STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Respondent.	Case No. SA-CE-1636-S PERB Decision No. 2106-S April 30, 2010

Appearances: Carroll, Burdick & McDonough by Gregg McLean Adam and Erick V. Munoz, Attorneys, for California Correctional Peace Officers' Association; Christopher E. Thomas, Labor Relations Counsel, for State of California (Department of Personnel Administration).

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Correctional Peace Officers' Association (CCPOA) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the State of California (Department of Personnel Administration) (DPA or State)[1] violated the Ralph C. Dills Act (Dills Act)[2] by interfering with and discriminating against union members when it provided enhanced dental benefits at a reduced cost to non-union members[3]. CCPOA

[1] PERB initially incorrectly cited the charge as filed against the Department of Corrections and Rehabilitation.

[2] The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[3] CCPOA withdrew a unilateral change allegation during the investigation of the charge.

alleged that this conduct constituted a violation of Dills Act section 3519(a). The Board agent dismissed the charge for failing to state a prima facie case of discrimination or interference.

The Board reviewed the dismissal and the record in light of CCPOA's appeal, DPA's response to the appeal and the relevant law. Based on this review, the Board affirms in part, and reverses in part, the dismissal of the unfair practice charge.

BACKGROUND

CCPOA is the exclusive representative of the employees in State Bargaining Unit 6. CCPOA and the State are parties to an expired memorandum of understanding (MOU) with a term of July 1, 2001 through July 2, 2006. For many years, CCPOA and the State agreed that the CCPOA Benefit Trust Fund would provide certain benefits to Unit 6 members, including dental and vision benefits.[4] Article 13.02 of the MOU required the State "to provide CCPOA the net sum of $44.33 per month per eligible employee for the duration of this agreement to provide a dental benefit through the CCPOA Benefit Trust Fund."

Prior to expiration of the MOU, CCPOA and the State initiated negotiations for a successor agreement. Negotiations eventually stalled and the parties participated in impasse procedures with a mediator. On September 6, 2007, the mediator confirmed that CCPOA had withdrawn from mediation. On September 18, 2007, DPA notified CCPOA that the State was implementing its last, best and final offer (LBFO).

[4] The CCPOA Benefit Trust Fund is an independent corporation established by CCPOA and maintained in accordance with the terms of the federal Employee Retirement Income Security Act of 1974 (ERISA). Three trustees are selected by CCPOA members and two trustees are appointed by the CCPOA President. In addition, the CCPOA president and the treasurer are ex-officio trustees. The Benefit Trust Fund defines a "Participant" as "a person who is or was a member of CCPOA or Bargaining Unit No. 6 or who may become eligible for benefits under the Plan or who otherwise qualifies as a participant under ERISA."

The LBFO "rolled-over" numerous provisions of the expired MOU, including Article 13.02. Pursuant to this article, the State continued to provide funding to CCPOA to provide Unit 6 employees with a dental benefit through the Benefit Trust Fund.

On October 29, 2007, the Benefit Trust Fund administrator wrote to the State Controller's Office (SCO) requesting that the SCO stop collecting and remitting to the Benefit Trust Fund, the dental and vision benefit contributions from non-union member employees. The letter further stated:

> As such, it will be the responsibility of the DPA to arrange for these benefits to be provided to the impacted employees through another source.

On October 31, 2007, in a letter to the Department of Corrections and Rehabilitation, the Benefit Trust Fund administrator stated:

> [E]ffective November 1, 2007, the CCPOA Benefit Trust Fund ("Trust Fund") is no longer able to provide former fair share members with dental and vision benefits through the CCPOA Dental and Vision Plans. Therefore, it is absolutely necessary that notice be provided to these individuals immediately to inform them of this change and advise them to immediately contact their State Personnel Offices to enroll in another State of California vision and dental plan.

In a letter dated November 5, 2007, DPA notified non-union member employees that the Benefit Trust Fund had terminated their dental and vision benefits effective October 31, 2007. Non-union members were told they would automatically be enrolled in the state-sponsored vision plan. DPA also invited non-union members to enroll in one of several existing state-sponsored dental plans that were offered to other state employees. As a result, while the State's contribution toward a union member's dental benefit remains at $44.33 per month, the State's contribution for non-union members can, according to the charge, be as much as $93.75 per month. After enrolling in a state-sponsored dental plan,

non-union members with two dependents pay $30.94 per month toward their dental benefit premiums, while CCPOA members with two dependents pay a dental premium of $41.80 per month. DPA did not offer the lower cost dental plan to union members.

