

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA UNION OF SAFETY)
EMPLOYEES,)
)
Charging Party,) Case No. SA-CE-1222-S
)
v.) PERB Decision No. 1347-S
)
STATE OF CALIFORNIA (DEPARTMENT OF)
MOTOR VEHICLES),) September 2, 1999
)
Respondent.)
_____)

Appearances: Linda M. Kelly, Attorney, for California Union of Safety Employees; State of California (Department of Personnel Administration) by Carol A. McConnell, Assistant Chief Counsel, for State of California (Department of Motor Vehicles).

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (PERB or Board) on the California Union of Safety Employees (CAUSE) appeal from a Board agent's partial dismissal (attached) of its unfair practice charge. As amended, the charge alleged that the State of California (Department of Motor Vehicles) (Department) violated section 3519(a), (b) and (c) of the Ralph C. Dills Act (Dills Act)¹ when it unilaterally changed

¹The Dills Act is codified at Government Code section 3512 et seq. Section 3519 provides, in relevant part:

It shall be unlawful for the state to do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of

its policy concerning work schedules and driver's license exams conducted during non-daylight hours and when it bypassed CAUSE and negotiated directly with employees.²

The Board has reviewed the entire record in this case, including the original and amended unfair practice charge, the partial warning and dismissal letters, CAUSE'S appeal and the Department's response thereto. The Board finds the partial warning and dismissal letters to be free from prejudicial error and adopts them as the decision of the Board itself.³

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.

²This appeal concerns only those allegations concerning employee work schedules. On May 10, 1999, the Board agent issued a complaint alleging that the Department violated the Dills Act when it unilaterally implemented a policy requiring License Registration Examiners (LREs) in the Department's Fullerton office to give routine driver's license exams during non-daylight (pre-dawn) hours and when it negotiated directly with LREs regarding those pre-dawn licensing exams.

³On appeal, CAUSE contends that the Board agent erroneously analyzed the change in work hours under section 7.2(b) (flexible work hours) of the expired memorandum of understanding (MOU) between the parties rather than section 7.2(a) (alternate workweek). However, although both the warning and dismissal letters refer to MOU section 7.2(b), CAUSE provides no justification for its failure to bring this alleged error to the Board agent's attention. (PERB Reg. 32635(b); PERB regs. are codified at Cal. Code Regs., tit 8, sec. 31001 et seq.) In addition, MOU section 7.2(a) provides that the Department may establish an alternate workweek for bargaining unit employees pursuant to operational need. CAUSE has presented no evidence that the Department deviated from this established policy when it implemented the alternate workweek at its Fullerton office.

ORDER

The partial dismissal in Case No. SA-CE-1222-S is hereby
AFFIRMED.

Chairman Caffrey and Member Amador joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD



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



May 10, 1999

Linda M. Kelly, Legal Counsel
California Union of Safety Employees
2029 "H" Street
Sacramento, CA 95814

Re: California Union of Safety Employees v. State of California
(Department of Motor Vehicles)
Unfair Practice Charge No. SA-CE-1222-S
PARTIAL DISMISSAL LETTER

Dear Ms. Kelly:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 12, 1999. The charge alleges that the State of California (Department of Motor Vehicles) (DMV) violated the Ralph C. Dills Act, Government Code section 3519(a), (b) and (c), when it made unilateral changes in policy concerning work schedules and driver's license exams conducted during non-daylight hours. The charge also alleges that the Department bypassed the exclusive representative, the California Union of Safety Employees (CAUSE), and negotiated directly with employees concerning these matters. This letter addresses only the allegations concerning changes to employee work schedules.

I indicated to you in my attached letter dated April 22, 1999, that certain allegations contained in the 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 these allegations to state a prima facie case or withdrew them prior to April 30, 1999, the allegations would be dismissed. On April 30, 1999, I received an amended unfair practice charge.

