STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA (DEPARTMENTS OF VETERANS AFFAIRS & PERSONNEL ADMINISTRATION), Charging Parties, v. SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000, CSEA, Respondent.	Case No. SA-CO-278-S PERB Decision No. 1997-S December 22, 2008

Appearances: State of California (Department of Personnel Administration) by Paul M. Starkey, Labor Relations Counsel, for State of California (Departments of Veterans Affairs & Personnel Administration); Melinda Williams, Attorney, for Service Employees International Union, Local 1000, CSEA.

Before Neuwald, Chair; McKeag and Wesley, Members.

DECISION

NEUWALD, Chair: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the State of California (Departments of Veterans Affairs & Personnel Administration) (State) to the proposed decision of an administrative law judge (ALJ) dismissing the State's unfair practice charge. The complaint in this matter alleged that the Service Employees International Union, Local 1000, CSEA (SEIU) breached the terms of the parties' memorandum of understanding (MOU) by "condoning" a sick-out held by certified nurse assistants (CNA's) in the skilled nursing unit of the Chula Vista Veterans Home (Home); failing to provide notice to union staff of the no-strike provisions of the MOU; and failing to encourage the CNA's to return to work. The complaint alleged that this conduct

constituted a unilateral change in violation of the Ralph C. Dills Act (Dills Act or Act)[1] section 3519.5(c).[2]

The Board has reviewed the entire record in this matter, including but not limited to the State's unfair practice charge, the complaint, SEIU's answer, the hearing transcript, the parties' post-hearing briefs, the proposed decision, the State's exceptions, and SEIU's response thereto. Based upon this review, the Board affirms the proposed decision consistent with the discussion below.

PROCEDURAL HISTORY

The State filed an unfair practice charge against SEIU on July 8, 2005, alleging that SEIU breached the terms of the parties' MOU when it allegedly failed to inform employees at the Home who were engaged in a sick-out in early July 2005 that it was their obligation to cease that job action. Along with the charge, the State also filed a request for injunctive relief. The Board denied the request for injunctive relief on July 18, 2005.

The General Counsel issued a complaint on July 18, 2005, and an amended complaint on July 19, 2005. An informal settlement conference was held on July 29, 2005, but the matter was not resolved. SEIU answered the complaint on August 12, 2005.

The ALJ conducted a formal hearing on November 29, 30, and December 1, 2005. Following the filing of post-hearing briefs, the ALJ issued a proposed decision on May 25, 2006, dismissing the complaint and unfair practice charge.

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[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.

[2]Section 3519.5(c) provides that:

> It shall be unlawful for an employee organization to:
>
> (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.

The State filed a statement of exceptions and supporting brief on July 5, 2006. SEIU filed a response thereto on August 7, 2006.

STATEMENT OF FACTS

The Home is a 400-bed facility providing three levels of nursing home care to veterans. One-hundred-sixty-five beds are devoted to independent living, 55 to assisted living, and 185 to skilled nursing care. The CNA's (Bargaining Unit 20) perform the primary duties of providing personal care to the residents, including such duties as assisting residents with their showers, oral care, feeding, toileting, shaving, etc. The CNA's assigned to the skilled nursing care section are divided into three, eight-hour shifts.

The State and SEIU were parties to an MOU that expired on June 30, 2005. The parties had not reached agreement on a new MOU, and had not reached impasse in their negotiations. Said MOU contained the following "no-strike" provision:

> A. During the term of this Contract, neither the Union nor its agents nor any employee, for any reason, will authorize, institute, aid, condone, or engage in a work slowdown, work stoppage, strike, or any other interference with the work and statutory functions or obligations of the State.
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> B. The Union agrees to notify all of its officers, stewards, chief stewards, and staff of their obligation and responsibility for maintaining compliance with this section, including the responsibility to remain at work during any activity which may be caused or initiated by others, and to encourage employees violating this section to return to work.

SEIU President Jim Hard (Hard) testified that he has explained the no-strike provision to SEIU members "many, many times over the years." He testified that he discussed the provision with SEIU bargaining representatives and attorneys several times over the past year.

Several events led up to the sick-out by the CNA's. In or about April 2005, CNA Nelia Olimpo (Olimpo), an employee of the Home, testified before the State Legislature in support of a bill prohibiting mandatory overtime work. Olimpo asserted that management rejected a

doctor's note excusing her from mandatory overtime. Following her testimony, the management staff of the Home held a meeting with Olimpo. SEIU asserts that management harassed Olimpo at this meeting. Thereafter, SEIU began to wage what Labor Relations Representative, Wendell Prude (Prude)[3] termed a "war" against the Home.

On June 16, 2005, the Home notified Prude and the CNA's that it intended to implement a "4/2 with options" schedule effective July 1, 2005. Also on June 16, an SEIU flyer was circulated at the Home. This flyer referenced the alleged harassment of Olimpo, and stated that a public protest would occur at the Home on June 24.

On June 23, Hard flew to Chula Vista in connection with the protest. Prude organized the picket line and protest that was held at the Home on June 24, 2005. SEIU Vice-President/Secretary-Treasurer, Cathy Hackett traveled from Sacramento to Chula Vista to participate in the protest.

On June 28, 2005, Prude and the SEIU job stewards at the Home held a union meeting. This meeting was held at the Chula Vista library, rather than in the employee lounge at the Home, in order to accommodate more people. Prude testified that the union discussed taking further actions, such as holding protests in front of the residences of management staff, and getting the attention of politicians. Prude denies that the union discussed holding a sick-out.

