

**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

Request for Reconsideration  
PERB Decision No. 1491-S

PERB Decision No. 1491a-S

November 12, 2002

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Matthew J. Gauger, Attorney, for International Union of Operating Engineers; Kronick, Moskovitz, Tiedemann & Girard by Elise Rose, Dorothy Bacskai Egel and Susan R. Denious, Attorneys, and State of California (Department of Personnel Administration) by Linda Diane Buzzini, Labor Relations 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 a request by the State of California (State Personnel Board) (SPB) that the Board grant a stay of proceedings and/or reconsideration of State of California (State Personnel Board) (2002) PERB Decision No. 1491-S (SPB). In SPB, the Board remanded the unfair practice charge to the administrative law judge (ALJ) for a hearing on the merits of SPB's motion to dismiss and ordered joinder of the State of California (Department of Personnel Administration) (DPA) as a separate party to this action.

After reviewing the entire record in this matter, including SPB's request for stay of proceedings and/or reconsideration, DPA's response and the International Union of Operating

Engineers' (IUOE) responses to the requests, the Board denies SPB's request for stay of proceedings and/or reconsideration.

## DISCUSSION

### Request for Stay

PERB Regulation 32370<sup>1</sup> provides:

An appeal will not automatically prevent the Board from proceeding in a case. Parties seeking a stay of any activity may file a request for a stay with the administrative appeal which shall include all pertinent facts and justification for the request. The Board may stay the matter, except as is otherwise provided in these regulations.

In addition, PERB Regulation 32410(c) provides:

(c) Unless otherwise ordered by the Board, the filing of a Request for Reconsideration shall not stay the effectiveness of a decision of the Board itself except that the Board's order in an unfair practice case shall automatically be stayed upon filing of a Request for Reconsideration.

SPB seeks a stay beyond the automatic stay provided by PERB Regulation section 32410(c), stating that such stay falls within the Board's general authority under Section 32320.<sup>2</sup>

We agree with DPA and IUOE that the issues before the appellate court differ from those before the Board. Although it may ultimately be necessary to decide whether the applicable Ralph C. Dills Act (Dills Act)<sup>3</sup> provisions can be harmonized with the California Constitution, Article VII, such a determination may not be dispositive in determining whether

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<sup>1</sup>PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

<sup>2</sup>Under PERB Regulation 32320(a)(2), the Board may "take such other action as it considers proper."

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

SPB's conduct in this matter violated the Dills Act. In other words, the appellate court's ruling in the litigation involving these parties over the Board of Adjustment (BOA) procedures may not resolve the Dills Act questions. Furthermore, there is nothing in the injunctive relief ordered in State Personnel Board v. Department of Personnel Administration, et al., Sacramento Superior Court Case No. 01CS00109 that prohibits IUOE and DPA from continuing to pursue this unfair practice charge before the Board. Therefore, we deny SPB's request for stay beyond that automatically provided under PERB Regulation 32410(c).

#### Request for Reconsideration

PERB Regulation 32410(a) allows any party to a decision of the Board itself, because of extraordinary circumstances, to request the Board to reconsider the decision. Section 32410(a) states, in pertinent part:

The grounds for requesting reconsideration are limited to claims that: (1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence. A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.

We first reject SPB's contention that the Board's decision in SPB contained prejudicial errors of law and fact in failing to address the Superior Court decision and the effect of the ruling on PERB's jurisdiction over this matter. Purported errors of law are not grounds for reconsideration. (Apple Valley Unified School District (1990) PERB Order No. Ad-209a

