

Union of Operating Engineers, AFL-CIO, Locals 3, 12, 39 and 501 (IUOE) on the subject of the impacts of federal gun control legislation on bargaining unit members, and insisted that bargaining take place at the departmental level.

After reviewing the entire record, including the unfair practice charge and complaint, the proposed decision, the hearing transcript, the State's exceptions and IUOE's response, the Board reverses the proposed decision and dismisses the unfair practice charge and complaint in accordance with the following discussion.

BACKGROUND

IUOE is the recognized exclusive representative of employees within State Bargaining Unit 12, Craft and Maintenance, and State Bargaining Unit 13, Stationary Engineers. On or about March 20, 1997, DPA notified IUOE and other exclusive representatives of the impacts on the Gun Control Act of 1968 (Gun Act) of provisions included in the Federal Omnibus Consolidated Appropriations Act of 1997. Among other impacts, the Gun Act was amended to make it unlawful for any person convicted of a misdemeanor crime of domestic violence to ship,

to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and confer in good faith with a recognized employee organization.

transport, possess, or receive firearms or ammunition. DPA noted that state agencies needed to take affirmative steps to determine if any employees were subject to this restriction, and to take appropriate remedial action. DPA also notified IUOE of its intent "to delegate implementation of the new requirements to each department." DPA decided to delegate this matter to individual departments because it believed that the process of reviewing the impact of the Gun Act amendments on specific employees and work settings, and considering what actions implementation of the amendments required, would be more effectively and efficiently completed at the departmental level. IUOE was advised to contact departmental employee relations officers if it wished to discuss impacts of the Gun Act amendments.

On March 28, 1997, IUOE responded to DPA's March 20 letter. IUOE rejected DPA's invitation to contact departmental labor relations officers, indicating that there should be a single, statewide application of the Gun Act amendments as they affected bargaining unit members. IUOE demanded to meet and confer with DPA on the subject.

On April 22, 1997, IUOE again wrote DPA, which had not responded to the March 28 letter, seeking information on employees affected by the Gun Act amendments. On June 4, 1997, IUOE again wrote to DPA reiterating IUOE's concern about conducting negotiations with individual departments on the subject.

On June 10, 1997, DPA responded to IUOE reiterating that negotiations over the impact of the Gun Act amendments were being delegated to individual departments and would not be conducted on a centralized, statewide basis.

On June 11, 1997, the State Department of Parks and Recreation (Parks and Recreation) wrote to IUOE inviting discussions on the implementation of a proposed policy relating to the Gun Act amendments. On June 23, 1997, IUOE responded and declined to participate in discussions, noting DPA's refusal to bargain the issue on a statewide basis. A month later, Parks and Recreation notified IUOE that there was no impact on Unit 12 employees within that department as a result of the policy.

The Department of Fish and Game (Fish and Game) wrote to IUOE on July 31, 1997, announcing its implementation of the Gun Act amendments, effective September 2. IUOE was invited to meet and confer on the impacts of the policy. IUOE responded on August 4 and asserted that Fish and Game was unilaterally implementing a new policy affecting terms and conditions of employment.

There is no specific evidence that bargaining unit members represented by IUOE ship, transport, possess or receive firearms or ammunition as part of their employment duties. There is no evidence that any individual department failed or refused to bargain with IUOE over the subject of the impact of the Gun Act amendments.

On June 20, 1997, IUOE filed the instant unfair practice

charge alleging that DPA refused to negotiate over the subject of the impact of the Gun Act amendments and instead advised IUOE that it "would have to bargain individually with each department within the State of California." IUOE alleged that this conduct constituted a failure to bargain in good faith in violation of the Dills Act. On July 23, 1997, the PERB Office of the General Counsel issued a complaint alleging that the State unlawfully failed and refused to bargain in good faith when it advised IUOE that it would not bargain the impact of the Gun Act amendments on a statewide basis, but would instead delegate bargaining responsibility to individual departments.