In the original charge, CAUSE alleged, in part, that the Department made an unlawful unilateral change in policy when it established a 4/10/40 work week for License Registration Examiners (LREs) and bypassed CAUSE to negotiate the revised work schedule directly with the LREs. I indicated in the attached letter that Article 7.2 of the parties' expired Memorandum of Understanding provides that the State may establish flexible work hours on its own initiative or upon request of CAUSE or an employee. Accordingly, the State did not make an unlawful unilateral change in policy or bypass CAUSE to negotiate a new

Partial Dismissal Letter
SA-CE-1222-S
Page 2

policy or a waiver of an existing policy when it met with the LREs to establish the new work schedule.

The amended charge concedes that Article 7.2 permits the Department to establish flexible work hours. However, CAUSE alleges for the first time that the Department failed to provide notice of the decision to establish the 4/10/40 work schedule and an opportunity to bargain the impacts of this decision.

However, Article 7.2 authorizes the State to establish alternative work schedules without a further obligation to bargain. There is no language in this provision which requires the State to notify CAUSE prior to establishing the 4/10/40 work schedule in the Fullerton DMV office.

Alternatively, assuming the Department had an obligation to provide notice and an opportunity to bargain, the Board has held that when an exclusive representative "receives actual notice of a decision, the effects of which it believes to be negotiable, the employer's 'failure to give formal notice is of no legal import.'" (Sylvan Union Elementary School District (1992) PERB Decision No. 919 (Sylvan), citing Regents of the University of California (1987) PERB Decision No. 640-H, p. 22.) Furthermore, when considering an effects bargaining allegation, the charging party must show that it made a request to bargain the effects of the decision. (Sylvan.)

The charge alleges that on September 14, 1998, CAUSE Labor Representative Donna Brady was informed by a unit member from the Fullerton DMV office that the LREs had reached an agreement with management to establish a 4/10/40 work week effective October 1, 1998. Although the charge states that Ms. Brady was concerned about the proposed change, there are no facts alleging that CAUSE made a demand to bargain the effects of the proposed work schedule change. Furthermore, on November 12, 1998, CAUSE'S Chief Legal Counsel, Sam McCall, sent a letter to DMV Labor Relations Officer Bruce Arbuckle reminding the Department of its obligation to provide notice to the union of proposed employment changes. However, the letter did not contain a demand to bargain over the effects of the schedule change. Thus, CAUSE was aware of the proposed change, having received actual notice of the Department's decision to change the LREs work schedule prior to its implementation, but CAUSE failed to make a demand to bargain. Therefore, under this theory, the allegation fails to state a prima facie case.

Accordingly, based on the discussion above and in the attached letter, the allegations that the Department made an unlawful unilateral change in policy when it established a 4/10/40 work week for LREs, failed provide notice and an opportunity to

Partial Dismissal Letter
SA-CE-1222-S
Page 3

bargain the effects of the decision to change the LREs' work schedule and bypassed CAUSE to negotiate the revised work schedule directly with the LREs, fail to state a prima face case and must be dismissed.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this partial dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, sec. 32635 (a) .) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d) ; see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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

Partial Dismissal Letter
SA-CE-1222-S
Page 4

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, 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. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

Extension of Time

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

Robin W. Wesley
Regional Attorney

Attachment

cc: Carol A. McConnell



Sacramento Regional Office
1031 18th Street, Room 102
Sacramento, CA 95814-4174
1916) 322-3198



April 22, 1999

Linda M. Kelly
Legal Counsel
California Union of Safety Employees
2029 "H" Street
Sacramento, CA 95814

Re: California Union of Safety Employees v. State of California
(Department of Motor Vehicles)
Unfair Practice Charge No. SA-CE-1222-S
PARTIAL WARNING LETTER

Dear Ms. Kelly:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 12, 1999. The charge alleges that the State of California (Department of Motor Vehicles) (DMV) violated the Ralph C. Dills Act, Government Code section 3519(a), (b) and (c), when it made unilateral changes in policy concerning work schedules and driver's license exams conducted during non-daylight hours. The charge also alleges that the Department bypassed the exclusive representative, the California Union of Safety Employees (CAUSE), and negotiated directly with employees concerning these matters. This letter addresses only the unilateral change and bypassing allegations concerning changes to employee work schedules.