(Apple Valley), citing South Bay Union School District (1990) PERB Decision No. 791a, p. 7; and State of California (California Department of Forestry and Fire Protection) (1989) PERB Decision No. 734a-S, pp. 2-3 (California Department of Forestry and Fire Protection.) It is unclear what error of fact the SPB is alleging. The Board, in SPB, clearly acknowledged the litigation among the parties to this charge involving the constitutionality of the BOA provisions. However, as stated above, that may or may not affect the resolution of the Dills Act issues in this matter. It is well established that the Board has initial exclusive jurisdiction over unfair practice charges involving the Dills Act. (Dills Act section 3514.5.<sup>4</sup>) Without a hearing on the merits of SPB's motion to dismiss after which an ALJ would evaluate the legal and factual arguments of all the parties, it is impossible for the Board to evaluate whether SPB violated the Dills Act or whether its constitutional role might preclude a Dills Act challenge to SPB's conduct. In other words, the trial court's refusal to stay its proceedings, the pending status before the Third District Court of Appeal of the parties' dispute over the BOA provisions' constitutionality, or the trial court's injunction of the parties' implementation of the BOA provisions in the memorandum of understanding does not in any way impact or alter the Board's decision to remand the case for a full hearing on the merits of SPB's motion to dismiss.

Second, we reject SPB's contention that a finding that SPB is not an "employer" under the Dills Act would allow SPB to discriminate against employees for protected activities without consequence is a prejudicial error of law. Again, Apple Valley and California Department of Forestry and Fire Protection preclude reconsideration for an error of law. In

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<sup>4</sup>See also, Barstow Unified School District (1997) PERB Decision No. 1138b in which the Board confirmed its exclusive jurisdiction based on the identical language in the Educational Employment Relations Act, section 3541.5.

addition, SPB mischaracterizes this portion of the Board's decision. What the Board stated is that without a complete record, it is impossible to determine whether SPB is an "employer" under the Dills Act for purposes of this case. SPB's contention that it is not subject to the Dills Act because it does not employ the Unit 12 and 13 employees is not dispositive of the matter. Section 3519 indeed makes it illegal for the "state," not the "employer," to violate the protected rights of state employees and their exclusive representatives.<sup>5</sup> As DPA noted, the correct inquiry may be to determine whether, as the "state," SPB's conduct violated the Dills Act.

Third, we reject SPB's claim that the Board erroneously found disputed issues of fact necessary to evaluate SPB's status as an "employer" under the Dills Act, to be a prejudicial error of fact. Again, SPB mischaracterizes the Board's finding. Rather, the Board stated that there appeared to be disputed issues of fact asserted by the parties and that such issues can only be determined with an adequate record based upon full participation by all the parties. The Board also rejects SPB's contention that the appropriate remedy for aggrieved employees, should the Board find SPB in violation of the Dills Act, is through writ of mandate via Code of Civil Procedure sections 1084 and 1085. The Board would be relinquishing its statutory responsibilities under the Dills Act to allow such a result. We agree with DPA and IUOE that such a result would conflict with legal principles requiring exhaustion of administrative remedies and PERB's preemptive jurisdiction. It is further important to note that no provision of the Dills Act has automatically exempted the SPB from the Board's jurisdiction. The Dills Act further makes no distinction between state agencies, in general, and quasi-adjudicatory or

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<sup>5</sup>Note that in Section 3513(j), the Dills Act defines "state employer" or "employer" as "the Governor or his or her designated representatives" only "for the purposes of bargaining or meeting or conferring in good faith." (Emphasis added.)

quasi-legislative state agencies. In addition, the Board's desire to obtain a full record that incorporates the legal and factual perspectives of all parties contradicts SPB's claim that not directly granting DPA's petition to file an information brief was prejudicial error. (Apple Valley.) SPB will have sufficient opportunity to respond to the other parties' arguments during a hearing on the merits of its motion.

We therefore conclude that SPB has not provided adequate grounds for the Board to stay the proceedings in this matter nor has it shown the existence of extraordinary circumstances under PERB Regulation 32410(c) by proving that the Board's decision in SPB contained prejudicial errors of fact or through introduction of newly discovered evidence. As a result, the Board denies SPB's request for stay of proceedings and/or reconsideration.

#### ORDER

The State of Personnel Board's request for stay of proceedings and/or reconsideration of the Board's decision in State of California (State Personnel Board) (2002) PERB Decision No. 1491-S is hereby DENIED.

Members Baker and Neima joined in this Decision.