On Thursday, June 30, the Home began to suspect that a high number of CNA's in the skilled nursing unit would be out sick the following day or days. Department of Personnel Administration Chief Counsel, K. William Curtis (Curtis) called and left a voicemail message that day for SEIU Deputy Chief Counsel, Paul Harris (Harris), and confirmed by e-mail, asking

[3]Prude is based in San Diego, and is responsible for an area which encompasses approximately 23,000 represented employees, including those in Chula Vista. He reports to Area Coordinator, John Dellaro (Dellaro), who reports to Area Director, Nick Builder, who in turn reports to SEIU Chief of Staff, Michael Baratz (Baratz).

for SEIU's assistance in stopping the sick-out. Several days later, Curtis e-mailed Harris again, expressing his concern. Harris responded to the second e-mail, stating that he had been out of town and would call when he "had a minute." Harris, however, did not call Curtis.

From approximately Friday, July 1 to Sunday, July 3, 2005, the sick-out occurred. During that period, the percentage of CNA's in the skilled nursing unit who called in sick was far above normal. On July 1, 36 out of 48 CNA's scheduled to work called in "sick" (75 percent sick rate). On July 2, 18 out of 49 CNA's scheduled to work called in "sick" (36.73 percent). On July 3, 10 out of 58 CNA's scheduled to work called in "sick" (17.24 percent).[4] In contrast, a "normal" percentage of CNA's calling in sick was in the range of 3-6 percent.[5]

State Chief of Labor Relations, David Gilb (Gilb) and his executive secretary testified that they faxed a letter to Hard and to SEIU Chief of Staff Baratz on July 1 providing notice of the sick-out, and alerting SEIU to its obligations under Article 5.1 of the MOU.

Baratz testified that he did not receive Gilb's July 1 letter until July 5. However, Baratz testified that he received two phone calls from the State on July 1 regarding the sick-out. At the time, Baratz was in Sacramento attending a bargaining meeting with 200 other people. Baratz testified that he called Prude on the telephone on the same day (July 1) and asked Prude to look into the alleged sick-out. Baratz testified that he took no further action to

[4]The State contends that the sick-out occurred from June 30 through July 5, but we find that the percentage of CNA's who called in sick on June 30 (7.27 percent sick), July 4 (6.90 percent), and July 5 (7.27 percent) was not high enough to establish that there necessarily was a sick-out on those days.

[5]During the hearing, SEIU sought to introduce declarations from 26 of the CNA's who called in sick during the relevant period, stating that they had doctor's notes excusing their absences. The State objected that such declarations were hearsay, and that it would unnecessarily delay the hearing to litigate whether each of the CNA's who called in sick was, in fact, sick. The ALJ sustained the objection and excluded the declarations. No exceptions were filed as to this issue.

ascertain whether there had been a sick-out, or what actions Prude had taken in response. Similarly, Hard testified that he delegated the responsibility for handling the sick-out to Baratz and Harris. SEIU's office was closed for the weekend due to the July 4th holiday.

Prude admits that he called a supervisor at the Home, Nida Oasin (Oasin), at 9:10 p.m. on Friday, July 1, intending to complain about a report that the Home was not accepting doctor's notes from CNA's as excuses for absences, but Oasin hung up on him. Prude claimed, however, that the call was not related to the sick-out.

Prude testified that he did not learn of the sick-out until Saturday, July 2, when he received a telephone call from Daniel Murray, the director of the Home.[6] Prude testified that after learning of the possible sick-out, he called three stewards at the Home. One steward, Brown, was in Sacramento as a bargaining delegate, and denied any knowledge of the sick-out. Another steward, Martha Solario (Solario), told Prude that she was out sick, and reportedly denied that the union had any involvement in the sick-out. Prude also spoke with Steward Judy Alford-Mayo (Alford-Mayo) several times during the sick-out. Prude testified that he told Solario, and possibly Alford-Mayo, to "put the word out" about the union's obligations under Article 5.1 of the MOU and the potential for employees engaged in a sick-out to be "severely disciplined." Prude testified that his SEIU supervisor, Dellaro, directed him to inform the stewards and CNA's of their obligations under Article 5.1. Prude also testified that his usual mode of communication with the CNA's was via the job stewards. Prude testified that he did not have home phone numbers or email addresses for most of the CNA's.

[6]This contradicts Baratz's testimony that he called Prude on July 1. It also contradicts the testimony of SEIU Job Steward Mary Brown (Brown), who testified that Prude called her while she was in Sacramento, and that she left Sacramento to return home to Southern California on July 1.

Brown testified that subsequent to the sick-out, she told some of the CNA's during lunch time that sick-outs are prohibited under Article 5.1. Brown testified that the stewards could talk with some of the CNA's in the employee lounge, but that they relied upon putting flyers in the CNA's mailboxes in order to disseminate messages to CNA's working all three shifts at the Home. Brown further testified that the stewards did not have home telephone numbers or email addresses for all of the CNA's. She further testified that the CNA's did not have work email addresses.

Gilb faxed another letter to SEIU on July 6, enclosing a copy of his July 1 letter and demanding a response. Baratz responded to Gilb in writing on the same day, asserting that there had been "no concerted activity" at the Home, blaming management for problems at the Home, and claiming without providing any details that SEIU had complied with Article 5.1.

The State presented evidence that previously, in 2002, there was a sick-out at three prisons operated by the California Department of Corrections by registered nurses (RN's) represented by SEIU, who are in Unit 17, which is a different bargaining unit from the one to which the CNA's belong (Unit 20). In that case, the California State Employees Association (CSEA) President, Perry Kenny (Kenny), was quoted in a newspaper article as stating, "We've been actively contacting our nurses telling them we cannot condone a sick-out." Additionally, Kenny is quoted as stating, "We've encouraged them to go to work."

The State also presented evidence that on or about August 23, 2005, in response to an alleged sick-out by RN's at the Correctional Training Facility and the Salinas Valley Psychiatric Program, John Simmons, SEIU senior labor relations officer, circulated a memorandum providing a reminder of the language of the no-strike clause in Section 5.1 of the Unit 17 contract.

