VACATED by State of California (Department of Forestry & Fire Protection, State Personnel Board (2014) PERB Decision No. 2317a-S

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CDFFIREFIGHTERS, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF FORESTRY & FIRE PROTECTION, STATE PERSONNEL BOARD), Res ondent.	Case No. SA-CE-1896-S PERB Decision No. 2317-S June 17, 2013

Appearances: Carroll, Burdick & McDonough by Gary M. Messing, Attorney, for CDF Firefighters; State of California Department of Personnel Administration by David M. Villalba, Legal Relations Counsel, for State of California (Department of Forestry & Fire Protection, State Personnel Board).

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the CDF Firefighters (CDFF) of a dismissal (attached) of its amended unfair practice charge against the State of California (Department of Forestry & Fire Protection, State Personnel Board) (State), specifically the State Personnel Board (SPB). The charge, as amended, alleged that SPB violated the Ralph C. Dills Act (Dills Act) [1] by unilaterally changing disciplinary appeal procedures without meeting and conferring with CDFF.

The General Counsel dismissed the charge, concluding that SPB has no duty to bargain with CDFF because the State Constitution gives SPB plenary authority over civil service statutes, including rule-making deemed necessary by SPB to enforce those statutes.

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

The Board has reviewed the entire record in this matter and given full consideration to the appeal and response thereto. Based on this review, the Board affirms the dismissal, but for different reasons than those relied on by the General Counsel.

SUMMARY OF ALLEGATIONS[2]

According to the charge, on August 18, 2010, SPB unilaterally implemented changes in the California Code of Regulations governing di9ciplinary hearings and appeals by state employees. Despite the fact that CDFF had submitted demands to meet and confer and offered suggested changes in the regulations that were initially proposed by SPB, SPB refused to meet and confer with CDFF. SPB asserted that it had no duty to meet and confer with CDFF or any other employee organization representing state employees because changes to the civil service system were "not part of the collective bargaining process."

The adopted changes to the regulations touched on such matters as the authority of SPB to bypass appellate procedures, pretrial disclosures of witnesses and testimony summary, a time limit for bringing cases to hearing, and time limits on propounding discovery requests.

CDFF filed this charge on February 11, 2011, within six months of SPB's final adoption of the regulation changes.

THE DISMISSAL

The Office of the General Counsel dismissed this charge based on its reading of *State Personnel Bd. v. Department of Personnel Admin.* (2005) 37 Cal.4th 512 *(DPA),* which invalidated provisions in memoranda of understanding that established review boards to adjudicate certain disciplinary actions. These provisions violated Article VII, Section 3 of the

[2] At this stage of the proceedings, we assume that the essential facts alleged in the amended charge are true. *(San Juan Unified School District* (1977) EERB Decision No. 12 [prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB]; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755.)

California Constitution, which grants SPB the authority to enforce the civil service statutes and "review disciplinary actions." The Court concluded: "Because employee discipline is an integral part of the civil service system, the State Personnel Board's *exclusive* authority to review disciplinary decisions is a critical component of the civil service system." *(DPA,* at p. 527; emphasis in original.)

Since Article VII, Section 3(a) of the Constitution also grants SPB authority to adopt and administer rules necessary to enforce the civil service statutes, the General Counsel reasoned that revision of SPB regulations governing disciplinary appeal procedures was "an act pursuant to its C01lstitutional mandate, and, as such, is not within the scope of bargaining under the Dills Act."

POSITION OF THE PARTIES

CDFF contends on appeal that even though SPB is not the appointing authority for the bargaining unit employees represented by CDFF, it nevertheless is obligated to negotiate over mandatory terms and conditions of employment, citing *Los Angeles County Civil Service Com. v. Superior Court* (1978) 23 Cal.3d 55 *(Los Angeles County).* SPB's constitutional authority over administration of the civil service system is not mutually exclusive of the obligation to negotiate over mandatory subjects of bargaining, according to CDFF. CDFF invites us to harmonize potential conflict between the Dills Act and the Constitution, relying on *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168.

According to CDFF, this case differs from *DPA, supra,* 37 Cal.App.4th 512, because here, the obligation to bargain over procedural regulations governing discipline does not divest SPB of its authority to review disciplinary actions or to establish rules relevant to those actions. It would simply have to negotiate with the "impacted representatives" before making such changes.