DISCUSSION

Dills Act section 3515 provides state employees with "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." Interference with or discrimination against employees because of their participation in union activities is an unfair practice. Dills Act section 3519(a) states that it is unlawful for the State to:

> 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.

Early PERB decisions show the Board looked to the National Labor Relations Board (NLRB) for guidance[5] in applying an identical statute under the Educational Employment Relations Act (EERA).[6] (*San Dieguito Union High School District* (1977) EERB[7] Decision No. 22; *Carlsbad.*) The National Labor Relations Act (NLRA)[8] contains similar, but not

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[5] Although it is not bound by decisions of the NLRB, the Board will take cognizance of NLRB precedent where appropriate, as an aid in interpreting identical or analogous provisions of the statutes. (*Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*).)

[6] EERA is codified at Section 3540 et seq. EERA section 3543.5(a) states, in relevant part, that it is unlawful for a public school employer to:

> 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.

[7] Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB).

[8] The NLRA is codified at 29 U.S.C. sec. 151 et seq.

identical, language prohibiting employer interference and discrimination. NLRA section 8(a)(1) provides that it is an unfair labor practice for an employer "to *interfere* with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157." (Emphasis added.) Unlawful intent or motive is not a necessary element of a Section 8(a)(1) interference charge. (*American Freightways Co.* (1959) 124 NLRB 146, 147.) NLRA section 8(a)(3) makes it unlawful for an employer "by *discrimination* in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." (Emphasis added.) Unlawful motive is in most cases a required element to find discrimination in violation of NLRA section 8(a)(3). (*NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393, 401.)

In *Carlsbad*, the Board observed that, unlike the NLRA, EERA's prohibitions on interference and discrimination are contained in the same subsection of the statute. Accordingly, the Board laid out a single test to establish a violation of both the interference and discrimination prohibitions in EERA section 3543.5(a):

> 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;
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> 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;
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> 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;
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> 5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the

complained-of conduct but for an unlawful motivation, purpose or intent.[9]

In *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*), the Board clarified the separate standards of proof for interference and discrimination violations. The Board adopted the NLRB's test for discrimination set out in *Wright Line* (1980) 251 NLRB 1083, holding that unlawful motive is an essential element of a discrimination violation. As for interference allegations, the Board explained that the test for whether a respondent interfered with employee rights does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct.

Interference

To establish a prima facie case of unlawful interference under the Dills Act, a charging party must establish that the employer's conduct tends to or does result in some harm to employee rights granted under the statute. (*Novato*; *State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S.) In *Clovis Unified School District* (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require

[9] The Board was clearly influenced by the standard set forth in *NLRB v. Great Dane Trailers* (1967) 388 U.S. 26 (*Great Dane*). In *Great Dane*, the U.S. Supreme Court found an employer's conduct to be "discriminatory" under NLRA section 8(a)(3) if: (1) its effect on employee rights was "inherently destructive" and the employer was unable "to establish that he was motivated by legitimate objectives;" or (2) the effect was "comparatively slight" and the employer could not justify a substantial and legitimate business purpose. (*Id.*, at p. 34.) Unlike the standard 8(a)(3) discrimination test, the *Great Dane* test does not require the charging party to establish the employer's unlawful motive. In this respect, the *Great Dane* standard is similar to the NLRB's test for interference under NLRA section 8(a)(1), which requires that: (1) employees engaged in protected activity; (2) the employer's conduct tends to interfere with, restrain or coerce employees in the exercise of those activities; and (3) the employer's conduct was not justified by legitimate business reasons. (*Fun Striders, Inc. v. NLRB* (9th Cir. 1981) 686 F.2d 659.) Despite this similarity, federal courts and the NLRB have continued to apply *Great Dane* to find 8(a)(3) violations in cases where employers treated groups of employees differently based on their participation in protected activity. (*National Fabricators v. NLRB* (5th Cir. 1990) 903 F.2d 396 [employer selected for layoff those employees likely to engage in picketing]; *Northeast Constructors* (1972) 198 NLRB 846 [employer refused to rehire laid off employees who had previously served as union stewards].)

evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity.

Once a prima facie case of interference is established, the burden shifts to the employer to justify its conduct due to operational necessity if the harm is slight, or where the harm is inherently destructive of employee rights, to show that its conduct should be excused because of circumstances beyond the employer's control. (*Carlsbad; Novato.*)

On October 31, 2007, the CCPOA Benefit Trust Fund notified the State that it would stop providing dental benefits to non-union members effective November 1, 2007. The Benefit Trust Fund advised the State to inform non-union members to enroll in another state dental benefit plan. DPA quickly notified non-union members of their option to enroll in the state-sponsored dental plans. CCPOA contends that the State created a disparity when non-union members were able to obtain enhanced dental benefits at a slightly lower cost than union members. The option to enroll in state-sponsored dental plans was not offered to union members.