DISCUSSION

We must determine whether SEIU made a unilateral change in policy in violation of Section 3519(c) of the Dills Act by failing to fulfill its obligations under Article 5.1 of the MOU, as alleged.

In reviewing exceptions to an ALJ's proposed decision, the Board reviews the record de novo, and is free to draw its own conclusions from the record apart from those made by the ALJ. (Woodland Joint Unified School District (1990) PERB Decision No. 808a.) The Board ordinarily gives deference to an ALJ's credibility determinations based upon considerations such as witness demeanor and appearance. (Beverly Hills Unified School District (1990) PERB Decision No. 789.)

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 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. (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; State of California (Department of Personnel Administration) (2004) PERB Decision No. 1601-S.) In this case, there is no dispute that the matter was within the scope of bargaining, and that there was no notice or opportunity to bargain over the alleged change in policy or practice.

Thus, the key issues are (1) whether SEIU breached Article 5.1 of the MOU, and (2) whether the alleged breach 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).

Whether SEIU Breached Article 5.1 of the MOU

The State alleges that SEIU violated Article 5.1(A)[7] and (B)[8] of the MOU,[9] which prohibited work stoppages, by SEIU's alleged actions and inactions in connection with a sick-out by CNA's at the Home, which lasted from approximately July 1 to July 3, 2005. The ALJ found that SEIU's actions or inactions may have breached the terms of the MOU. The three issues presently before the Board regarding the alleged breach of contract are whether the SEIU "condoned" the sick-out, failed to "encourage employees violating the section to return to work," or failed to provide notice to SEIU staff of their obligations under Article 5.1.

First, it is arguable that SEIU "condoned" the sick-out. The term "condone" in Article 5.1 of the contract is not defined. The only evidence of the past interpretation of that phrase is that, in 2002, CSEA President Kenny was quoted in a newspaper article as stating,

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[7]Article 5.1(A) provided that "neither the Union nor its agents nor any employee, for any reason, will authorize, institute, aid, condone, or engage in a work slowdown, work stoppage, strike, or any other interference with the work and statutory functions or obligations of the State."

[8]Article 5.1(B) provided that the "Union agrees to notify all of its officers, stewards, chief stewards, and staff of their obligation and responsibility for maintaining compliance with this section, including the responsibility to remain at work during any activity which may be caused or initiated by others, and to encourage employees violating this section to return to work."

[9]Although the MOU expired on June 30, 2005, its terms continued in effect pursuant to Section 3517.8 of the Dills Act. That section expressly provides that the terms of an expired agreement, including "any no strike provisions," continue in effect if the parties have not agreed to a new MOU and have not reached an impasse in negotiations, which was the case here.

"We've encouraged them to go to work." The federal decision in Latas Libby's, Inc. v. United Steelworkers of America (1st Cir. 1979) 609 F.2d 25 [102 LRRM 2796] (Latas Libby's, Inc.) may provide some guidance.[10] That case addressed the issue of whether a union "condoned" a work stoppage in violation of a no-strike clause. In that case, the court reviewed a provision in a labor contract stating that "No officer or representative of the Union . . . shall authorize, instigate aid or condone [any strike]." (Id. at p. 28.) Although the record in that case indicated that the union representative, Velazquez, had "repeatedly advised the officers of the local that the strike was illegal," the court found that his conduct "constituted condonation of the strike" in violation of the contract. The court explained,

> Webster's Third New International Dictionary (1966) defines 'condone' as '(to) permit the continuance of'; the American Heritage Dictionary (1976) defines it as 'to forgive, overlook, or disregard (an offense) without protest or censure.' The express terms of the no-strike provision, read literally, thus prohibit the Union from disregarding a strike and permitting its continuance once it has commenced, regardless of whether the Union itself authorized or instigated the strike. We think it clear that this language imposes an obligation on the Union to take some affirmative steps toward ending a strike. We need not explore the limits of this obligation, for the Union, through [Alejo] Velazquez, made only the most minimal effort to end this strike. Velazquez testified that when he spoke to [Ramon] Hernandez on Friday, the day after the commencement of the strike, he told Hernandez, 'listen, there is a violation of the agreement and you should try to go back to work.' Velazquez did not threaten to impose sanctions against Hernandez and other Local officials if they did not end the strike immediately, nor did he unequivocally order Hernandez to terminate the strike. Even after Hernandez responded that he had tried unsuccessfully to convince the workers to return, Velazquez declined to return to Villalba on Friday to try to arrange a meeting with management, thus ensuring that the stoppage would continue after the weekend. We

[10]We would point out that Latas Libby's, Inc. was not a National Labor Relations Board (NLRB) unfair practice charge case but an action for breach of contract under Section 301 of the Labor Management Relations Act, 29 U.S.C. sec. 185.

> conclude that the only significant step taken by Velazquez to end the strike before Tuesday, October 25 explaining to Hernandez that the strike was illegal was foreseeably ineffective. (Latas Libby's, Inc. at pp. 29-30.)