In opposing the appeal, the State asserts four reasons supporting the dismissal of the charge. First, requiring SPB to negotiate over disciplinary appeal procedures would interfere with its constitutional authority because the regulations are part of how disciplinary appeals are managed. *Los Angeles County, supra,* 23 Cal.3d 55 is distinguishable from this case because it did not involve an entity with the same unique level of constitutional authority as SPB, according to the State. Second, SPB does not have a duty to bargain because it is not the Governor's designated representative in negotiations with state employee organizations. Third, disciplinary appeal procedures in general are outside the scope of bargaining under the Dills Act because discipline is governed by statutes. Therefore, according to the State, changes to disciplinary regulations are outside the scope of bargaining because disciplinary procedures are "extra-contractual," citing *Carmichael Recreation & Park District* (2008) PERB Decision No. 1953-M. Lastly, the State urges that the appeal be dismissed because the unfair practice charge was untimely. It asserts that CDFF knew on January 8, 2010 of these proposed regulatory changes. According to the State, "CDFF was fully aware of SPB's intent to alter its regulations a full thirteen months before CDFF filed its charge on February 17, 2011."

DISCUSSION

Because we uphold the dismissal of this charge on the ground that SPB does not have a duty to meet and confer with exclusive representatives of non-SPB employees, we do not address the other arguments raised by the State.

This unfair practice charge was initially filed against both SPB and the appointing authority of employees represented by CDFF, the California Department of Forestry and Fire Protection (CDF). However, the amended charge makes clear that the charge is directed only against SPB, not CDF. Although SPB is not the employer in this case, PERB has held that SPB may be subjected to unfair practice charges in certain circumstances. *(State of California*

(State Personnel Board) (2006) PERB Decision No. 1864-S *(State of California),* at p. 23 . ["SPB, as a State agency, is subject to the Dills Act section 3519"].)3 In *State of California,* SPB was charged with interfering with protected rights of employees and their organizations in violation of Dills Act section 3519(a) and (b).

Where it is alleged that SPB has violated Dills Act section 3519(c) by refusing to bargain or by unilaterally changing terms and conditions of employment allegedly within the scope of bargaining, we must determine if SPB has a duty to negotiate with an exclusive representative of employees employed by different appointing authority. For the reasons below, we hold that it does not have such a duty.

The Dills Act uses three different terms to refer to state management entities. Section 35130) defines "'[s]tate employer,' or 'employer,' for the purposes of bargaining or meeting and conferring 1n good faith, (as] the Governor or his or her designated representatives." (Emphasis added.) As the Board noted in *State of California, supra,* PERB Decision No. 1864-S, at p. 22, this definition is for the limited purpose of designating the state representative for the purpose of bargaining or meeting and conferring in good faith. Section 3519, which defines unfair practices under the Dills Act, uses the broader term "state." As *State of California* concluded, these two sections 3519 and 3513G) address separate subjects and "state" as it is used in section 3519 is not synonymous with the more narrowly-defined "[s]tate employer" in section 3513G).

Although the Governor or his designee is the state's representative for purposes of meeting and conferring, it is well established that the appointing authority will be liable for violations of Dills Act section 3519(c) when the appointing authority makes a unilateral change in terms of conditions of employment of its own employees. *(State of California*

[3] Dills Act section 3519 sets forth and defines unfair practices by "the state.H

(Department of Mental Health) (1990) PERB Decision No. 840-S [Department of Mental Health liable for violating section 3519(c) when it unilaterally changed employees scheduling system]; *State of California (Department of Youth Authority* (2000) PERB Decision No. 1374-S [unilateral change in released time policy]; *State of California (Department of Corrections)* (2000) PERB Decision No. 1381-S [Department of Corrections found liable for failing to negotiate over safety effects of staff reduction in prison library.)[4]

Although Dills Act section 3519(a), proscribing unfair practices, declares that it will be unlawful "for the state to do any of the following: . . . (c) [r]efuse or fail to meet and confer in good faith," (emphasis added) we do not believe that the Legislature intended by this wording to impose on SPB a duty to negotiate with any unions other than those representing SPB employees.[5]

