

**OVERRULED IN PART by County of Sacramento
(2013) PERB Decision No. 2315-M**

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



UNION OF AMERICAN PHYSICIANS &
DENTISTS,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENT OF
VETERANS AFFAIRS),

Respondent.

Case No. SA-CE-1808-S

PERB Decision No. 2110-S

June 1, 2010

Appearances: Davis, Cowell & Bowe by Andrew J. Kahn, Attorney, for Union of American Physicians & Dentists; State of California (Department of Personnel Administration) by Jake M. Hurley, Labor Relations Counsel, for State of California (Department of Veterans Affairs).

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

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Union of American Physicians & Dentists (UAPD) of a Board agent's dismissal of its unfair practice charge. The charge, as amended, alleged that the State of California (Department of Veterans Affairs) (DVA or State) violated the Ralph C. Dills Act (Dills Act)¹ by unilaterally deciding to close the acute care unit at the Yountville Veterans Home (Home) and refusing UAPD's demands to bargain over the closure and its effects. The Board agent dismissed the charge for failure to state a prima facie case of refusal to bargain.

¹ The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

The Board has reviewed the dismissal and the record in light of UAPD's appeal, DVA's response and the relevant law. Based on this review, the Board affirms the dismissal of the unfair practice charge for the reasons discussed below.

BACKGROUND

UAPD is the exclusive representative of employees in State Bargaining Unit 16, including physicians employed by DVA. In May 2009, DVA sent layoff notices to Unit 16 members employed in the Home's acute care unit. The layoff notices informed employees that DVA was closing the acute care unit effective August 1, 2009. UAPD learned of the closure decision and layoffs from employees who had received layoff notices.

Sometime in July 2009, DVA posted a Public Notice of Proposed Closure stating that "acute care hospital services will be eliminated" at the Home effective August 1, 2009. Around this time, UAPD President Dr. Stuart Bussey (Bussey) met with Department of Personnel Administration (DPA) representatives about the closure. UAPD requested information about the reasons for the closure and said it wanted to negotiate over the decision. According to Bussey, DPA representatives responded with words to the effect "we're not going to get into that."

On July 16, 2009, Andrew Kahn, UAPD's attorney, sent a letter to DVA officials and DPA representatives regarding the closure. The letter asserted that the closure and the resulting use of private hospitals to provide acute care services to Home residents were illegal for three reasons: (1) they violated state constitutional limits on contracting out civil service work; (2) they violated the Legislative mandate that acute care services be performed on-site; and (3) DVA failed to bargain with UAPD over the closure. Regarding the third reason, the letter stated in full:

The decision to close this unit and contract-out the work to private hospitals was not bargained with UAPD, in violation of

the Dills Act. UAPD learned of this decision only after its members at the facility were notified that it was happening. UAPD would have liked the opportunity to show the State it will only end up paying more, as noted above.

The letter closed:

If we do not hear from you or your attorneys within 48 hours that you are either going to hold off on closure or can show us why these claims lack merit, then we intend to immediately seek judicial and administrative relief.

UAPD filed the instant unfair practice charge on July 20, 2009. The following day, DVA Deputy Secretary and Chief Counsel Robert D. Wilson (Wilson) responded to UAPD by letter. Regarding the alleged Dills Act violation, Wilson stated that the closure decision was not negotiable because it “does not alter the conditions of any employment” but merely affects the fact of employment.

The amended charge, filed on October 26, 2009, alleged:

In or about July 28, 2009 at a meeting with DPA’s Jackie Cervantes and a DVA representative, UAPD through representatives Zegory Williams, Al Groh and Jim Moore sought to negotiate over the decision to close and its impact, but were told by these management representatives that these were not negotiable matters and all that would take place is that DVA would explain its layoff implementation plan.

DVA closed the Home’s acute care unit on August 1, 2009, as planned. After that date, Home residents were transported to nearby private hospitals for acute care services.