Thus, under the standard in Latas Libby's, Inc., a no-strike clause prohibiting a union from "condoning" a strike requires the union to "take some affirmative steps toward ending a strike." The court found that merely informing a local union official that the strike violated the contract was not sufficient. Under the circumstances of Latas Libby's, Inc., the court found such limited action to be "foreseeably ineffective," and thus in violation of the contract. The court also explained that, in that case, "at no time during the course of the strike did Velazquez, or any other official of the Union, publicly disavow or censure the actions of the striking workers." Additionally, Velazquez had said "'if you want to go on strike, go ahead.'" Thus, the court found that the union had "condoned" the strike in violation of the contract. (Id. at p. 30.)[11]

As the ALJ found, under the standard discussed in Latas Libby's, Inc., SEIU could be found to have breached its obligation not to "condone" a sick-out. The sick-out occurred in the heat of a "war" against the Home spearheaded by SEIU Labor Relations Representative Prude. Prude held a large union meeting at the Chula Vista library just a few days prior to the sick-out. Although Prude denied discussing the sick-out at this meeting, it appears likely that the sick-out was planned, or at least discussed, during this meeting. Chief Steward Brown testified that the CNA's were a "passive" group, who were difficult to contact en masse due to the fact that they worked three different shifts and had no work e-mail accounts. Additionally, Prude

[11]Similarly, the NLRB indicated in Arrow Sash & Door Co. et al. (1985) 276 NLRB 1166 [120 LRRM 1172], that a union might be found to have "condoned" a strike where the union's business representative stated that a sick-out "wasn't a very good idea, but, you know, if they wanted to do it, go ahead," and "it would be hard for the company to prove that they were not sick on that day."

called a supervisor at the Home at 9:10 p.m. on July 1, the first day of the sick-out, to complain that the Home would not accept doctor's notes. This circumstantial evidence[12] tends to prove that Prude had knowledge of the planned sick-out. If the CNA's discussed the sick-out during the June 28 meeting, and Prude had knowledge of it but failed to stop the sick-out, that would arguably constitute "condoning" the sick-out. Rather than stating that he told the CNA's that a sick-out would violate the contract, Prude instead denied any knowledge of it. Prude's denial of knowledge is difficult to believe, given his attendance at the June 28 meeting and the fact that he admits that he called Oasin, the supervisor, on July 1, as well as the contradictions between Prude's testimony and the testimony of Baratz and Brown regarding when Prude was notified of the sick-out. Because we resolve this case based upon the issue of whether there was a unilateral change (as discussed infra), however, we find it unnecessary to rule on whether SEIU "condoned" the sick-out in violation of the contract.

Second, it is arguable whether SEIU failed to provide sufficient encouragement for "sick" employees to return to work. SEIU leadership (Hard, Harris, and Baratz) relied upon Prude to handle the sick-out. Prude testified that he telephoned Brown and Solario to ascertain whether there was a sick-out. Prude alleges that they both told him that the union had not organized a sick-out. Nevertheless, Prude alleges that he told Solario, and possibly Alford-Mayo, to tell the CNA's that a sick-out was prohibited by Article 5.1. (Unfortunately, neither

[12]We note that reliance upon circumstantial evidence is permissible to a certain extent. The Board relies upon such evidence in cases of alleged retaliation. "As direct evidence of nexus is seldom available, it may be shown by circumstantial evidence." (Contra Costa Community College District (2003) PERB Decision No. 1520.) Additionally, California law recognizes that circumstantial evidence must often be used to establish fraudulent intent to breach a contract (Locke v. Warner Bros., Inc. (1997) 57 Cal.App.4th 354 [66 Cal.Rptr.2d 921); as well as conspiracy to interfere with a contract (Allen v. Powell (1967) 248 Cal.App.2d 502, 508 [56 Cal.Rptr. 715].)

Solario nor Alford-Mayo testified at the hearing, so it is unknown what actions they took, if any.)

SEIU argues, "Unlike Latas Libby['s], the Union had little opportunity to confirm that there was an actual 'sick-out' in effect, until after it was over."[13] Additionally, SEIU argues that Prude took actions that were expected to be effective (i.e., he contacted Alford-Mayo and Solario, after consulting with Brown). SEIU points to the ALJ's finding that the absenteeism rate diminished after Prude contacted the stewards, and concludes that Prude's action was not ineffectual.

As discussed above, circumstantial evidence indicates that Prude may have "condoned" the sick-out. Additionally, Prude's contradictory testimony regarding when he was notified of the sick-out casts doubt upon Prude's alleged efforts to encourage the CNA's to return to work. Moreover, there is no evidence, aside from Prude's alleged calls to Solario, and possibly Alford-Mayo, and Dellaro's reported directive to Prude to spread the word about Article 5.1, that SEIU took any other actions during the sick-out to encourage the CNA's to return to work. SEIU took no subsequent actions to publicly disavow or censure the actions of the CNA's who participated in the sick-out. Thus, SEIU may have breached the provision of Article 5.1 requiring it to encourage "sick" employees to return to work.

On the other hand, it appears that SEIU satisfied the provision under Article 5.1 requiring it to "notify all of its officers, stewards, chief stewards and staff of their obligation." Hard testified that he repeatedly informed employees of the requirements of Article 5.1.

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[13]In addition to Latas Libby's, Inc., the State also cites Am. Airlines, Inc. v. Allied Pilots Ass'n. (5th Cir. 2000) 228 F.3d 574 [165 LRRM 2449]. That case is distinguishable because it involved the issue of whether the union adequately complied with a temporary restraining order requiring the union to "take 'all reasonable steps within their power' to prevent continuation or encouragement of the sick-out." (Id. at p. 577.) This appears to involve a different standard than determining whether the union has violated a contractual provision requiring it not to "condone" any work stoppage.

Additionally, Prude testified that his supervisor, Dellaro, told him to spread the word about the no-strike clause. Prude also testified that he told Steward Solario to tell the CNA's that a sick-out would violate the contract. Finally, Chief Steward Brown testified that she told employees in the lunch room at the Home that sick-outs or strikes were not permitted by the MOU.

Based upon the record, the ALJ concluded that SEIU's actions or inactions in this case may have constituted a breach of contract under the standard of Latas Libby's, Inc. The ALJ found, however, that an analysis simply applying the rule of Latas Libby's, Inc. is insufficient, because that case addressed only whether the union had violated the contract. The ALJ found that federal case law interpreting Section 301 of the Labor Management Relations Act, 29 U.S.C. sec. 185, was not controlling because that section provides a cause of action for breach of a collective bargaining contract,[14] rather than for a unilateral change in policy or failure to bargain in good faith. The ALJ concluded that there may have been a contract violation in this case, but that the key issue is whether such a breach had a generalized impact or continuing effect sufficient to constitute a unilateral change. We agree.

