

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA STATE EMPLOYEES)
ASSOCIATION,)
) Case No. SA-CE-926-S
 Charging Party,)
 v.) PERB Decision No. 1204-S
)
STATE OF CALIFORNIA (DEPARTMENT) June 18, 1997
OF CORRECTIONS),)
)
 Respondent.)
_____)

Appearance; Bill Kelly, Senior Labor Relations Representative,
for California State Employees Association.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION AND ORDER

DYER, Member: This case is before the Public Employment Relations Board (Board) on appeal by the California State Employees Association (Association) to a Board agent's dismissal (attached) of the unfair practice charge and refusal to issue a complaint. The Association requested repugnancy review of an arbitrator's award in a previous case (SA-CE-734-S) pursuant to section 3514.5(a) of the Ralph C. Dills Act (Dills Act).¹

¹The Dills Act is codified at Government Code section 3512 et seq. Section 3514.5(a) states, in pertinent part:

(2) . . . The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits; otherwise, it shall dismiss the charge.

The Board has reviewed the entire record in this case, including the Board agent's warning and dismissal letters, the unfair practice charge and the Association's appeal. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

The unfair practice charge in Case No. SA-CE-926-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Johnson joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198



January 31, 1997

Bill Kelly, Senior Labor Relations
Representative
California State Employees Association
1108 "0" Street
Sacramento, CA 95814

Re: NOTICE OF DISMISSAL AND REFUSAL TO ISSUE COMPLAINT
California State Employees Association v. State of
California (Department of Corrections)
Unfair Practice Charge No. SA-CE-926-S

Dear Mr. Kelly:

I indicated to you, in my attached letter dated January 23, 1997, 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 which 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 January 30, 1997, the charge would be dismissed.

I have not received either an amended charge or a request for withdrawal. You confirmed by telephone on January 31, 1997 that the charge was not being amended or withdrawn. Therefore, I am dismissing the charge based on the facts and reasons contained in my January 23, 1997 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you 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 of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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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 of Regs., tit. 8, sec. 32635(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 of Regs., tit. 8, sec. 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed.

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 of Regs., tit. 8, sec. 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,

ROBERT THOMPSON
Deputy General Counsel

By .
Les Chisholm
Regional Director

Attachment

cc: Robert K. Roskoph

PUBLIC EMPLOYMENT RELATIONS BOARD



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
(916) 322-3198



January 23, 1997

Bill Kelly
Senior Labor Relations Representative
California State Employees Association
1108 "O" Street
Sacramento, CA 95814

Re: WARNING LETTER
Unfair Practice Charge No. SA-CE-926-S
California State Employees Association v. State of
California (Department of Corrections)

Dear Mr. Kelly:

The above-referenced charge, filed on September 16, 1996, seeks review by the Public Employment Relations Board (PERB or Board) of a grievance arbitration award for the purpose of determining whether the award is repugnant to the purposes of the Ralph C. Dills Act (Dills Act)¹

Background

The California State Employees Association (CSEA or Charging Party) represents, inter alia, State Bargaining Unit 3, which includes employees employed by the State of California, Department of Corrections (Department or State). In an earlier charge (S-CE-734-S, filed January 10, 1995), CSEA alleged the Department violated Dills Act sections 3519 (c) and (b) by unilaterally increasing teacher-inmate contact time by one-half hour at several work locations. That charge was dismissed and deferred to arbitration based on findings that the complained-of

¹The Dills Act is codified at Government Code section 3512 et seq. Section 3514.5 provides in pertinent part as follows:

[PERB] shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits; otherwise, it shall dismiss the charge.

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conduct was arguably prohibited by the parties' memorandum of understanding (MOU) and that the MOU provided for binding arbitration of grievances.

The Unit 3 MOU then in effect between the parties included the following provisions in Article 23.1:

a. This contract sets forth the full and entire understanding of the parties regarding the matters contained herein, and any other prior or existing understanding or contract by the parties, whether formal or informal, regarding any such matters are hereby superseded. Except as provided in this contract, it is agreed and understood that each party to this contract voluntarily waives its right to negotiate with respect to any matter raised in negotiations or covered by this contract.

With respect to other matters within the scope of negotiations, negotiations may be required as provided in subsection b. below.

b. The parties agree that the provisions of this Subsection shall apply only to matters which are not covered in this contract. The parties recognize that it may be necessary for the State to make changes in areas within the scope of negotiations. Where the State finds it necessary to make such changes, the State shall notify [CSEA] of the proposed change 30 days prior to its proposed implementation. The parties shall undertake negotiations regarding the impact of such changes on the employees in Unit 3, when all three of the following exist:

(1) Where such changes would affect the working conditions of a significant number of employees in Unit 3;

(2) Where the subject matter of the change is within the scope of representation pursuant to the Ralph C. Dills Act;

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(3) Where the Union requests to negotiate with the State.

Any agreement resulting from such negotiations shall be executed in writing and shall become an addendum to this contract. If the parties are in disagreement as to whether a proposed change is subject to this Subsection, such disagreement may be submitted to arbitration procedure for resolution. The arbitrator's decision shall be binding. In the event negotiations on the proposed change are undertaken, any impasse which arises may be submitted to mediation pursuant to Section 3518 of the Ralph C. Dills Act.

