

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

INTERNATIONAL UNION OF OPERATING
ENGINEERS,

Charging Party,

v.

STATE OF CALIFORNIA (STATE PERSONNEL
BOARD),

Respondent.

Case No. SA-CE-1295-S

PERB Decision No. 1491-S

July 18, 2002

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Matthew J. Gauger, Attorney, for International Union of Operating Engineers; State of California (Department of Personnel Administration) by Linda Diane Buzzini, Labor Relations Counsel, and Kronick, Moskovitz, Tiedemann & Girard by Philip A. Wright, Attorney, Elise S. Rose, Attorney, and Dorothy Bacskai Egel, Senior Staff Counsel, for State of California (State Personnel Board).

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the International Union of Operating Engineers (IUOE)¹ of the administrative law judge's (ALJ) notice of dismissal on SPB's motion to dismiss. The charge, as amended,² alleged that SPB violated the Ralph C. Dills Act (Dills Act)³ by refusing to

¹The State of California (Department of Personnel Administration) (DPA) has also filed an information brief with points and authorities in support of IUOE's appeal. From the record, it is unclear whether DPA is a party or an intervenor in this case. DPA claims that it is a party, representing the State of California (State), and filed a notice of appearance on May 9, 2001. State of California (State Personnel Board) (SPB) disputes DPA's alleged status as a party because DPA has refused to represent SPB in this matter and expressly supports IUOE's position.

²By letter dated July 27, 2001, IUOE withdrew its unilateral change allegation.

approve settlement agreements for employees who participated in the contractual Board of Adjustment disciplinary review procedure. IUOE alleged that this conduct constituted a violation of Section 3519(a), (b) and (c).⁴ The Board agent issued a complaint that stated that SPB is a “state employer” under Section 3513(j) and that SPB refused to approve proposed settlement agreements for employees who participated in the contractual Board of Adjustment disciplinary review procedure, in violation of Section 3519(a) and (b). On August 28, 2001, SPB filed a motion to dismiss. On September 24, 2001, the ALJ issued a notice of dismissal. The basis for dismissal was that SPB is not a “state employer” under Section 3513(j) because, in the present matter, it is acting in its adjudicatory capacity.

After reviewing the entire record in this matter, including the unfair practice charge, the complaint, the ALJ’s notice of dismissal, IUOE’s appeal, DPA’s information brief, SPB’s response to IUOE’s appeal, and other correspondence contained within the record, the Board

³The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

⁴Section 3519 provides, in pertinent 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 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.

finds that this matter should be remanded to the ALJ for hearing on the merits. In addition, the Board, on its own motion, hereby orders joinder of DPA under PERB Regulation 32164(d).⁵

BACKGROUND⁶

IUOE is the exclusive representative for State bargaining units 12 and 13. DPA is the organization designated under Government Code section 19815.4(g) to represent the State under section 3517 of the Dills Act. SPB is an agency of the State of California and the respondent in this matter. According to DPA, SPB received delegation from DPA to provide its own legal representation in this matter.⁷ The unfair practice charge underlying this matter was filed on May 3, 2001,⁸ by IUOE, unit 12 and 13 division, against the SPB. The charge alleges that the SPB has violated the Dills Act:

. . . by refusing to approve and by stating it would refuse to approve adverse action settlements achieved through a Larson Alternative Dispute Resolution process solely because the worker used his or her collective bargaining agreement rather than private counsel or other representative.

On July 30, the Office of the General Counsel issued a complaint against SPB. The complaint alleges that SPB is “the state employer within the meaning of Government Code section 3513(j)” and that:

⁵PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

⁶This section contains the ALJ’s findings of fact but identifies significant events and clarifies all the parties’ positions in this matter.

⁷DPA provided this information in the cover letter to its notice of appearance dated May 9, 2001. That letter also stated that any settlement between the parties would require DPA approval.

⁸All dates occurred in 2001 unless stated otherwise.

In or about March 2001, Respondent refused to approve proposed settlement agreements for employees who participated in the contractual Board of Adjustment disciplinary review procedure.