The Board agent dismissed the charge on the ground that UAPD failed to allege facts establishing it made a valid request to bargain over the effects of the closure. On appeal, UAPD asserts it made two valid requests to bargain both the closure decision and its effects: the July 16, 2009 letter and the July 28, 2009 oral request. UAPD also contends that DVA made an unlawful unilateral change by closing the acute care unit because “contracting out services is within the scope of bargaining.” DPA responds that the charge failed to establish a

valid demand by UAPD to bargain the effects of the closure decision and that the decision is not negotiable because it involved a cessation of operations rather than contracting out of bargaining unit work.

DISCUSSION

1. UAPD's Request for Leave to File Reply Brief

UAPD has requested leave to file a reply brief in response to DPA's brief in opposition to the appeal. The basis for UAPD's request is that DPA's brief raised the issue of contracting out, which was not addressed in the Board agent's dismissal. DPA opposes the request on the ground the contracting out issue was raised before the Board agent and therefore UAPD was on notice that DPA disputed the issue.

PERB regulations do not expressly provide for or preclude the filing of reply briefs on appeal. (*Los Angeles Unified School District/Los Angeles Community College District* (1984) PERB Decision No. 408.) Consequently, the Board has ruled that it has discretion to allow the filing of a reply brief when a response to exceptions "raises new issues, discusses new case law or formulates new defenses to allegations." (*Ibid.*)

The issue of whether DVA contracted out bargaining unit work by closing the acute care unit and sending Home residents to private hospitals for acute care services is not a new issue first raised by DPA in its opposition to the appeal. As DPA points out, the contracting out argument in its opposition brief is almost identical to that set forth in DPA's earlier position statements. Moreover, in the unilateral change section of its appeal, UAPD itself raises the issue "that contracting out services is within the scope of bargaining." The fact that the Board agent did not address the contracting out issue in the dismissal does not mean the issue is no longer before PERB because the Board may affirm a dismissal on any ground supported by the record. (See *Pleasant Valley School District* (1988) PERB Decision No. 708 [affirming ALJ's finding

of a violation on different grounds].) Accordingly, we deny UAPD's request for leave to file a reply brief.

2. Merits of the Charge

UAPD's charge raises two issues: (1) whether DVA made an unlawful unilateral change when it decided to close the Home's acute care unit; and (2) whether DVA unlawfully refused UAPD's requests to bargain over the effects of the closure on Unit 16 members.

a. *Unilateral Change*

An employer's unilateral change in terms and conditions of employment is considered a per se violation of Dills Act section 3519, subdivision (c) if: (1) the employer breached or altered the parties' written agreement or its 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 in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

DVA changed its past practice of providing acute care services at the Home, a change which necessarily had a generalized effect and continuing impact on Unit 16 members employed in the Home's acute care unit. The May 2009 layoff notices to Unit 16 members did not constitute sufficient notice to UAPD of DVA's decision to close the acute care unit. (*Fall River Joint Unified School District* (1998) PERB Decision No. 1259.) Moreover, the layoff notices indicated that DVA had already made a firm decision to close the acute care unit and therefore any request by UAPD to bargain over the decision would have been futile.

(*Ibid.*) Consequently, we find DVA did not provide UAPD with notice and an opportunity to bargain before reaching a firm decision to close the Home's acute care unit.

The parties dispute whether DVA's closure decision concerned a matter within the scope of representation and therefore was subject to negotiation. UAPD asserts the decision to close the acute care unit and layoff unit employees was negotiable because it was the result of DVA contracting out bargaining unit work to private hospitals. DVA counters that the decision was a non-negotiable managerial prerogative because it involved a change in the scope of services provided by the Home.

As a general rule, the decision to layoff employees is not within the scope of representation. (*State of California (Department of Personnel Administration)* (1987) PERB Decision No. 648-S; *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223.) However, when the layoffs result from a decision to contract out bargaining unit work, "the decision to subcontract and lay off employees is subject to bargaining." (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 621.) Contracting out is negotiable in either of two circumstances: (1) where the employer simply replaces its employees with those of a contractor to perform the same services under similar circumstances; or (2) where the decision was motivated substantially by potential savings in labor costs. (*Lucia Mar Unified School District* (2001) PERB Decision No. 1440.)