On March 30, 1999, I telephoned you to discuss the charge. During our conversation you indicated you would provide me with additional information. Since I have not received any further information I will address the allegations as presented in the charge.

On September 14, 1998, CAUSE Labor Representative Donna Brady was informed by a unit member from the Fullerton DMV office that the License Registration Examiners (LREs) in that office had reached an agreement with the office management to establish a 4/10/40 work week beginning October 1, 1998. The charge alleges that this work schedule would require the LREs to conduct pre-dawn drive tests in violation of department policy prohibiting routine driver's license field exams during non-daylight hours.

In response to concerns raised by CAUSE, on October 13, 1998, the LREs sent a letter to Bruce Arbuckle, DMV Labor Relations Officer. In their letter, the LREs sought to clarify that they had agreed to conduct the pre-dawn exams and that these pre-dawn drives were limited to one per examiner per day.

On November 12, 1998, Sam McCall, CAUSE Chief Legal Counsel, sent a letter to Mr. Arbuckle reminding the Department of its obligation to provide notice to the union of proposed employment changes. Mr. McCall also reminded the Department of its duty to negotiate only with the union, not individual employees.

Article 7.2 of the parties' memorandum of understanding applicable to this dispute, dated July 1992 through June 1995, states in pertinent part:

b. The State may establish, pursuant to an operational need or a request by either a CAUSE representative or an employee, flexible work hours. Unit 7 employees who are placed on a flexible work hours [sic] will comply with reasonable procedures established by his/her department.

Based upon the facts stated above, the allegations that the Department unilaterally established a 4/10/40 work schedule and bypassed CAUSE to negotiate the change in the work schedule with employees, fail to state a prima facie case.

To establish a prima facie case of an unlawful unilateral change, the charging party must allege facts which demonstrate that: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to bargain. (Grant Joint Union High School District (1982) PERB Decision No. 196.)

Furthermore, an employer violates the duty to bargain in good faith when it bypasses the exclusive representative to negotiate directly with employees over matters within the scope of representation. (Walnut Valley Unified School District (1981) PERB Decision No. 160.) However, once a policy has been established by lawful means, an employer has the right to take necessary actions, including consulting with employees, to implement the policy. To establish that an employer has unlawfully bypassed the union, the charging party must demonstrate that the employer dealt directly with its employees: (1) to create a new policy of general application, or (2) to obtain a waiver or modification of existing policies applicable to those employees. (Ibid.)

The charge alleges in part that the Department in its Fullerton office negotiated directly with the LREs to establish an alternate work schedule allowing the LREs to work a 4/10/40 schedule. By this same conduct, the charge alleges that the Department made an unlawful unilateral change in policy by

Partial Warning Letter
SA-CE-1222-S
Page 3

establishing an alternate work schedule without providing CAUSE with notice and an opportunity to bargain.

However, Article 7.2 authorizes the State to establish flexible work schedules upon request of an employee. Apparently several if not all of the LREs in the Fullerton office desired to work the alternate work schedule. Since the MOU permits the State and the employee to agree to an alternate work schedule, there is no unilateral change in policy and the Department did not bypass CAUSE to negotiate a new policy or a waiver of an existing policy with the LREs. Accordingly, these allegations fail to state a prima facie case and must be dismissed.

For these reasons the allegations that the Department unilaterally established a 4/10/40 work schedule and bypassed CAUSE to negotiate the change in work schedule with employees, as presently written, do 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 have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before April 30, 1999, I shall dismiss the above-described allegations from your charge. If you have any questions, please call me at (916) 322-3198, ext 3 05.

Sincerely,

Robin W. Wesley
Regional Attorney