (1981) PERB Decision No. 177 (Anaheim).[7] Proceeding through each of the elements in the test, the State concludes that the procedures for authorization of Union leave are negotiable and consequently, the Union has failed to negotiate in good faith.

CSEA argues that "who at CSEA is authorized to sign union leave requests is not negotiable" under the Anaheim test. The matter is not logically related to hours or any other condition of employment, CSEA contends. Moreover, CSEA continues, the subject is not of such a concern that the mediatory effects of collective bargaining are needed. Finally, CSEA concludes, if CSEA is required to negotiate about the subject its freedom to exercise its prerogative over fundamental matters of association policy would be significantly abridged. The question of which person within CSEA has the authority to incur financial liability against the Union is not a matter that should be subjected to the collective bargaining process, CSEA asserts. "The State is not permitted to become involved in matters of such fundamental

[7] This test was approved in San Mateo City School District v. PERB (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800].

financial policy of a labor union," CSEA concludes. "Therefore, the matter is not within scope."

As noted by the parties, the issue here is not the negotiability of Union leave. The parties have negotiated provision for Union leave in their agreement and there is no assertion here that Union leave is outside the scope of representation. The question here is the negotiability of procedures for determining who approves Union leaves. The PERB has never considered this issue.

Under Dills Act section 3516, 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.

The Union is obligated therefore to "meet and confer in good faith"[8] regarding "wages, hours and other terms and conditions of employment." Refusal to meet about these mandatory subjects, or to make a unilateral change, is an unfair practice.

The Union would not violate the Act, however, if it refused to negotiate about, or makes a unilateral change affecting, a matter outside the scope of representation. Both parties to the negotiations process have an absolute right to take unilateral actions regarding matters that are not mandatory subjects of bargaining.

The PERB's test for negotiability was written from the perspective of what an employer is obligated to negotiate about. Because the test as written does not recognize the union interests that are involved here, I will apply a modified version. I conclude that as to a union, a subject is negotiable under section 3516 if: (1) it is logically and reasonably related to wages,

[8] See section 3519.5(c).

hours or other terms and conditions of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) obliging the union to negotiate would not specifically abridge the union's freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the union's mission.[9]

Union leave is related to both hours and wages. When employees go on Union leave they are excused from hours and their wages and benefits are maintained. Thus, Union leave impacts both. Yet Union leave could not exist without some procedure under which the leave can be taken. There has to be a method agreed upon by the parties whereby leaves can be requested, approved or denied and the State reimbursed for the lost time. Without a procedure, there would be no way for the option of Union leave to be exercised. The procedural method is directly related to Union leave and, accordingly, related to hours and wages. Indeed, these parties have negotiated just such a procedure. The procedure they negotiated identifies who at the State shall have the authority to approve Union leaves: "the affected department head or designee." It does not identify who at the Union shall have the authority to request a Union leave. Yet had the parties chosen to negotiate about who at the Union would make the request for Union leave, the relationship to Union leave would have been apparent.

As the facts of this case illustrate, the question of who at the Union has the authority to request Union leave is a subject of such concern to both parties that the mediatory influence of collective bargaining is an appropriate means of resolving the conflict. The State has

[9] The Anaheim test was adopted for application under the Dills Act in State of California (Department of Transportation) (1983) PERB Decision No. 361-S.

expressed no interest in controlling who at CSEA has the authority to seek Union leaves. Indeed, in his letter of March 20, 2001, Mr. Schwartz asserted that "[i]t is for CSEA alone to decide who, within its organization, has the authority to request union leave and to communicate that decision clearly to DPA." But what the State has asserted is the need for an unequivocal statement from CSEA about who has the authority to approve leaves. When CSEA changed the prior practice and substituted a centralized authority for the diffused authority of the past, the State was confronted with the rival factions at CSEA each asserting that organizational bylaws and rules gave it the sole authority to request Union leave. The State was not in a position to choose sides. However, if the matter were put at the bargaining table the State could insist that CSEA designate an approving authority and place that designation in the agreement so the State would not again be caught between the rival factions within CSEA.

The final question is whether negotiations would abridge CSEA's freedom to exercise its prerogatives over matters of fundamental policy essential to the achievement of the union's mission. CSEA sees any requirement that it bargain over the question of who may seek authorization for Union leave as an intrusion into the Union's control over its financial decisions. "Taken to its extreme conclusion," CSEA argues, "the State could dictate to CSEA who would be responsible for making these decisions and incurring significant financial liability for CSEA. The State is not permitted to become involved in matters of such fundamental financial policy of a labor union."