After conducting a hearing on November 18, 1997, a PERB ALJ issued a proposed decision on February 27, 1998, finding that the State violated Dills Act section 3519(a), (b) and (c) when it refused to negotiate on a statewide basis and insisted that bargaining take place at the departmental level.

POSITIONS OF THE PARTIES

Dills Act section 3517² requires the Governor or his

²Dills Act section 3517 states, in pertinent part:

The Governor, or his representative as may be properly designated by law, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations.

"Meet and confer in good faith" means that the Governor or such representatives as the Governor may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer . . . and to endeavor to reach

designated representative to negotiate in good faith. IUOE argues that DPA, as the Governor's designated representative, has no authority to further delegate bargaining to individual departments, and its insistence on doing so represents a refusal to bargain in good faith. IUOE asserts that DPA's action presents a clear and present danger to the bargaining process.

(Savanna School District (1982) PERB Decisions No. 276

(Savanna).) According to IUOE, the danger results from the potential need for IUOE to conduct separate negotiations with approximately thirty individual departments.

DPA responds that in Government Code section 19815.4(g) the Director of DPA is expressly designated as the Governor's representative under Dills Act section 3517. Further, Government Code section 19815.4(f) expressly authorizes the Director of DPA to "delegate powers to any authorized representative."

Therefore, DPA's delegation to individual departments of bargaining over the impacts of the Gun Act amendments is lawful. DPA notes that the Board has expressly affirmed DPA's authority to delegate bargaining to departments at its discretion (State of California (Department of Personnel Administration) (1996) PERB Decision No. 1145-S (State of California (DPA))). Also, the Board has recently held that a union has no authority to dictate the setting in which negotiations must occur (State of California (Board of Equalization) (1997) PERB Decision No. 1235-S).

agreement on matters within the scope of representation.

DISCUSSION

In considering allegations that a party has failed to negotiate in good faith, the Board generally reviews the totality of the circumstances involved. However, certain acts have such potential to frustrate negotiations that they are considered per se violations of the duty to bargain in good faith. (Pajaro Valley Unified School District (1978) PERB Decision No. 51 (Parajo Valley) Examples of per se violations include an outright refusal to negotiate (Sierra Joint Community College District (1981) PERB Decision No. 179); or employer unilateral changes to terms and conditions of employment (California State Employees' Assn. v. Public Employment Relations Bd. (1996) 51 Cal.App.4th 923, 934-935 [59 Cal.Rptr.2d 488])).

Dills Act section 3517 states that "the Governor or such representatives as the Governor may designate" has the obligation to meet and confer in good faith. IUOE asserts that:

Nowhere is the duty to meet and confer defined in such a manner that would allow the DPA to re-delegate, absent authority from the Governor, bargaining authority.

Consequently, IUOE argues that DPA's unauthorized insistence on delegating negotiations over the impact of Gun Act amendments to individual departments constitutes an outright refusal to bargain.

IUOE's assertion is incorrect. In State of California (DPA), while dismissing allegations of unlawful conduct relating to DPA's requirement that individual departments obtain DPA approval before negotiating with exclusive representatives, the

Board stated:

Dills Act section 3513(j) defines the State employer for purposes of bargaining as the Governor or his designated representatives. DPA has acted as the designee. As such, it may delegate this authority to State agencies or departments, at its discretion. There is no evidence that such delegation is either a subject within the scope of bargaining or that this delegation has interfered with the State's obligation to bargain in good faith.

Since DPA has the discretion to delegate the authority to bargain to departments, the delegation of negotiations over the impact of Gun Act amendments does not in and of itself constitute a refusal to bargain.

However, our inquiry does not end here. A specific delegation of bargaining may be unlawful if it is found to be inconsistent with the obligation to bargain in good faith. In considering an allegation that a specific delegation of bargaining responsibility is unlawful, the Board must consider the totality of the circumstances involved.