Whether the Alleged Contract Violation Had a Generalized Effect or Continuing Impact

We find that the ALJ correctly concluded that there was no change in policy in this case. Section 3514.5(b) of the Dills Act provides that the Board cannot enforce a labor contract where an alleged breach is not also an independent violation of the Act. It states,

> The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

[14]Section 301(a) makes collective bargaining agreements judicially enforceable. (Carbon Fuel Co. v. United Mine Workers of America (1979) 444 U.S. 212, 216 [102 LRRM 3017].)

In order for a breach of contract to amount to a unilateral change, the breach must have a "generalized effect or continuing impact" that would constitute a change in policy. The Board explained in Grant,

> [S]ubsection 3541.5(b) does not divest PERB of jurisdiction to resolve an unfair practice charge simply because the employer's conduct also constitutes the breach of an existing collective agreement. Rather, subsection 3541.5(b) grants PERB the authority to resolve an unfair practice charge even if it must interpret the terms of a collective agreement to do so. There is, of course, no doubt that in the absence of a collective agreement PERB has jurisdiction over all conduct which allegedly violates the Act. That such conduct might also breach an existing agreement does not defeat the Board's jurisdiction, though it may give rise to a separate remedy for breach of contract. Victor Valley Joint Union High School District (12/31/81) PERB Decision No. 192; C & C Plywood Corporation (1967) 385 U.S. 421 [64 LRRM 2065]. [Fn. omitted; emphasis in original.]
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> The Act is designed to foster the negotiation process. Such a policy is undermined when one party to an agreement changes or modifies its terms without the consent of the other party. PERB is concerned, therefore, with a unilateral change in established policy which represents a conscious or apparent reversal of a previous understanding, whether the latter is embodied in a contract or evident from the parties' past practice. Anaconda Aluminum Co. (1966) 160 NLRB 35 [62 LRRM 1370], Perry Rubber Co. (1961) 133 NLRB 275 [48 LRRM 1630]. In the words of the National Labor Relations Board:
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> '. . . [Such] conduct, . . . [amounts] to a rejection of the most basic of collective bargaining principles . . . the acceptance and implementation of the bargain[ing] reached during negotiations. Sea Bay Manor Home (1980) 253 NLRB [739, 741] [106 LRRM 1010, 1012].'
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> This is not to say that every breach of contract also violates the Act. Such a breach must amount to a change of policy, not merely a default in a contractual obligation, before it constitutes a violation of the duty to bargain. This distinction is crucial. A change in policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. On the other hand, when an employer unilaterally breaches an agreement without instituting a new policy of general application or continuing effect, its conduct, though remediable through the courts or arbitration,

> does not violate the Act. The evil of the employer's conduct, therefore, is not the breaching of the contract per se, but the altering of an established policy mutually agreed upon by the parties during the negotiation process. Walnut Valley Unified School District (3/30/81) PERB Decision No. 160; C & S Industries (1966) 158 NLRB 454 [62 LRRM 1043]. By unilaterally altering or reversing a negotiated policy, the employer effectively repudiates the agreement. Sea Bay Manor Home, supra.
> (Grant at pp. 7-9, emphasis added.)

The Board in Grant found that a school district made an unlawful unilateral change by posting a notice of a change in the district's employee transfer policy. However, the Board found that there was no unilateral change with regard to an alleged alteration in policy regarding health benefits, because the contract was unambiguous and did not support the association's allegations. Finally, the Board found that there was no unilateral change with regard to an alleged change in policy regarding contingency pay:

> [T]he facts asserted by the Association actually challenge the District's application of the contract's provision. The District does not deny its contractual obligation but claims it properly implemented the provision both as to the use and the amount of the surplus funds. We find in these competing claims nothing which demonstrates a 'policy change.'
> (Grant at p. 12, emphasis added.)

The Board has found in a number of cases that one-time breaches of contract are not unilateral changes. In Trustees of the California State University (1997) PERB Decision No. 1243-H, the Board held that the CSU's refusal to make a one-time payment to one bargaining unit member was not a unilateral change, because the alleged violation did not have a generalized effect or continuing impact. In East Side Union High School District (1997) PERB Decision No. 1236, the Board upheld the dismissal of a charge alleging that one teacher was assigned to teach outside of his area, in violation of the collective bargaining agreement. The Board found that this contract violation did not have a generalized effect. Additionally, in Riverside Unified School District (1987) PERB Decision No. 639, the Board held that an

employer's action that was limited to one employee, in a particular arbitration proceeding, did not amount to a unilateral change. In Santa Paula School District (1985) PERB Decision No. 505, the Board found that an isolated discriminatory transfer was not sufficient to constitute a unilateral change in policy.