Requiring SPB to negotiate with unions other than those that represent its own employees would undermine the essence of collective bargaining which implies trade-offs and compromises between the employer and the exclusive representative. Each party is expected to exert its power to obtain its respective goals. This frequently involves one side giving up some advantage or benefit in a trade to obtain something perceived to be of greater value. Because SPB is not the appointing power for CDF employees, this dynamic of quid pro quo is absent. The CDFF has no leverage with SPB because the union has nothing of conceivable value to trade in exchange for a favorable agreement on disciplinary appeal regulations. For

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[4] PERB has also exercised jurisdiction over allegations that individual state agencies have violated section 3519(a) or (b). *(State of California (Department of Corrections)* (2001) PERB Decision No. 1435-S; *State of California (Department of Developmental Services)* (1982) PERB Decision No. 228-S; *State of California (Departments of Personnel Administration, Banking, Transportation, Water Resources and Board of Equalization)* (1998) PERB Decision No. 1279-S [various departments liable for violations of section 3519(a) and (b) for discriminatory application of internal e-mail policy].)

[5] "State," as opposed to "state employer" is not defined in the Dills Act.

these statutory and policy reasons, we conclude that the Legislature did not intend to impose on SPB a duty to bargain with exclusive representatives of employees other than those of SPB.

Because we conclude SPB has no duty to bargain with CDFF under the Dills Act, there is no need to resolve the state constitutional issues raised by the parties concerning the SPB's authority over rule-making regarding disciplinary appeals. Nor do we opine on any of the other issues raised by the State in support of its opposition to the appeal.

ORDER

The unfair practice charge in Case No. SA-CE-1896-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Huguenin joined in this Decision.

STATE OF CALIFORNIA
EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT KELATIONS BOARD

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December 9, 2011 .

Gary M. Messing, Attorney
Carroll, Burdick & McDonough, LLP
980 9th Street, Suite 380
Sacramento, CA 95814-2723

Re: *CDF Firefighters v. State of California (Department of Forestry & Fire Protection, State Personnel Board)*
Unfair Practice Charge No. SA-CE-1896-S
DISMISSAL LETTER

Dear Mr. Messing:

The above..:referenced unfair practice charge was filed with the Public Employment Relations Board (PERE. or Board) on February 17, 2011. The CDF Firefighters (CDFF or Charging Party) alleges that the State of California (Department of Forestry & Fire Protection, State Personnel Board) (State or Respondent) violated the Ralph C. Dills Act (Dills Act)[1] by unilaterally changing a term and condition of employment without providing CDFF n_otice and an opportunity to negotiate. Although the charge was filed against both the California Department of Forestry & Fire Protection and the State Personnel Board, this letter will only discuss the allegations a:s they relate to the State Personnel Board (SPB).

Charging Party was informed in the attached Warning Letter dated October 18,2011, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge; You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to November. I, 2011, the charge would be dismissed.

. The October 18 Warning Letter informed Charging Party that the California Constitution expressly requires SPB to adopt and administer the rules necessary to enforce the civil service statutes. Therefore, the SPB's action to revise its regulations governing disciplinary hearings and appeals for State employees in August 2010 was an act pursuant to its Constitutional mandate and not within the scope of bargaining under the Dills Act.

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and PERE Regulations may be found ·at www.perb.ca.gov.

After requesting and being granted an extension of time, Charging Party filed a first amended charge on November 9, 2011.[2] The November 9, 2011 amended charge does not sufficiently address the concern that the SPB's action to revise its regulations in August 2010 was an act pursuant to its Constitutional mandate and not within the scope of bargaining under the Dills Act. Charging Party continues to allege that the State is required to meet and confer with employee organizations regarding rules governing grounds for disciplinary action, as well as the manner in which disciplinary actions are to be heard, citing to *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802 and *San Mateo City School District* (1984) PERB Decision No. 383. Therefore, according to the charge, the State should be required to meet and confer over any changes to the SPB's disciplinary appeal process.

As Charging Party was previously informed, it is well-established that a refusal to bargain over matters within the scope of bargaining is a per se violation of section 3519(c) of the Dills Act. However, Charging Party was also informed that, unlike the above-cited cases, the SPB has no duty to bargain, because SPB acts pursuant to its constitutional mandate under Article VII of the State Constitution.