The Board reviews the totality of the circumstances to determine whether there are sufficient objective indicia of a subjective intention to participate in good faith in the bargaining process and to reach agreement, or, conversely, of an intent to frustrate or avoid the bargaining process. (Placentia Fire Fighters v. City of Placentia (1976) 57 Cal.App.3d 9, 25 [129 Cal.Rptr. 126] (Placentia); see also Pajaro Valley at pp. 4-5.) The parties' outward conduct is examined to determine whether it indicates a serious attempt to resolve differences and reach a common ground. (Placentia at p. 25; see also, Stockton

Unified School District (1980) PERB Decision No. 143 at p. 21.)

In Savanna, the Board considered allegations that aspects of the methodology or structure of bargaining utilized by a party violated the duty to bargain in good faith. In that case, a school employer alleged that an exclusive representative's insistence that non-district employees, serve as members of the negotiating team constituted bad faith bargaining. The Board dismissed the charge and held that the charging party had the burden of showing "substantial evidence of ulterior motive or bad faith," by the exclusive representative such that the conduct constituted a "clear and present danger to the bargaining process." (Id. at pp. 4-5, proposed dec.) The Board specifically held that the charging party must provide concrete examples of disruptions to the bargaining process in order to demonstrate that the respondent engaged in unlawful conduct. (Id. at p. 5.)

IUOE cites Savanna and argues that DPA's delegation of bargaining in this case represents a clear and present danger to the bargaining process. IUOE refers to the time and expense involved in negotiating the impact of Gun Act amendments with approximately thirty individual departments which employ bargaining unit members. IUOE states:

. . . department wide bargaining on this issue would severely restrain the Union due to the costs and time associated with bargaining with the multitude of departments that employ Unit members.

The Board agrees that it is appropriate to apply the

standard adopted in Savanna in evaluating the allegations presented in the case at bar. As a result, in order to prevail in this case, IUOE must present evidence of ulterior motives by DPA, or concrete examples of disruptions to the bargaining process which demonstrate that DPA's delegation of bargaining to individual departments presents a clear and present danger to that process.

IUOE has failed to meet this standard. DPA asserts that its reason for delegating bargaining over the Gun Act amendments was to increase the efficiency and effectiveness of that bargaining. IUOE has presented no evidence of an ulterior motive. IUOE asserts that the delegation of bargaining to individual departments has the effect of "requiring the Union to bargain with potentially thirty some separate departments." However, the mere "potential" of this bargaining does not demonstrate disruption to the bargaining process. The record contains evidence of IUOE contacts with two individual departments concerning the impacts of the Gun Act amendments. In one department, Parks and Recreation, apparently no IUOE members were impacted by the amendments. In the other, Fish and Game, it is unclear whether there was impact on IUOE members. Further, these contacts were initiated by the departments, so it does not appear that the delegation of bargaining to individual departments prevented the bargaining process from going forward.

IUOE points out that the time and costs associated with conducting negotiations with thirty different departments would

severely strain the Union's resources. As noted above, however, IUOE has presented no evidence that its members in numerous departments are involved in the shipment, transportation, possession or receipt of firearms or ammunition, duties which the Gun Act amendments addressed. It cannot be concluded, based on the evidence presented, that negotiations by IUOE with numerous departments would actually be required in this case. As a result, IUOE's reference to the increased cost and time associated with bargaining with numerous individual departments is purely speculative.

IUOE has failed to demonstrate evidence of ulterior motive by DPA or any concrete example of disruption which poses a clear and present danger to the bargaining process. Therefore, considering the totality of the circumstances, the Board cannot conclude that DPA violated its obligation to negotiate in good faith when it delegated bargaining over the impacts of Gun Act amendments to individual departments.

ORDER

The unfair practice charge and complaint in Case No. SA-CE-1005-S are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Amador joined in this Decision. Member Dyer's dissent begins on page 12.