By this conduct, the complaint alleges, SPB violated Government Code section 3519(a) and (b).

SPB filed a motion on August 28, asking that the charge and complaint be dismissed. The motion sets out a number of grounds for dismissal, including assertions that SPB is not a “state employer” or “employer” under Section 3513(j) and that PERB lacks jurisdiction to determine the California constitutional question upon which this case ultimately rests.⁹

These events grow out of contractual agreements reached in 1999 between DPA and IUOE, which represents employees in the State bargaining units 12 and 13. Under the terms of the agreements covering units 12 and 13, a Board of Adjustment composed of two management and two IUOE representatives is created as part of the grievance procedure.¹⁰ A majority of the Board of Adjustment can resolve a grievance. In the event of a deadlock, IUOE can move the dispute to arbitration. In the event of major disciplinary action,¹¹ an employee is given the choice of invoking the jurisdiction of SPB or filing a grievance under the contract. The choice of forum rests solely with the employee and once made is irrevocable.

⁹IUOE did not file a response to the motion to dismiss. (See PERB Regulation 32190(b).)

¹⁰See article 14.8 of the agreement covering unit 12 and article 5.9 of the agreement covering unit 13.

¹¹Article 15.B.2.b of the agreement for unit 12 defines “major discipline” as “dismissal, permanent demotion, suspension of more than 3 working days, a temporary demotion or deduction in pay of 5 percent (or one step) or greater for more than three months (or equivalent reduction in salary).” Article 6.B.2.b of the agreement for unit 13 defines “major discipline” as “dismissal or suspension of more than 3 working days.”

These contractual procedures were enacted into law with legislative approval of the negotiated agreements.

According to SPB, under the contracts as implemented, the State and IUOE have taken the results of disciplinary arbitrations and settlements to SPB for ratification.¹² SPB, however, has refused and has stated that it will continue to refuse to review and ratify such settlements or arbitration awards on the ground that the procedure violates Article VII, section 3(a) of the California Constitution.¹³ SPB's refusal to act is the cause of action contested in the unfair practice at issue here. IUOE asserts that by its refusal to review settlements of disciplinary action and its statements that it would refuse to approve such settlements, the SPB has interfered with both employee and union rights.

The complaint in this matter proceeded as follows. On May 9, DPA filed a notice of appearance with PERB. On August 29, ALJ Jim Tamm (Tamm) held an informal conference with the parties. DPA participated in the August 29 informal conference. SPB filed its motion to dismiss on August 28. On August 31, ALJ Tamm issued a notice of second informal conference to be held on September 24. Also, on August 31, ALJ Ron Blubaugh (Blubaugh)

¹²See SPB points and authorities in support of motion to dismiss at pp. 3-4. However, in IUOE's appeal documents, IUOE asserts that it has never requested SPB to approve a Board of Adjustment decision or presented a settlement for SPB to review; instead, this case arose out of SPB's statement on an unrelated settlement agreement that it would reject settlements tainted by the Board of Adjustment process. Since IUOE was not allowed to present its position in the motion to dismiss, this allegation was not weighed by the ALJ in his decision to dismiss the complaint.

¹³Section 3(a) of the California Constitution provides that:

The [State Personnel] board shall enforce the civil service statutes and, by majority vote of all its members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions.

issued a notice of formal hearing to be held January 10 and 11, 2002. After a conversation with SPB's counsel shortly before the second informal conference was to occur, ALJ Tamm cancelled the September 24 informal conference. Also, on September 24, ALJ Blubaugh issued his notice of dismissal. IUOE did not file a response to SPB's motion to dismiss allegedly because of its belief that the parties would set a briefing schedule should settlement negotiations fail at the second settlement conference. Therefore, ALJ Blubaugh based his findings of fact solely on SPB's motion to dismiss and supporting documentation.