Article VII, section 3 of the California Constitution states:

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[2] The Warning Letter also addresses Charging Party's burden of alleging the "who, what, when, where and how" of an unfair practice charge. *(State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Specifically, Charging Party was told that the burden includes facts showing that the unfair practice charge was timely filed. Charging Party was informed that in a unilateral change case, the statute of limitations begins to run on the date the charging party has actual or constructive notice of the respondent's intent to implement a change in policy. *(County of Sonoma* (2011) PERB Decision No. 2173-M; *South Placer Fire Protection District* (2008) PERB Decision No. 1944-M.) Actual or constructive notice occurs when the exclusive representative has knowledge of the proposed change. *(State of California (Department of Personnel Administration)* (2008) PERB Decision No. 1978-S.)

In the original charge, Charging Party stated that CDFF sent an initial letter setting forth objections and assertions that SPB could not make its proposed changes without bargaining on June 30, 2010. As such, it appeared that CDFF had knowledge of SPB's intent to modify its regulations as early as June 30, 2010. Charging Party was asked _to provide additional information establishing *when* it had actual or constructive knowledge of the proposed regulation change. In the amended charge, Charging Party states that between June 30 and August 18, 2010, the parties "continued to engage in a back-and-forth discussion on the issue of the duty to meet and confer, and [CDFF] continued to be uncertain as to the final position the SPB would take." As such, Charging Party argues that the August 18, 2010 implementation date is when it had actual or constructive knowledge. Without making a determination as to whether Charging Party satisfied its burden of establishing *when* it had actual or constructive knowledge of the proposed regulation change, the amended charge is analyzed solely under the theory of whether the SPB had a duty to bargain.

> (a) The [SPB] shall enforce the civil service statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications, and adopt other rules authorized by statute, and review disciplinary actions.
>
> (b) The executive officer shall administer the civil service statues under rules of the board.

Dills Act section 3512 states:

> Nothing in this chapter shall be construed to contravene the spirit or intent of the merit principle in state employment, nor to limit the entitlements of state civil service empioyees, including those designated as managerial and confidential, provided by Article VII of the California Constitution or by laws or rules enacted thereto.

As the California Supreme Court held, the Legislature fashioned the Dills Act "specifically to avoid any conflict with [the] constitutional mandate [in Article VII]." *(Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 174.)

Citing *Los Angeles County Civil Service Commission v. Superior Court of Los Angeles County* (1978) 23 Cal.3d 55 *(Los Angeles),* Charging Party argues that it is well-established that independent entities like the SPB are required to meet and confer over items within the mandatory scope of bargaining. In *Los Angeles,* the Civil Service Commission was acting as a third party hearing body changing its own internal regulations. *(Ibid.)* Nevertheless, the California Supreme Court held that an independent, third party entity had an obligation to bargain over the changes. *(Ibid.)*

However, Charging Party fails to address the California Supreme Court's holding in *State Personnel Board v. Department of Personnel Administration, et al.* (2005) 37 Cal.4th 512. In that case, the California Supreme Court further clarified this issue, specifically with respect to the SPB, by stating that:

> [A] state civil service based in merit principle can be achieved only by developing and consistently applying uniform standards · for employee hiring, promotion, and discipline. By vesting in the nonpartisan State Personnel Board the *sole* authority to administer the state civil service system (Cal. Const., art. VII, § 3), our state Constitution recognizes.that this task must be entrusted to a *single* agency, the constitutionally created State Personnel Board. Because employee discipline is an integral part of the civil service system, the State Personnel Board's *exclusive*

> authority to review disciplinary decisions is a critical component of the civil service system.

(Emphasis added.)

The Constitution expressly requires SPB to "adopt" and "administer" the "rules" necessary to enforce the civil service statutes. Therefore, the SPB's action to revise its regulations in August 2010 was an act pursuant to its Constitutional mandate, and, as such, is not within the scope of bargaining under the Dills Act.