Additionally, the Board has held that there is no unilateral change where an employer merely takes a legal position that is contrary to that of the union. (Trustees of the California State University (1997) PERB Decision No. 1231-H, discussing the interpretation of contractual grievance provisions.) Similarly, in Fall River Joint Unified School District (1998) PERB Decision No. 1259, the Board held that a mere challenge to the application of a contractual provision was not sufficient to establish a unilateral change. In that case, the union claimed that the district defaulted on its obligation to inform an employee of all other positions for which he was qualified, because it merely informed him of some of those positions. The Board found that the union had failed to demonstrate a change to the policy embodied in the contract, and thus did not meet the Grant standard for a unilateral change. (Id. at p. 26.) These cases hold that where the meaning of the relevant contract provision is ambiguous, such that the action in question does not clearly breach the contract, a unilateral change is not established.[15]

The Board has also held that a breach of contract amounts to a unilateral change where the party in breach asserts that the contract authorizes its conduct. In Hacienda La Puente Unified School District (1997) PERB Decision No. 1186, the Board held that the district's

[15]Note that this rule applies where a hearing before an ALJ has already been held, and the parties have presumably had the opportunity to present evidence supporting their interpretation of the contract. In contrast, where an unfair practice charge alleges a violation of contract, and the meaning of a contract provision is ambiguous on its face, the Board has held that a complaint must issue to provide an opportunity for the parties to present evidence as to their intent in drafting the provision. (Fullerton Joint Unified School District (2004) PERB Decision No. 1633, reversing dismissal of a charge alleging that the district unlawfully changed the work shifts of custodians temporarily during the graduation period.)

unilateral change to a unit member's shift was a change in policy, rather than an isolated breach, because the district relied upon its interpretation of the management rights clause in the contract and believed that the clause authorized it to make the change in shift. In Fremont Unified School District (1997) PERB Decision No. 1240, the Board upheld an ALJ's determination that the district had "abandoned" its past practice and made an unlawful unilateral change when it did not use a "qualified re-hire" list that it had used during the past two years pursuant to the CBA. The district had argued that it was permitted to do so based upon another section of the CBA, as well as the Education Code. These cases are distinguishable from the case before the Board, in which the evidence did not show that SEIU ever stated that it was not required to comply with Article 5.1.

The Board has held that contract breaches are unilateral changes where there is a change in policy that is generally applicable to future situations. In State of California (Department of Youth Authority) (2000) PERB Decision No. 1374-S, the Board held that the state's change in the pattern of union representation at one institution was not a mere default in a contractual obligation, but constituted an unlawful unilateral change in policy. The Board reasoned that the state's denial of permission for a steward to travel to other institutions was not a one-time breach, but rather, was generally applicable to future situations. (Id. at p. 12.) In San Jacinto Unified School District (1994) PERB Decision No. 1078, the Board held that a district memorandum stating that "the following schedule will be used for [maintenance] personnel to cover home football games," which was applicable to five specified football games, constituted a unilateral change. Although the duration of the change was temporary, the Board found that it changed the nature of duties at football games. Additionally, in Klamath-Trinity Joint Unified School District (1993) PERB Decision No. 1003, the Board held that the district's decision that certain conditions deprived teachers of additional educational

supplies had a generalized effect and continuing impact. Although the decision potentially affected only four teachers, the Board found that it had the potential to affect more in ensuing years, and thus constituted a unilateral change.

In summary, these cases hold that a contract breach must be generally applicable to future situations, either through the circumstances or the parties' assertion that their conduct is legally permitted, to have a "generalized effect or continuing impact" sufficient to constitute a unilateral change. Additionally, the interpretation of a contractual provision must be sufficiently clear to establish a breach that amounts to a unilateral change.

In a case involving a strike, the Board in San Diego Unified School District (1980) PERB Decision No. 137 (San Diego) held that the district's failure to abide by an agreement prohibiting sanctions following settlement of the strike constituted a unilateral change. The Board found that the district's action "amounted to a unilateral change of a subject already agreed to by the parties, potentially affecting a wide range of employee working conditions without notice to or negotiations with the exclusive representative." (Id. at p. 19.) San Diego is distinguishable from the present case, because the "no sanctions" agreement in that case applied only to the particular strike at issue. The district's violation of that agreement thus repudiated the entire agreement. That case is also distinguishable because the Board found that it involved action by the district constituting a unilateral change in policy. In this case, the record indicates that SEIU management did not make a unilateral change.

In the present case, the record does not establish that SEIU management - Hard, Baratz, or Harris - implemented a new policy of repudiating the no-strike clause. Instead, management directed Prude to look into the sick-out. By the time the July 4th holiday had ended, and Hard, Baratz, and Harris had returned to work, the sick-out had ended. The only argument that SEIU management implemented a unilateral change is that they were not more pro-active in

determining the status of Prude's efforts during the sick-out, and that they failed to send a post-hoc letter disavowing the sick-out. Additionally, SEIU never argued that it was legally permitted to "condone" the strike or to fail to encourage employees to return to work. Nothing in the record indicates that SEIU had breached Article 5.1 in the past, or that it would breach Article 5.1 in the future. We find that, under the circumstances of this case, although it is arguable whether or not SEIU breached the contract in connection with the sick-out at the Home, SEIU management did not implement a unilateral change in policy.

With regard to Prude, there is circumstantial evidence that he "condoned" the sick-out. The fact that Prude was admittedly in the process of orchestrating a "war" against the Home while the sick-out occurred, as well as the fact that he organized the June 28 union meeting held just prior to the sick-out, is strong evidence that he had knowledge of the sick-out and may have "condoned" it.

However, the evidence does not establish that Prude made a unilateral change in policy. Prude did not assert that a sick-out was permitted under the contract. There was no evidence that Prude had condoned any work stoppages in the past, or that he would do so in the future.

Moreover, under the circumstances, it appears that Prude, as a labor relations representative, had no authority to make a unilateral change in policy regarding Article 5.1 on behalf of SEIU. The Board applies common law principles to determine the existence of an agency relationship. (Inglewood Unified School District (1990) PERB Decision No. 792 (Inglewood), affd., Inglewood Teachers Assn. v. Public Employment Relations Bd. (1991) 227 Cal.App.3d 767 [278 Cal.Rptr. 228].) The burden of proof is on the party asserting the existence of the agency. (Inglewood.) The charging party must prove the agency relationship by actual or apparent authority by establishing representation by the principal (SEIU) of the

agency; justifiable reliance by the charging party on that representation, and a change in position by the charging party as a result of the agency. (Id. at p. 20.) As the court stated in Inglewood Teachers Assn. v. PERB, supra, 227 Cal.App.3d 767,

> Actual authority is that which 'a principal intentionally confers upon the agent, or intentionally, or by want of ordinary care, allows the agent to believe himself to possess.' (Civ. Code, sec. 2316.) Ostensible or apparent authority is that which 'a principal, intentionally or by want or ordinary care, causes or allows a third person to believe the agent to possess.' (Civ. Code, sec. 2317.) (Id. at p. 781.)