DYER, dissenting: I dissent. Section 3521 of the Ralph C. Dills Act (Dills Act) empowers the Public Employment Relations Board (Board) to determine appropriate bargaining units for employees of the State of California (State). In 1979, after extensive hearings, the Board created a statewide unit of Craft and Maintenance employees (Bargaining Unit 12) and a statewide unit of Stationary Engineers (Bargaining Unit 13). (Unit Determination for the State of California (1979) PERB Decision No. 110-S at pp. 43-44.) In doing so, the Board specifically rejected the possibility of creating department-wide or agency-wide bargaining units, noting that such units would unnecessarily fragment "employees who perform substantially identical functions in state service." (Id. at p. 6.) Today, the majority effectively undermines the Board's unit determination by ceding to the State employer, the authority to dictate whether negotiations will occur on a unit-wide basis or whether an exclusive representative must negotiate individually with every department in the State.

For the reasons that follow, I conclude that the issue of whether bargaining takes place on a unit-wide or department-by-department basis is a negotiable ground rule and that the State violated Dills Act section 3519(a), (b) and (c) when it refused to meet and confer over the setting of impact negotiations.

FACTUAL SUMMARY

This case presents a relatively straightforward factual scenario. The International Union of Operating Engineers,

AFL-CIO, Locals 3, 12, 39 and 501 (IUOE) is the exclusive representative of employees in State Bargaining Units 12 and 13. The State employs members of Bargaining Unit 12 in approximately 40 departments and employs members of Bargaining Unit 13 in approximately 25 departments throughout the State.

In 1997, the United States Congress passed the federal Omnibus Consolidated Appropriations Act of 1997. Among other things, this legislation amended the federal Gun Control Act of 1968 (Gun Act), making it unlawful for any person convicted of a "misdemeanor crime of domestic violence" to ship, transport, possess, or receive firearms or ammunition.

On March 20, 1997, the labor relations office for the State of California (Department of Personnel Administration) (DPA)¹ notified IUOE that Congress had amended the Gun Act. DPA informed IUOE that the State intended to take unspecified actions to ensure compliance with the amendment. Although DPA recognized that these actions could impact matters within the scope of bargaining, DPA indicated that it would not negotiate those impacts on a unit-wide basis. Instead, DPA stated that IUOE would have to contact each individual department to request impact negotiations.

On March 28, 1997, IUOE responded to DPA's March 20 letter. IUOE rejected DPA's offer of compartmentalized negotiations. Noting the statewide implications of the Gun Act amendment, IUOE

¹The Director of DPA serves as the Governor's representative pursuant to the provisions of Dills Act section 3517. (Cal. Gov. Code sec. 19815.4.)

requested that DPA meet and confer over the unit-wide impacts of the amendment.

DPA did not respond to IUOE's March 28 letter.

On April 22, 1997, IUOE sent a second letter to DPA. IUOE reiterated its demand for unit-wide bargaining and requested the name, classification, department, and worksite location of each employee affected by the Gun Act amendment, as well as the State's rationale for applying the Gun Act to that employee.

DPA did not respond to IUOE's April 22 letter.

On June 4, 1997, IUOE contacted DPA for the third time. IUOE again voiced its objection to bargaining with individual departments. IUOE questioned whether each department had the authority to enter into a separate memorandum of understanding controlling the Gun Act's impact on terms and conditions of employment. (See Dills Act sec. 3517.5.)

On June 10, 1997, DPA responded to IUOE's June 4 letter. DPA confirmed that it had delegated compliance with the Gun Act amendment to each individual department. DPA affirmatively stated that it would not bargain the matter on a centralized, unit-wide basis.

On June 20, 1997, IUOE filed the underlying unfair practice charge alleging that the State had failed and refused to meet and confer in good faith when it refused to bargain over the impact of the Gun Act amendment on a unit-wide basis.

