-JUDICIAL APPEAL PENDING-

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS & REHABILITATION, AVENAL STATE PRISON), Respondent.	Case No. SA-CE-1830-S PERB Decision No. 2196-S August 12, 2011

Appearances: Jennifer L. Ragan, Staff Counsel, for California Correctional Peace Officers Association; State of California (Department of Personnel Administration) by Heather N. Bendinelli, Labor Relations Counsel, for State of California (Department of Corrections & Rehabilitation, Avenal State Prison).

Before McKeag, Dowdin Calvillo and Huguenin, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Correctional Peace Officers Association (CCPOA) of a Board agent's dismissal of its unfair practice charge. The charge, as amended, alleged that the State of California (Department of Corrections & Rehabilitation, Avenal State Prison) (CDCR or Department) violated the Ralph C. Dills Act (Dills Act)[1] by unilaterally changing its policy concerning unannounced random searches within the secured perimeter at Avenal State Prison (ASP) without providing CCPOA notice and an opportunity to bargain regarding the effects of the change. The Board agent dismissed the charge on the ground that it failed to state a prima facie violation of the Dills Act.

[1] The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise noted, all statutory references are to the Government Code.

The Board has reviewed the dismissal and the record in light of CCPOA's appeal, CDCR's response to the appeal, and the relevant law. Based on this review, the Board affirms the dismissal of the charge for the reasons set forth below.

BACKGROUND

ASP has had several different written policies under which it conducts employee searches for unauthorized items and contraband. Under Operational Procedure (OP) 28, employees are subject to search when they enter the main gate to the institution. If the search staff discovers unauthorized items in the possession of an entering employee, employees are normally permitted to return unauthorized items to their vehicles if doing so would not compromise the security of the institution.[2] Thus, under OP 28, security staff only confiscate "felonious contraband."

In addition, under State Department Operations Manual (DOM) section 52050.15, all employees of CDCR are subject to search of their person, property, and vehicles, "to the extent deemed necessary by the official in charge." DOM section 52050.15 further authorizes CDCR to conduct employee searches based upon a "reasonable suspicion" that an employee possesses unauthorized items, and provides:

> An employee may be subjected to a more intensive search than is normally required when the official in charge has reasonable suspicion that the employee is involved in the unauthorized or unlawful possession or movement of anything into or out of an institution or facility of the Department.

When a search is conducted under DOM section 52050.15, the employee is entitled to be informed of the reason for the search and the name of the official ordering the search before the search begins.

[2] Examples of unauthorized items include personal pocket knives, personal electronic paging devices and cell phones, gym bags, backpacks, and extra clothing.

In May 2009, ASP implemented a new Operational Procedure, OP 38, which authorized the Department to conduct random, unannounced searches of employees entering the secured perimeter of ASP. A search conducted pursuant to OP 38 does not require reasonable suspicion that the employee is involved in the unauthorized or unlawful movement of items into or out of the institution. OP 38 also does not require that the employee be advised of the reason for the search or the name of the official ordering the search. Unauthorized items discovered during such searches are subject to confiscation, and employees are not afforded the opportunity to return any such items to their vehicles. OP 38 further provides, in relevant part:

> In some instances, the scope should include all staff entering, while at other times, a random sampling/selection would make for a more reasonable and manageable operation, i.e., every third person, etc. In each case, management staff should be mindful of potential overtime costs, delays in service, and the appearance of fundamental fairness.

CCPOA did not receive formal notice of the decision to implement OP 38 prior to its implementation. Once the policy was implemented, CCPOA did not request to bargain over the effects of OP 38.

PROCEDURAL HISTORY

On October 14, 2009, CCPOA filed an unfair practice charge alleging that, by implementing OP 38 without providing CCPOA with notice and an opportunity to bargain, ASP unilaterally changed its policy and procedure governing employee entrance inspections. The charge alleged that OP 38 represented a unilateral change because it "replaced OP 28 and deleted some of the procedures that had existed under OP 28." The charge further alleged that, under OP 38, "staff were no longer permitted to return unauthorized items to their vehicles, and all contraband of any kind was to be confiscated."

After the Board agent issued a letter warning CCPOA that the charge failed to state a prima facie case of unilateral change, CCPOA filed an amended charge. In its amended

charge, CCPOA stated that it did not object to the decision to conduct searches under OP 38 or to the confiscation of unauthorized items, but only to the manner in which OP 38 was implemented and the failure of CDCR and ASP to meet and confer regarding the impacts of the decision to conduct random, unannounced searches pursuant to OP 38. The amended charge further alleged that the implementation of OP 38 constituted a unilateral change in the past practice for random, unannounced searches set forth under DOM section 52050.15 in that it removed the requirement that there be reasonable suspicion that the employee is involved in the unauthorized or unlawful possession or movement of items into or out of the institution and that employees be informed of the reason for the search and the name of the official conducting the search.[3] In addition, the amended charge alleged that the implementation of OP 38 "causes significant processing delay in getting officers through the secured perimeter sally ports and to their posts timely" and that "reporting officers are not properly compensated for their time as they arrive to their posts late, and those already on shift who leave late due to late relief are paid overtime wages as a result." In support of these assertions, CCPOA provided sign-in/sign-out sheets purportedly documenting the late relief due to random, unannounced searches of employees arriving at ASP on April 19 and 20, 2009.