"Mere surmise as to the authority of an agent is insufficient to impose liability on a principal based on a theory of apparent authority." (Inglewood at p. 20, citation omitted.)

We note that Prude was an agent of SEIU with regards to the contract violation. Although there is no evidence that SEIU management gave Prude any actual authority to condone a sick-out, we find that he had apparent authority to do so. Prude organized the June 24 protest and June 28 meeting. Both Hard and Hackett were involved with the June 24 protest, and thus SEIU leadership sanctioned at least some of Prude's efforts against the management of the Home. The State notified SEIU management of the sick-out by telephone on the first day, July 1. After initially requesting that Prude look into the sick-out, SEIU management neglected to follow through during the ensuing three days by ascertaining the status of the sick-out and taking affirmative steps to encourage employees to return to work, as would be required under Latas Libby's, Inc. After the sick-out ended, SEIU management did not issue any statements disavowing the sick-out. Thus, we find that SEIU management "ratified" Prude's actions and inactions with regard to the alleged contract violation. If Prude breached Article 5.1, it appears that SEIU would be liable under an agency theory for breach of contract.

On the other hand, Prude had neither actual nor apparent authority to make a change in policy regarding Article 5.1. Although it is possible that SEIU management violated Article 5.1 by neglecting to follow through and take affirmative steps to stop the sick-out, the record indicates that SEIU management did not "ratify" any policy change. The letter that Baratz sent to the State on July 6 simply asserted that there had been "no concerted activity" at the Home, and claimed that SEIU had complied with its obligations under Article 5.1.

Finally, the record indicates that SEIU did not repudiate Article 5.1, and instead fulfilled its obligation under Article 5.1 to "notify all of its officers, stewards, chief stewards and staff of their obligation" under the no-strike provision. Hard testified that he repeatedly informed union members of the requirements of Article 5.1; Prude testified that Dellaro told him to spread the word about the no-strike clause; Prude testified that he told Solario to tell the CNA's that a sick-out would violate the contract; and Brown testified that she told employees in the lunch room at the Home that sick-outs or strikes were not permitted by the MOU.

Thus, we find that Prude's actions and/or inactions at most may have amounted to a one-time breach of contract. Under the circumstances, the record lacks sufficient evidence that SEIU made any policy change that would be generally applicable to future situations. That is, SEIU's alleged actions and inactions had no "generalized effect or continuing impact" sufficient to constitute a unilateral change. Our decision would possibly be different if the union had violated Article 5.1 in the past, or if the evidence indicated that SEIU management did more than negligently fail to follow through and ensure a stronger union response in compliance with Article 5.1 while the sick-out was occurring.

The State argues that in two prior sympathy strike cases, PERB stated that "'if' there had been express contractual language prohibiting the conduct in question, then the violation of such contractual language/intent would equate to a unilateral change." (Oxnard Harbor

District (2004) PERB Decision No. 1580-M and Regents of the University of California (2004) PERB Decision No. 1638-H.) We find that those cases are not controlling. The Board stated therein, in dicta, that sympathy strikes are not prohibited by common law, and that such a strike would only be an unfair practice if prohibited by a CBA. However, those cases did not involve express contractual language prohibiting the sympathy strike in question. In those cases, the Board did not need to address whether the alleged contract breach had a "generalized effect or continuing impact," because it found that there was no breach. Therefore, the Board's comments about the presence of contractual language prohibiting the strike conduct are not controlling. As stated earlier, we would find that not every breach of a no-strike clause becomes a unilateral change. Instead, the breach must amount to a repudiation of the no-strike clause and thus a change in policy.

Additionally, the State argues that the breach in this case had a "generalized effect" upon bargaining unit members, because (1) the striking employees were docked pay and subject to disciplinary action for the sick-out; (2) non-striking employees had to give up their Fourth of July week-end to work overtime and perform the work of the striking employees; and (3) the change in policy negatively impacted the veterans who reside in the Skilled Nursing Unit at the Home. However, these alleged effects of the sick-out were not the type of "generalized effect or continuing impact" contemplated in the Grant test, because these impacts were simply the effects of a one-time alleged breach of contract. These impacts do not indicate that SEIU will breach Article 5.1 in the future, or that SEIU has implemented any change in policy with regard to Article 5.1.

Therefore, although it is arguable that SEIU "condoned" the sick-out in this case and engaged in a one-time breach of Article 5.1 of the MOU, the record does not show that SEIU

made a unilateral change in policy. The Board therefore affirms the ALJ's dismissal of the unfair practice charge and complaint.

ORDER

The complaint and underlying unfair practice charge in Case No. SA-CO-278-S are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Wesley joined in this Decision.

Member McKeag's dissent begins on page 25.

McKEAG, Member, dissenting: I respectfully dissent from the majority's ruling that Service Employees International Union, Local 1000, CSEA (SEIU) did not commit an unlawful unilateral change when it condoned a sick-out in violation of Article 5.1 of the memorandum of understanding (MOU). The majority concluded the State of California (Departments of Veterans Affairs & Personnel Administration) (State) established the first, second and fourth elements of its unilateral change allegation, but failed to establish the third. According to the majority, "although it is arguable that SEIU 'condoned' the sick-out in this case and engaged in a one-time breach of Article 5.1 of the MOU, the record does not show that SEIU made a unilateral change in policy." Although I agree with the majority that SEIU condoned the sick-out, I disagree that SEIU's conduct did not constitute a change in policy. Accordingly, for the reasons set forth below, I conclude SEIU committed an unlawful unilateral change when it condoned the sick-out.