At this time, the parties, including DPA, are involved in litigation over this matter.¹⁴

ALJ'S NOTICE OF DISMISSAL

The ALJ only addressed the jurisdictional issue concerning whether or not SPB is an "employer" under the Dills Act in order to dispose of this case and, therefore, did not reach the constitutional issue. He determined that ordinarily DPA is the state employer¹⁵ under Dills Act section 3517(j).¹⁶ (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1305-S; State of California (Department of Personnel Administration) (1996) PERB Decision No. 1145-S.) He also stated that in cases involving unilateral changes, or interference or discrimination against employees for their protected acts, PERB has found individual agencies to be the State employer. (State of California (Department of Youth

¹⁴California State Personnel Board v. California Department of Personnel Administration, et al., Sacramento County Superior Court, No. 01CS00109.

¹⁵The ALJ also cited a letter from DPA labor relations counsel to PERB that he believed demonstrated DPA's position that DPA does not consider SPB to be the State employer and has not delegated authority to SPB to represent the State.

¹⁶Section 3513(j) provides:

Authority) (2000) PERB Decision No. 1374-S; State of California (Department of Corrections) (2000) PERB Decision No. 1381-S; State of California (Department of Corrections) (2001) PERB Decision No. 1435-S.) In situations where individual state agencies were deemed a “State employer,” those agencies were the appointing authority.

According to the ALJ, PERB has previously considered whether a state agency acting in an adjudicatory capacity can be a “State employer,” and in that circumstance, decided it cannot. (California State Employees Association (Gonzalez-Coke, et al.) (2000) PERB Decision No. 1411-S.) In that case, the Board determined that PERB itself could not commit an unfair practice through its administrative decisions. Analogizing the present matter, the ALJ found that SPB was acting in its adjudicatory capacity because the employees neither work for SPB nor does IUOE represent SPB employees. SPB’s position is based upon its interpretation of its constitutional mandate and therefore, the ALJ found that the proper forum for challenging SPB’s actions is in court.

DISCUSSION

This case involves legal issues of great import to this Board, namely, whether or not SPB is an employer under the Dills Act given the factual circumstances in this case; whether any agency, acting in a quasi-adjudicatory capacity, is an employer under the Dills Act; and, whether the Dills Act and memorandum of understanding (MOU) provisions may be harmonized with that portion of Cal. Constit. Art. VII, section 3(a), which establishes SPB’s authority to review disciplinary actions. In light of the importance of these issues, the Board concludes the following.

“State employer,” or “employer,” for the purposes of bargaining or meeting and conferring in good faith, means the Governor or his or her designated representatives.

First, the Board, on its own motion, orders that DPA be joined as a party to this case. DPA and SPB dispute DPA's status as a party. It is unclear in the record whether DPA is a party or not. Although DPA filed a timely notice of appearance during the Board agent's investigation, DPA participated in the informal conference and, under Government Code section 19815.4(g), DPA would normally be the State representative in this matter, DPA has declined to represent SPB because of a conflict of interest. Furthermore, the charge by IUOE is clearly against SPB. However, DPA has declared that a settlement in this matter must be approved by DPA. DPA is also clearly a party to the unit 12 and 13 MOUs, whose provisions are at issue in this case.

Under PERB Regulation 32164(d), PERB, on its own motion, may order joinder of a party if:

- (1) In the absence of the employer, employee organization or individual, as a party, complete relief cannot be accorded; or
- (2) The employer, employee organization or individual has an interest relating to the subject of the action and is so situated that the disposition of the action in their absence may:
 - (A) As a practical matter impair or impede their ability to protect that interest; or
 - (B) Leave any of the parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of said interest.

In this matter, at issue is the validity of provisions of MOUs between DPA and IUOE. If the charge were upheld, then the decision would impact DPA in the same manner as IUOE. A logical remedy would be for SPB to cease and desist from not approving Board of Adjustment settlements, the process agreed to in negotiations. As a party to the MOUs, DPA should have the same right to seek enforcement of such a decision as IUOE. Therefore, DPA

has as much interest in this action as IUOE. On the other hand, if DPA were not joined, a PERB ruling for SPB affecting only IUOE might result in inconsistent contractual obligations between DPA and IUOE pertaining to the relevant provisions of the MOUs. DPA's circumstances thereby fall within Section 32164(d)(2)(A) and (B). In order to eliminate any confusion as to DPA's status as a party and to ensure a just resolution in this matter, the Board, on its own motion, therefore orders DPA to be joined under this rule.