Good faith bargaining does not encompass the idea of one side being able to dictate to the other any term or condition. Good faith bargaining rests on the idea that the two sides will bargain toward a mutually agreeable result. The question here is whether the identity of who is

authorized to request Union leave is a matter of fundamental policy. I do not find it so. I would note that the agreement between these parties already specifies who on the management side can approve Union leaves: "the affected department head or designee." One can imagine a discussion at the bargaining table over whether authority for approvals of Union leave should be centralized or diffused. Negotiating about centralized or diffused approval authority would not interfere with the Union's fundamental interests which are negotiating agreements and representing employees in grievances.

This conclusion is not affected by the possible financial implications of approvals for Union leave. Many subjects negotiated in collective bargaining have financial implications. That a negotiating proposal might involve the expenditure of funds, or a determination of who is authorized to expend funds, does not mean that it encroaches upon a fundamental interest. All that is involved here is the procedure for making and approving requests for Union leave. The Board has found procedural arrangements to be negotiable when they do not usurp an employer's rights or involve core managerial decisions that go to the heart of an employer's ability to formulate policy and carry out its overall mission. (Fremont Unified School District (1997) PERB Decision No. 1240-E at pp. 35-37 of the adopted decision of the administrative law judge.) I conclude that the same principle is applicable here and that CSEA's January 29, 2001, change in the past practice regarding who was authorized to request Union leave did involve a matter within the scope of representation.

CSEA presented considerable evidence during the hearing to demonstrate that its action was motivated by a desire to stop what it considered to be an abuse of Union leave. However, good motivation is not a defense to an allegation of unilateral change. A party may have very good reasons for wanting to implement a particular change. Nevertheless, if the change

involves a negotiable matter, the party wishing to make the change must take it to the bargaining table. In the meantime, the prior practice must remain in effect.

Accordingly, I conclude that CSEA failed to meet and confer in good faith when on or about January 29, 2001, it notified the State that henceforth only the general manager of CSEA was authorized to request permission for a CSEA member to go on Union leave.

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.

Here, CSEA unilaterally changed the past practice regarding who in CSEA had the authority to request Union leave for CSEA members. This change had the effect of requiring the State to choose which among two competing factions at CSEA had the authority to speak for the Union. The change also resulted in the failure of CSEA to reimburse the State for Union leave approved by one, but not both, of the competing factions. This action was a violation of section 3519.5(c).

The ordinary remedy in a case involving a unilateral change is an order reinstating the past practice and directing the party that made the change to make the injured party whole for any losses caused by the change. It also is appropriate to order the party that made the change to cease and desist from making a unilateral change. These remedies will be granted here.

It is further appropriate that CSEA be directed to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of CSEA, will provide employees with notice that CSEA 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 CSEA'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 California State Employees Association, SEIU Local 1000 (CSEA or Union), violated the Ralph C. Dills Act (Act), Government Coed section 3519.5(c). CSEA violated the Act when on or about January 29, 2001, CSEA informed the State of California (Department of Personnel Administration) (State) that henceforth it would reimburse the State for only those Union leave requests that were made by the general manager of CSEA. This policy was a change from the past practice whereby both the director and deputy director of the Civil Service Division of CSEA also had the authority to request Union leave. This change had the effect of requiring the State to choose which among two competing factions at CSEA had the authority to speak for the Union. The change also resulted in the failure of CSEA to reimburse the State for Union leave approved by one, but not both, of the competing factions. Pursuant to section 3514.5(c) of the Government Code, it hereby is ORDERED that CSEA and its representatives shall:

A. CEASE AND DESIST FROM:

Unilaterally changing the past practice whereby CSEA officers in addition to the general manager had the authority to make Union leave requests on behalf of CSEA members.

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 the prior practice whereby CSEA officers in addition to the general manager have the authority to make Union leave requests on behalf of CSEA members.

2. Reimburse the State of California for all Union leave which the State granted to CSEA members in accord with the prior practice but whose leave requests were not signed by the CSEA general manager. The reimbursement shall include interest at the rate of 7 percent accrued beginning 30 days after the first date on which the State submitted invoices to CSEA that were subsequently denied because the Union leave request forms had not been signed by the CSEA general manager.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations, throughout the State of California, where CSEA customarily posts notices to its members, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of CSEA, indicating that CSEA 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 Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

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

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. (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 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, secs. 32135(a) and 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 California Code of Regulations, title 8, section 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, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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, 32140, and 32135(c).)

Ronald E. Blubaugh
Administrative Law Judge