CCPOA contends the State has provided "enhanced" dental benefits to non-union members because the amount of the State's contribution for the state-sponsored dental plan is larger than the State's contribution toward the CCPOA dental plan. This claim fails, however, because there are no facts to show that the state-sponsored dental plan provides greater benefits. The mere fact that the State pays more for the state-sponsored plan does not demonstrate that the State plan provides enhanced benefits over the CCPOA dental plan.

CCPOA union member employees exercised rights protected by the Dills Act when they chose to become members of the union. CCPOA has not alleged that the difference in benefit costs for union and non-union members resulted in actual harm to the rights of union members. There is no evidence that any union member employees opted to resign their union

membership in order to obtain dental benefits at a reduced cost, or that any non-union employees declined membership because of the benefit cost. Nor did CCPOA allege that any union member requested to switch to the state-sponsored plan and was denied. Thus, there is no evidence of actual harm to employee rights.

However, the lower cost dental benefit was not offered to union members. Providing benefits at a lower cost to non-union members, while excluding union members from this option, tends to result in at least slight harm to employees who choose to exercise the right to join a union. A reduced benefit cost available only to non-union members may influence an employee's decision to join the union. Accordingly, the charge states a prima facie case of interference.[10]

Discrimination

CCPOA also alleges the State discriminated against union members by providing lower cost dental benefits to non-union members.

As explained above, the Board in *Novato* adopted the NLRB's *Wright Line* standard for discrimination. To demonstrate that an employer discriminated against an employee in violation of Dills Act section 3519(a), the charging party must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato*; *State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S.)

Once a prima facie case of discrimination is established, an employer may justify its conduct by demonstrating that it would have taken the adverse action even if the employee had

[10] At this stage of the charge review, the Board decides only whether the factual allegations state a prima facie case. It is not appropriate at this point to determine whether DPA's actions were justified due to operational necessity and/or circumstances beyond the employer's control.

not engaged in protected activity. (*Novato*; *Wright Line; McPherson v. PERB* (1987) 189 Cal.App.3d 293.)

Clearly, union member employees exercised rights under the Dills Act when they opted to join the union. DPA was aware of the employees' union membership status as it sent a notice only to non-union members regarding the termination of their benefits by CCPOA's Benefit Trust Fund.

In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely on the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689 (*Palo Verde*).) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an *adverse impact on the employee's employment.*

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; fn. omitted.)

The charge fails to establish that the State took adverse action against union members. No action was taken against union members that either imposed discipline or changed their terms and conditions of employment. Union members continued to receive the same dental benefits at the same employee contribution rate. There was no impact on the employees' employment.

The Board has held that an adverse action must involve actual, not merely speculative, harm to the employee's employment. (*Palo Verde*; *City & County of San Francisco* (2004) PERB Decision No. 1664-M.) In *Palo Verde*, a teacher, who served as a union bargaining team member, performed an extra-duty assignment as the district computer coordinator. When

a strike was imminent, the district relocated the teacher from his extra-duty office located next to the school superintendent's office, to a classroom. The Board held that the teacher was not adversely affected because his duties and compensation remained the same. The Board refused to give weight to the teacher's subjective view that he suffered a loss of prestige due to the relocation. The Board has similarly rejected other conduct that did not change an employee's employment terms. (*County of Riverside* (2009) PERB Decision No. 2065-M [reclassification not adverse because pay and job duties remained the same]; *Alvord Unified School District* (2009) PERB Decision No. 2021 [no impact on compensation or number of classes taught by change in class schedule].)

In *City of San Diego* (2005) PERB Decision No. 1738-M (*San Diego*), the Board adopted the administrative law judge's proposed decision that found the denial of a benefit to be an adverse action. *San Diego* arises under the Meyers-Milias-Brown Act (MMBA), which contains a non-discrimination provision similar to the Dills Act.[11]

In *San Diego*, the city and union negotiated an agreement to provide employees with a flexible benefits plan. Employees were required to apply the employer's benefit contribution amount to select a health insurance plan and a life insurance plan. With the remaining funds, employees could select from additional benefit options. However, the dental and vision benefits were open only to union members and agency fee payers. The charging party in this

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[11] The MMBA is codified at Section 3500 et seq. MMBA section 3506 states:

> Public agencies and employee organizations shall not interfere with, intimidate, restrain, coerce or discriminate against public employees because of their exercise of their rights under Section 3502.