Second, the ALJ's dismissal of this matter without obtaining IUOE's position does not yield a just result. There was clearly confusion in the conduct of PERB's informal and formal processes. In less than a one-month period, between August 29 and September 24, the parties were involved in settlement discussions with ALJ Tamm, SPB filed a motion to dismiss, and on the scheduled date of the second settlement conference, ALJ Blubaugh issued his notice of dismissal. There is a factual dispute as to whether a briefing schedule was to be negotiated should settlement negotiations fail, perhaps facilitated by ALJ Tamm. The notice of dismissal was issued at the time that settlement negotiations appeared to break down. Technically, IUOE may not have met the requirements for filing its response to the motion to dismiss or for requesting an extension of time to file its response. However, given the timing of the events and the confusion regarding which ALJ was handling the case at that time, it appears that justice would not be served without giving IUOE "an opportunity to be heard." In addition, the significance of the issues involved in this case demands that the Board create a fully-developed record of the facts and legal arguments before rendering its decision. It appears that there are disputed issues of fact. For example, one factual issue raised by DPA in its information brief concerns whether or not SPB was acting in its adjudicatory capacity when it decided not to approve Board of Adjustment settlements. Such issues can only be developed

with an adequate record based upon full participation by all parties; no such record has been created in this case.

Third, the ALJ's ruling that PERB lacks jurisdiction over state agencies acting in their adjudicatory capacities is overly broad. Taken to an extreme, as stated by IUOE and DPA, SPB, acting in its quasi-adjudicatory capacity, could deny an employee union representation at a disciplinary appeal hearing or could rule against an employee because of the employee's protected activities and still be insulated from the dictates of the Dills Act. PERB would be abdicating its statutory responsibilities in allowing such an absurd result. After a hearing on the merits, it could be determined that SPB, whether or not acting as a quasi-adjudicatory agency, is an "employer" under Section 3513(j) and that its actions violated the Dills Act. It could also be determined that SPB, in whatever capacity, is not an "employer," did not violate the Dills Act, or acted outside the bounds of the Dills Act. Without a complete record, it is impossible to know.

SPB also argues that PERB cannot rule on the constitutionality of its actions. While this may be true, the Board has the authority to harmonize provisions of the laws under its jurisdiction with other laws. This already has been done on several occasions. (See, e.g., Pacific Legal Foundation v. Brown (1981) 29 Cal. 3d 168, 175 [172 Cal.Rptr. 487]; San Ysidro School District (1980) PERB Decision No. 134; Sonoma County Bd. of Education v. Public Employment Relations Bd. (1980) 102 Cal. App. 3d 689, 701 [163 Cal.Rptr. 464]; San Bernardino City Unified School District (1989) PERB Decision No. 723; Cajon Valley Union School District (1989) PERB Decision No. 766.)

In light of the above, the Board hereby remands this case to the ALJ for a hearing on the merits of the motion to dismiss. The issues at stake here, particularly, the interpretation of

“employer” under the Dills Act, are so critical that only a hearing would provide sufficient information to yield a fair and well-reasoned result. The importance of the issues is evidenced by the fact that DPA and SPB are involved in at least three lawsuits to determine the constitutionality of the MOU provisions.¹⁷ In addition, in order to clarify DPA’s status in this matter, under PERB Regulation 32164(d), by its own motion, the Board orders joinder of DPA.

ORDER

The unfair practice charge in Case No. SA-CE-1295-S is hereby REMANDED to the Administrative Law Judge for a hearing on the merits of SPB’s motion to dismiss, consistent with this Decision. Pursuant to PERB Regulation 32164(d), the Board also orders joinder of the State of California (Department of Personnel Administration) as a party to this case.

Members Baker and Neima joined in this Decision.

¹⁷Two of these lawsuits are awaiting a decision by the Third District Court of Appeal and in the third one, DPA and IUOE have apparently filed an appeal from a ruling by the Sacramento County Superior Court.