The language of Article 23.1 was relied upon by PERB in its dismissal of S-CE-734-S, and by the arbitrator in deciding the grievance. Arbitrator William Eaton issued his opinion and award on June 14, 1996, and ruled as follows:

1. The State did violate its obligations under Article 23.1.a and .b when it extended the inmate work day an additional 30 minutes.
2. The parties shall meet and confer regarding the impact of the change in dispute.

By letter of July 10, 1996, CSEA demanded, based on the arbitrator's award, that the Department rollback the changes in work schedules and teacher/inmate contact time until negotiations were completed. CSEA also took the position that the contact time bargaining should be done at the "main table" where negotiations over a successor MOU for Unit 3 were underway. While the Department did provide subsequent notice and opportunity to bargain pursuant to Arbitrator Eaton's award, the Department did not agree to a rollback of the changes which gave rise to the dispute and did not agree to submit the issue to the main table negotiations.

CSEA's Position

CSEA argues that, under facts similar to this case, the Board held an arbitrator's award repugnant in Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a (Dry Creek). In Dry Creek, an arbitrator found that the respondent violated the collective bargaining agreement when it cut teacher

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salaries but did not order restoration of the cuts because he "considered himself without authority" to do so and/or because he believed such a remedy inappropriate.

PERB found the arbitrator's failure to order restoration of the status quo rendered the remedy so deficient as to justify a finding that the award was repugnant to the purposes of the Educational Employment Relations Act, and directed issuance of a complaint in the matter. (Id.)

CSEA contends that Arbitrator Eaton's award is repugnant to the purposes of the Dills Act in two respects: (1) the arbitrator did not order restoration of the status quo ante, and (2) he did not order the negotiations to take place in conjunction with the successor contract negotiations.

State's Position

The State opposes issuance of a complaint in this matter. The State argues that relevant PERB precedent does not require a remedy different than that ordered by Arbitrator Eaton, and that PERB should not substitute its judgment for that of the arbitrator.

Rule of Law

In adopting the test for exercise of its discretionary jurisdiction to review arbitration awards for repugnancy, the Board relied on National Labor Relations Board (NLRB) precedent. (Dry Creek.) The NLRB has since reaffirmed its test in Motor Convoy (1991) 303 NLRB 135 as follows:

The [NLRB] will defer to an arbitration award when the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Act. *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Additionally, the arbitrator must have considered the unfair labor practice issue which is before the [NLRB]. *Raytheon Co.*, 140 NLRB 883 (1963). In *Olin Corp.*, 268 NLRB 573, 574 (1984), the [NLRB] clarified that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant

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to resolving the unfair labor practice. The [NLRB] will find deferral inappropriate under the clearly repugnant standard only when the arbitrator's award is "'palpably wrong,' i.e., . . . is not susceptible to an interpretation consistent with the Act." Ibid. The party seeking to have the [NLRB] reject deferral bears the burden of proof. Ibid.

(See, also, The Hoover Co. (1992) 307 NLRB 524.)

The Board adopted the Spielberg criteria and restated the repugnancy test in Dry Creek as follows:

While the Board will not necessarily find an award repugnant because it would have provided a different remedy than that afforded by the arbitrator, it may well so consider an award which fails to protect the essential and fundamental principles of good faith negotiations. [Emphasis in original.]

Discussion

Contrary to CSEA's assertions, the facts underlying the current charge differ materially from Dry Creek. Dry Creek relied on clear precedent holding that "good faith negotiations cannot and should not proceed until the status quo is restored" [Footnote omitted.], but did so under facts where the respondent had unilaterally implemented a change in terms and conditions of employment (salaries) and the decision itself was subject to a duty to bargain.

In fashioning appropriate remedies and determining whether to order a return to the status quo ante, the Board has long distinguished between those cases where the decision itself is a mandatory subject of bargaining and those cases where the respondent is obliged to bargain the effects of an otherwise lawful change by the employer. (See, for example, Moreno Valley Unified School District (1982) PERB Decision No. 206 (Moreno Valley).)

The facts alleged by CSEA establish that the issue before Arbitrator Eaton was the same as in this unfair practice charge, and the parties agreed to be bound by the decision. CSEA does not allege that the arbitration proceedings were other than "fair and regular."

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Under the plain language of Article 23.1.a and .b, the State was obliged to bargain the impact of the change it implemented but not the decision itself. Arbitrator Eaton found the State in violation of Article 23.1, and ordered the State to meet and confer with CSEA over the impact of the change.

Under Moreno Valley and similarly decided cases, PERB precedent does not routinely require restoration of the status quo ante under facts like those here. For the foregoing reasons, the first point in CSEA's argument for a repugnancy finding must be dismissed.

The second point raised by CSEA concerns its demand that the negotiations over impact of the change be addressed within the larger negotiations over a successor contract. CSEA does not cite any precedent or offer a rationale for its position that the arbitrator should have ordered such a remedy.

Under Dry Creek, it is not appropriate to speculate whether PERB would have ordered a different remedy. Under relevant precedent, there is no basis for concluding that either of CSEA's objections establish that the arbitrator's award was "palpably wrong" (Olin Corp and Motor Convoy) or failed "to protect the essential and fundamental principles of good faith negotiations." (Dry Creek.)

Conclusion

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please 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 the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before January 30, 1997, I shall dismiss your charge. If you have any questions, please call me at (916) 322-3198, ext. 359.

Les Chisholm
Regional Director