MMBA section 3502 grants public employees "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."

case, neither a union member nor an agency fee payer, was denied the opportunity to select the dental and vision benefits.[12]

The Board in *San Diego* held that the denial of the benefit opportunity was an adverse action. However, the Board incorrectly applied the *Novato* discrimination standard to find an adverse action. The Board relied on the "discrimination" test in *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*), as the basis for applying, in part, the *Novato* standard for discrimination.

In *Campbell*, during negotiations for a new contract, the union and the city reached impasse over two issues. Among the terms on which the parties had reached agreement was that any wage and fringe benefit increases would be retroactive to October 1, 1978. Following an impasse hearing before the city council, the city council adopted the city negotiator's position on the two disputed issues, but also modified the retroactive application of benefits from October 1, 1978 to February 1, 1979, an issue that was not a subject of the impasse proceedings. The court noted that the retroactive date for application of benefits for all other represented employees remained October 1, 1978, and that this union was the only union to utilize the impasse procedures.

The court in *Campbell* applied the standard set out in *Great Dane* to find the city's conduct was discriminatory. The court found the employees' participation in the impasse procedures was a protected right. The court then concluded that the city's conduct, changing the retroactive date, had either an "inherently destructive" or "comparatively slight" effect on employee rights. The court found it unnecessary to decide the level of harm to employee rights because the city did not provide any justification for its conduct. Although the court labeled

[12] The negotiated agency shop provision applied only to newly hired employees. Existing employees were not required to join the union or pay fair share fees.

the city's conduct discriminatory, it did not consider whether the city took adverse action against bargaining unit employees.[13]

Thus, in *San Diego*, the Board erred in applying the *Novato* discrimination standard to find adverse action. Accordingly, that portion of *San Diego* is overruled.[14]

As the charge in the present case does not demonstrate that the State took adverse action against union members when it provided non-union members with a lower cost dental benefit, the dismissal of the discrimination allegation is affirmed.

ORDER

The Public Employment Relations Board (Board) AFFIRMS the dismissal in Case No. SA-CE-1636-S of the allegation that the State of California (Department of Personnel Administration) (State) discriminated against union members.

The Board REVERSES the dismissal of the allegation that the State interfered with the rights of union members and REMANDS that allegation to the Office of the General Counsel for issuance of a complaint consistent with this Decision.

Chair Dowdin Calvillo joined in this Decision.

Member McKeag's concurrence and dissent begins on page 13.

[13] Similarly, in *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*), the court found that by providing different benefits to non-represented management employees and represented rank and file employees, the city both interfered with and discriminated against union represented employees in violation of MMBA section 3506. The court in *San Leandro* also did not determine that the employer took adverse action against the employees to find the city's conduct was discriminatory.

[14] The Board in *San Diego* additionally utilized the *Campbell* interference analysis, applying the inherently destructive/comparatively slight standard to find that the union's denial of a benefit to a unit member affected the employee's rights and thus violated the MMBA.

McKEAG, Member, concurring and dissenting: I agree with the majority's ruling that the State of California (Department of Personnel Administration) (State) did not discriminate against California Correctional Peace Officers' Association (CCPOA) members when it offered non-members dental insurance normally available to other state employees. I respectfully dissent, however, from the majority's ruling that the State committed unlawful interference based on the same conduct.

In order to find unlawful interference, the Public Employment Relations Board (PERB) has held that the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under the Ralph C. Dills Act. (*State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S, citing *Carlsbad Unified School District* (1979) PERB Decision No. 89 and *Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106.)

In the instant case, CCPOA members continued to enjoy the exact same dental benefits after the implementation of the State's last best and final offer. When CCPOA Benefit Trust Fund refused to provide dental benefits to the former CCPOA agency fee payers, the State was faced with a choice to either offer these employees the dental benefit currently offered to non-CCPOA members or to provide no dental benefit. Clearly, the latter option was untenable and would have likely resulted in litigation. Therefore, the State had only one legitimate option, and it exercised that option. The mere fact that non-CCPOA members were provided dental benefits available to other non-Bargaining Unit 6 members simply does not constitute a harm in this instance.

Based on the foregoing, I find the State's conduct simply did not result in any harm to employee rights. Accordingly, I conclude the interference charge should be dismissed for failure to establish a prima facie case.