Therefore, the charge is hereby dismissed based on the facts and reasons set forth herein and in the October 18, 2011 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[3] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit 8, § 32635, subd. (a).) Any document filed with the Boar.cl must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

[3] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

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

Service

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

Extension of Time

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

Final Date

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

Sincerely,

SUZANNE MURPHY
General Counsel

By _____
Katharine Nyman
Regional Attorney

Attachment

cc: David M. Villalba, Legal Counsel

STATE OF CALIFOR NIA EDMUND G. BROW N JR., Governor

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October 18i 2011

Gary M. Messing, Attorney .
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Re: *CDF Firefighters v. State of California (Department of Forestry & Fire Protection, State Personnel Board)*
Unfair Practice Charge No. SA-CE-1896-S
WARNING LETTER

Dear Mr. Messing:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 17, 2011. The CDF Firefighters (CDFF or Charging Party) alleges that the State of California (Department of Forestry & Fire Protection, State Personnel Board) (State or Respondent) violated the Ralph C. Dills Act (Dills Act)[1] by unilaterally changing a term and condition of employment without providing CDFF notice and an opportunity to negotiate. Although the charge was filed against both the California Department of Forestry & Fire Protection and the State Personnel Board, this letter will only discuss the allegations as they relate to the State Personnel Board (SPB).

Factual Background as Alleged

On August 18, 2010, the SPB unilateraliy implemented changes to the California Code of Regulations governing disciplinary hearings and appeals for State employees. Charging Party alleges that SPB did not "meet and confer" with any of the impacted State bargaining units, and did not engage in impasse procedures prior to implementation.

According to the charge, CDFF exchanged several letters with the SPB, including a June 30, 2010 letter which set forth CDFF's objections and assertions that SPB could not make its proposed changes without bargaining CDFF followedup with SPB on October 6, 2010. CDFF's objections essentially were that the proposed changes created an additional burden on the appellant/employee and altered their fundamental due process rights. The changes allegedly involved matters within the scope of bargaining that were raised in CDFF's letters to SPB includiilg:

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and PERB Regulations may be found at www.perb.ca.gov.

Rule No. 35.4

The new rule permits "the Board, the Executive Officer, or the Chief ALJ [to] reassign an appeal to any process." This proposed rule grants unrestricted authority to bypass the appellate procedures otherwise called for (though limitations exist based on the provisions of the FFBOR and the POER). Furthermore, there is no stated time restriction, thus creating confusion and uncertainty.

Rule No. 57.1

Subsection (:f), requires the parties to specifically identify percipient witnesses, provide summaries of anticipated witness testimony, disclose expert witnesses and their intended testimony, identify planned exhibits, and summarize evidentiary issues before the prehearing settlement conference. These requirements are unduly burdensome and costly, particularly at this early stage of the proceedings. This is especially burdensome on appellants who may have just recently been provided with information and evidence that their employers have been gathering for many months. In light of the fact that subsection (:f)(9) allows the exclusion of undisclosed evidence, we believe this raises serious fairness and due process concerns.

The proposed mandatory disclosures would also require an appellant to divulge his/her trial strategy, potentially abrogating the attorney-client privilege and work product doctrine.

Rule No. 58.3 *[fOrmerl y Rule No. 52.2]*

This revision requires, without exception, the dismissal of any appeal not brought to hearing within three years of filing, regardless of the cause of the delay. The prior version of the rule permits an extension by stipulation. The inflexibility of the rule is unnecessary and unreasonable. Exceptions allowing extensions for demonstrated "good cause" and where bad faith obstruction by the employer has delayed an appeal from proceeding to hearing are called for.

Rule No. 59.1 *[fOrmerl y Rule No. 57.2]* ·

The rule contained a new restrictive time limitation on the right to propound discovery (90 days from the filing of the appeal).

Rule No. 60.1

> This rule requires motions to dismiss, strike, consolidate, or sever be made no later than 90 days from the date of the appeal. On the same day as the discovery deadline, meaning it would be highly unlikely [that an] appellant would have received any discovery responses by the time these motions are due. The rule also may preclude a party from making a motion to dismiss upon the completion of the employer's case in chief and may bar an appellant from making a motion to strike during the course of a he?.ring when it appears the employer will not put on sufficient evidence to prove a charge.

On October 29, 2010, in response to the concerns raised in CDFF's June 30 and October 6, 2010 letters, SPB asserted that because it is a constitutionally created agency established to administer the state civil service system, its changes to the regulations "were not part of the collective bargaining process." Rather, according to SPB, the changes were "enacted in the Board's capacity as the adjudicatory body and not as an employer or appointing authority." The letter further stated that the changes do not deal with "wages, hours or other terms and conditions of employment. . ."