A. SEIU's Conduct had a Generalized Effect on the Terms and Conditions of Employment

Section 3514.5(b) of the Ralph C. Dills Act provides that the Public Employment Relations Board (PERB or Board) cannot issue a complaint on any charge based an alleged breach of a collective bargaining agreement, unless the breach also constitutes an unfair labor practice. As the Board explained in Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant), in order for a breach of contract to constitute a unilateral change, the breach must have a "generalized effect or continuing impact" that would constitute a change in policy. It is noteworthy that the Grant definition of "policy" is in the alternative. Thus, the presence of either a generalized effect or a continuing impact will constitute a change of policy. (State of California (Department of Mental Health) (1990) PERB Decision No. 840-S (Mental Health).)

In the instant case, only 12 of 48 (25%) certified nurse assistants (CNAs) who were scheduled to work at the Chula Vista Veterans Home (Home) on July 1, 2005, reported for duty. On the following day, only 31 of 48 (65%) CNAs reported for duty, and on the third day, only 48 of 58 (83%) employees reported for duty. The employees who participated in the sick-out had their pay docked for the days they failed to report to duty, and approximately 44 of these employees were subjected to disciplinary action. Conversely, the employees who reported to duty were faced with an increased workload (and potential job duties for which they were not trained) to accommodate their colleagues who failed to report to duty.

Clearly, the sick-out effected virtually every bargaining unit member who either worked or was scheduled to work at the Home over the Fourth of July weekend. Moreover, there is no doubt that the sick-out had a negative impact on the resident-patients of the Home. Because I find SEIU condoned the work action, I conclude SEIU's conduct significantly contributed to the difficult situation faced by the Home employees and resident-patients during this time. Accordingly, I find SEIU's conduct had a generalized effect upon the terms and conditions of employment of bargaining unit members.[1]

B. SEIU's Conduct had a Continuing Impact on the Terms and Conditions of Employment

As stated above, 44 CNAs were disciplined for participating in the sickout.[2] Consequently, these employees had adverse actions included in their personnel file which may

[1]Admittedly, the sick-out only occurred at one facility and only involved a small portion of the employees in the bargaining unit. However, the Board has found a generalized effect on the terms and conditions of employment in cases involving only one facility. (Mental Health.) In addition, the Board has found that the change need not effect every member of the bargaining unit. (Jamestown Elementary School District (1990) PERB Decision No. 795.) Thus, the fact that the sick-out occurred only at the Home and only impacted the bargaining unit employees assigned to that facility does not preclude a finding that SEIU's conduct amounted to an unlawful unilateral change.

[2]Five of these employees did not appeal the adverse action.

impact subsequent disciplinary actions, as well as promotional and/or transfer opportunities in the future. The remaining 39 employees appealed the adverse actions. However, these employees, even if they prevailed on appeal, were subjected to the rigors of a State Personnel Board appeal that continued long after the sick-out ran its course. For these reasons, I conclude the sick-out had a continuing impact on the conditions of employment for bargaining unit members.

C. SEIU's Conduct Undermined the Bargaining Relationship Between the Parties

As explained by the Board in Grant:

> The Act is designed to foster the negotiation process. Such a policy is undermined when one party to an agreement changes or modifies its terms without the consent of the other party. PERB is concerned, therefore, with a unilateral change in established policy which represents a conscious or apparent reversal of a previous understanding, whether the latter is embodied in a contract or evident from the parties' past practice. Anaconda Aluminum Co. (1966) 160 NLRB 35 [62 LRRM 1370], Perry Rubber Co. (1961) 133 NLRB 275, [48 LRRM 1630].

Quoting Sea Bay Manor Home for Adults (1980) 253 NLRB 739, 741 [106 LRRM 1010], the Board indicated that the acceptance and implementation of an agreement reached during negotiations is the "most basic of collective bargaining principles."

Throughout the instant proceedings, SEIU repeatedly acknowledged its obligations under Article 5.1 of the MOU, yet failed to take any meaningful action to either abate the sick-out or otherwise encourage the CNAs to return to duty. In contrast, when faced with a sick-out by nurses in 2002, SEIU contacted the nurses, told them SEIU could not condone the action, and encouraged them to return to duty. SEIU also posted a notice on its website discouraging sick-outs and strikes by the nurses. Based on its previous conduct, SEIU clearly knew what steps could be taken to help avert a potential sick-out, yet it failed to take any meaningful actions in this instance. I find SEIU's failure to take any meaningful action to avert the sick-

out was a conscious reversal of Article 5.1 of the MOU. In so doing, SEIU undermined the negotiation process between the parties which, according to the Board in Grant, is precisely the conduct about which PERB is concerned.

It is also noteworthy that there is nothing in the record to suggest SEIU would refrain from engaging in this conduct in the future. To the contrary, notwithstanding its inaction, SEIU denies any wrongdoing and instead blames the State for the sick-out and the consequences thereof. The State, however, was not responsible for the hardships faced by the nursing staff, the administrative staff and resident-patients of the Home over the Fourth of July weekend. That responsibility lies solely with SEIU. When coupled with the fact that the sick-out potentially jeopardized the health and safety of resident-patients of the Home, SEIU's conduct was particularly egregious.

Based on the foregoing, I do not believe SEIU committed an isolated breach of the contract. Rather, I conclude SEIU consciously repudiated Article 5.1 and, therefore, effected a change in policy. Thus, because the State established all four elements of the unilateral change test, I would find SEIU committed an unlawful unilateral change when it condoned the sick-out.