DISCUSSION

This case presents a simple question: Did the State employer fail or refuse to meet and confer over a matter within the scope of bargaining?

The majority answers this question in the negative, concluding that the State merely empowered individual departments to negotiate the effects of the Gun Act amendment. In reaching this conclusion, the majority ignores the crux of this case: whether, when making a change affecting matters within the scope of bargaining, the State may unilaterally require an exclusive representative to engage in serial negotiations with multiple departments.

The Board has recently held that an exclusive representative has no right to dictate the "setting" in which bargaining takes place. (State of California (Board of Equalization) (1997) PERB Decision No. 1235-S at p. 3.) Accordingly, an exclusive representative may not require the State to negotiate an issue at the main bargaining table. (Ibid; see also, Professional Engineers in Cal. Government v. Department of Transportation (1980) 114 Cal.App.3d 93, 99 [170 Cal.Rptr. 444] (holding that employee organization may not compel an individual department to meet and confer unless the department has been designated the Governor's representative).) Likewise, an exclusive representative may not dictate the schedule for negotiations, the physical location of negotiations, or the number of bargaining unit members given release time to negotiate. By the same token,

however, an employer has no authority to unilaterally dictate these terms. These are the ground rules that underlie the negotiations process. As such, they are within the scope of bargaining and must be negotiated by the parties.

Ground rules are essentially an agreement covering the procedural aspects of substantive bargaining. Bargaining over ground rules is done in the same manner as negotiations over substantive terms and conditions of employment. Refusing to bargain over ground rules or reneging on established ground rules may constitute a violation of the duty to bargain. (See, e.g., State of California (Department of Personnel Administration) (1991) PERB Decision No. 900-S at p. 4.)

As noted above, the State notified IUOE of its intent to comply with the Gun Act amendment on March 20, 1997. The State offered to negotiate the impacts of that compliance on a department-by-department basis. On March 28, IUOE declined the State's offer of department-by-department negotiations and requested that the State meet and confer over the unit-wide impacts of the State's action. The State did not respond. IUOE reiterated its request to bargain on April 22 and June 4, 1997. On June 10, the State specifically refused to bargain on a unit-wide basis.

According to testimony at the hearing, the State wished to delegate negotiations to the individual departments because the Gun Act amendment potentially affected individual employees in a number of work settings; because individual departments were in a

better position to determine how to deal with those employees; and because DPA lacked the information to effectively negotiate. IUOE wished to negotiate on a unit-wide basis because it believed that the Gun Act amendment had statewide impacts that should have a statewide interpretation; and because bargaining with multiple departments would unnecessarily tax IUOE's limited resources.

As this case illustrates, parties may, for valid reasons, disagree over whether a particular decision has unit-wide or merely local impacts. That is precisely why the parties must negotiate the issue of whether negotiations should take place on a unit-wide or a department-by-department basis.

That is not to say that the State employer may not delegate its authority to bargain. (See Dills Act sec. 3517; State of California (Department of Personnel Administration) (1996) PERB Decision No. 1145-S, warning letter at p. 6.) However, the authority to select one's negotiators does not include the power to require an exclusive representative to engage in serial negotiations over mandatory subjects of bargaining. By that logic, the State could delegate its authority to negotiate wages, requiring an exclusive representative to negotiate a separate salary schedule with each individual State department.

In this case, the parties stipulated that the State refused to consider IUOE's requests for unit-wide bargaining over the impact of the Gun Act amendment. More than hard bargaining, the State's actions constituted an outright refusal to bargain over this issue.

Based on the foregoing, I conclude that neither the employer nor the exclusive representative may dictate whether negotiations take place on a unit-wide or a department-by-department basis. Instead, the parties must reach agreement on this issue prior to beginning substantive negotiations. Accordingly, I conclude that the State violated Dills Act section 3519(a), (b) and (c) when it refused to meet and confer over this issue.