To establish that an employer contracted out bargaining unit work, the charging party must show the employer entered into an agreement with a contractor under which the contractor will perform the same work formerly performed by bargaining unit members. (*Rialto Police Benefit Assn. v. City of Rialto* (2007) 155 Cal.App.4th 1295, 1299; *Oakland Unified School District* (2005) PERB Decision No. 1770.) In *Oakland Unified School District*, *supra*, the Board found contracting out where the district laid off its security officers and

entered into a written memorandum of understanding with the Oakland Police Department to provide security on district campuses for two years in exchange for a \$1 million payment. The Board rejected the district's argument that its decision to no longer provide security services was a "change in direction" that was not subject to negotiation. The Board suggested that had the district merely laid off its security officers and then allowed the police department to patrol its campuses as part of its regular beat, the Board would have reached a different conclusion.

Here, it is undisputed that, following closure of the acute care unit, Home residents received acute care services at private hospitals. However, UAPD failed to allege facts showing that DVA had an agreement with the private hospitals to provide those services. UAPD provided no written agreements nor did it allege that such agreements existed. The allegation that DVA arranged to have Home residents transported to private hospitals for acute care services falls far short of establishing a contractual agreement with the hospitals to provide those services. In short, UAPD's assertion that the work was contracted out, absent allegations establishing an agreement, is insufficient to show that DVA contracted out bargaining unit work. (See *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944 [legal conclusions are not sufficient to state a prima facie case].)

UAPD nonetheless argues that DVA contracted out bargaining unit work because the State continued to pay for Home residents' acute care services via Medi-Cal. As the affected employees' appointing authority, DVA is the "State employer" for purposes of this charge. (*State of California (Department of Veterans Affairs)* (2004) PERB Decision No. 1686-S.) The charge failed to establish that DVA paid the private hospitals to perform services for Home residents that were previously performed by DVA employees. Rather, it appears that Medi-Cal paid the hospitals directly based on patient eligibility, without any funds passing through DVA.

In sum, the charge failed to allege facts to establish that DVA contracted out Bargaining Unit 16 work. Accordingly, we conclude that DVA's decision to close the acute care unit and layoff unit employees was not within the scope of representation, and thus DVA did not commit an unfair practice by unilaterally making that decision.

b. Refusal to Bargain Effects of Closure

An employer's duty to bargain is triggered by an exclusive representative's valid demand to bargain. (*Newman-Crows Landing Unified School District, supra.*) While the demand need not take any particular form, it must sufficiently signify the exclusive representative's desire to bargain over a subject within the scope of representation. (*Sylvan Union Elementary School District* (1992) PERB Decision No. 919.) When an exclusive representative demands to bargain over the effects of a non-negotiable decision, the demand must clearly identify the negotiable effects. (*State of California (Department of Corrections)* (2006) PERB Decision No. 1848-S; *Newman-Crows Landing Unified School District, supra.*)

UAPD alleged that it requested to bargain over the effects of DVA's decision to close the Home's acute care unit on two occasions: (1) in its July 16, 2009 letter to DVA; and (2) during a meeting with DVA and DPA representatives on July 28, 2009.

UAPD admits in its appeal that it did not specifically request to negotiate in its July 16, 2009 letter but nonetheless claims that the letter constituted a "general notice of interest" in the closure sufficient to trigger DVA's duty to bargain pursuant to *Allan Hancock Community College District* (1989) PERB Decision No. 768. However, while the letter addressed the closure decision, it merely stated UAPD's displeasure that it was not afforded an "opportunity to show the State it will only end up paying more." The letter did not mention the layoffs at all, much less any effects of the layoffs on acute care unit employees. Consequently, the letter did not constitute a valid demand to bargain over the effects of the layoffs.

During the July 28, 2009 meeting, UAPD representatives “sought to negotiate over the decision to close and its impact.” The amended charge provides no further details of the bargaining demand. Thus, the charge failed to allege that UAPD’s demand identified any negotiable effects of the closure decision.

For the above reasons, we conclude that UAPD did not make a valid demand to bargain over negotiable effects of DVA’s decision to close the acute care unit and layoff Unit 16 employees. Accordingly, DVA did not violate Dills Act section 3519, subdivision (c) by failing to bargain with UAPD over such effects.

ORDER

The unfair practice charge in Case No. SA-CE-1808-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.