Discussion

PERB Regulation 32615(a)(5)[2] requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. *(State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. *(Ibid.; Charter Oak Unified School District* (1991) PERB Decision No. 873.)

1. Unilateral Change

Charging Party alleges that the State is required to meet and confer with employee organizations regarding rules governing grounds for disciplinary action, as well as the manner in which disciplinary actions are to be heard, citing to *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802 and *Sari Mateo City School District* (1984) PERB Decision No. 383. Therefore, the State should be required to meet and confer over any changes to SPB's disciplinary appeal process.

[2] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

It is well-established that a refusal to bargain over matters within the scope of bargaining is a per se violation of section 3519(c) of the Dills Act. However, unlike the above-cited cases, the SBP has no duty to bargain because SPB acts pursuant to its constitutional mandate under Article VII of the State Constitution.

Article VII, section 3 of the California Constitution states:

> (a) The [SPB] shall enforce the civil service statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications, and adopt other rules authorized by statute, and review disciplinary actions.
>
> (b) The executive officer shall administer the civil service statues under rules of the board.

Dills Act section 3512 states:

> Nothing in this chapter shall be construed to contravene the spirit or intent of the merit principle in state employment, nor to limit the entitlements of state civil service employees, including those designated as managerial and confidential, provided by Article VII of the California Constitution or by laws or rules enacted thereto.

As the California Supreme Court held, the Legislature fashioned the Dills Act "specifically to avoid any conflict with [the] constitutional mandate [in Article VII]." *(Pacific Legal Foundation v. Brown* (1981) 29 Ca1.3d 168, 174.)

In *State Personnel Board v. Department of Personnel Administration, et al.* (2005) 37 Cal.4th 512, the California Supreme Court further. clarified this issue by stating that:

> [A] state civil service based in merit principle can be achieved only by developing and consistently applying uniform standards for employee hiring, promotion, and discipline. By vesting in the nonpartisan State Personnel Board the *sole* authority to administer the state civil service system (Cal. Const., art. VII, § 3), our state Constitution recognizes that this task must be entrusted to a *single* agency, the constitutionally created State Personnel Board. Because employee discipline is an integral part of the civil service system, the State Personnel Board's *exclusive* authority to review disciplinary decisions is a critical component of the civil service system.

(Emphasis added.)

The Constitution expressly requires SPB to "adopt" and "administer" the "rules" necessary to enforce the civil service statutes. It therefore appears that SPB's action to revise its regulations in August 2010 was an act pursuant to its Constitutional mandate. Such conduct is not within the scope of bargaining under the Dills Act.

2. Statute of Limitations

Further, a charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. *(Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. *(Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. *(Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

In a unilateral change case, the statute of limitations begins to run on the date the charging party has actual or constructive notice of the respondent's intent to implement a change in policy. *(County of Sonoma* (2011) PERB Decision No. 2173-M; *South Placer Fire Protection District* (2008) PERB Decision No. 1944-M.) Actual or constructive notice occurs when the exclusive representative has knowledge of the proposed change. *(State of California (Department of Personnel Administration)* (2008) PERB Decision No. 1978-S.)

The charge states that on August 18, 2010, SPB unilaterally implemented changes to the California Code of Regulations governing disciplinary hearings and appeals for State employees. The charge also states that CDFF sent an initial letter setting forth CDFF's objections and assertions that SPB could riot make its proposed changes without bargaining on June 30, 2010; As presently written, it appears that CDFF had knowledge of SPB's intent to modify its regulations as early as June 30, 2010. As stated above, the charging party's burden includes alleging the *when* of an unfair practice. *(State of California (Department of Food and Agriculture), supra,* PERT? Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale), supra,* PERB Decision No. 944.) Therefore, without more information establishing *when* Charging Party had actual or constructive knowledg of the proposed change, the charge fails to satisfy the *Ragsdale* burden, and thus fails to demonstrate a prima facie violation. *(United Teachers-Los Angeles (Ragsdale), supra,* PERB Decision No: 944.)

For these reasons the charge, as presently written, does not state a prima facie case.[3] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before November 1, 2011,[4] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Katharine Nyman
Regional Attorney

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[3] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary th.eories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal headng." *(Ibid.)*

[4] A document is "filed" on the date the document is actually received by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)