On September 2, 2010, the Board agent dismissed the charge, finding that the amended charge failed to provide facts showing that CCPOA requested to negotiate over either the decision to implement OP 38 or the impact of the implementation.

[3] The amended charge also asserts that, in comparison to OP 28, OP 38 designates a significantly more extensive list of unauthorized items and does not allow staff to return unauthorized items to their vehicles. However, it is clear from the amended charge and appeal that the alleged unilateral change is not from the gate searches covered by OP 28 but rather from the reasonable suspicion searches covered by DOM section 52050.15 to the broader random searches at the secured perimeter authorized by OP 38.

ISSUES ON APPEAL

On appeal, CCPOA argues:

1. Where the employer does not provide notice or an opportunity to bargain prior to implementation of a unilateral change, the union does not waive its right to bargain by failing to demand bargaining over the effects of the change, citing *State of California (Department of Personnel Administration)* (1999) PERB Decision No. 1313-S (*Department of Personnel Administration*); and

2. The charge, as amended, sets forth sufficient facts to state a prima facie case of failure to bargain over the effects of the implementation of OP 38. In support of this argument, CCPOA asserts that the plain language of OP 38 indicates that management "clearly appreciated" that there would be impacts within the scope of representation and that documentation submitted with the charge and amended charge establishes the impact of the implementation of OP 38 on late relief and overtime resulting from the searches.

In response, CDCR argues:

1. The appeal is defective because it fails to comply with the requirements of PERB Regulation 32635;[4]

2. The charge fails to establish that CDCR implemented a change to its search policy from that set forth under either OP 28 or DOM section 52050.15; and

3. The charge was properly dismissed because CCPOA failed to meet its burden of showing that it made a valid demand to bargain the effects of any change in policy.

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

DISCUSSION

As set forth in the amended charge and undisputed on appeal, CCPOA does not object to the actual searches being conducted under OP 38 or to the confiscation of unauthorized items. Thus, the appeal in this case is limited to the issue of whether the charge, as amended, states a prima facie case of failure to bargain the *effects* of a nonnegotiable unilateral change in policy.

Compliance with Requirements for Filing Appeal

Pursuant to PERB Regulation 32635(a), an appeal from dismissal must:

> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;
>
> (3) State the grounds for each issue stated.

Compliance with PERB regulations governing appeals is required to afford the respondent and the Board an adequate opportunity to address the issues raised, and noncompliance will warrant dismissal of the appeal. (*Oakland Education Association (Baker)* (1990) PERB Decision No. 827; *United Teachers-Los Angeles* (1989) PERB Decision No. 738.) To satisfy the requirements of PERB Regulation 32635(a), the appeal must sufficiently place the Board and the respondent "on notice of the issues raised on appeal." (*State Employees Trades Council United* (2009) PERB Decision No. 2069-H (*State Employees Trades Council*); *City & County of San Francisco* (2009) PERB Decision No. 2075-M (*City & County of San Francisco*).) An appeal that does not reference the substance of the Board agent's dismissal or merely reiterates facts alleged in the unfair practice charge fails to comply with PERB Regulation 32635(a). (*United Teachers of Los Angeles (Pratt)* (2009) PERB Order No. Ad-381 (*Pratt*); *Lodi Education Association (Hudock)* (1995) PERB Decision No. 1124;

United Teachers - Los Angeles (Glickberg) (1990) PERB Decision No. 846; *State Employees Trades Council*; *Contra Costa County Health Services Department* (2005) PERB Decision No. 1752-M; *County of Solano (Human Resources Department)* (2004) PERB Decision No. 1598-M.)

CCPOA's arguments in support of its appeal discuss the substance of the Board agent's dismissal letter and make reference to specific pages of the letter. Moreover, as indicated by CDCR's discussion of the merits of CCPOA's arguments in its response to the appeal, the appeal sufficiently put the Board and CDCR on notice that CCPOA is appealing the Board agent's dismissal of the effects bargaining allegations. (*City & County of San Francisco.*) Therefore, we find that CCPOA sufficiently placed CDCR and the Board on notice of the issues raised on appeal.

Duty to Bargain over Effects of Nonnegotiable Decision

A unilateral change is a "per se" violation of Dills Act section 3519, subdivision (c), if: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

"Where a change is made to a matter that is not within the scope of representation, or where the right to demand bargaining over the decision to change has been waived by the employee organization, the employer is obligated to provide notice and an opportunity to bargain

over the negotiable effects of the decision, but not the decision itself." (*County of Riverside* (2010) PERB Decision No. 2097-M (*County of Riverside*), citing *Sylvan Union Elementary School District* (1992) PERB Decision No. 919 (*Sylvan*), *Mt. Diablo Unified School District* (1984) PERB Decision No. 373b and *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223 (*Newman-Crows Landing*).) Thus, an employee organization is entitled to reasonable notice and an opportunity to bargain over the "reasonably foreseeable" negotiable effects of a non-negotiable decision. (*Fremont Union High School District* (1987) PERB Decision No. 651; *Trustees of the California State University* (2007) PERB Decision No. 1926-H; *Newman-Crows Landing*.)

Where formal notice is not given, however, but the employee organization receives actual notice of a decision, the employer's "failure to give formal notice is of no legal import." (*County of Riverside*; *Sylvan*; *Regents of the University of California* (1987) PERB Decision No. 640-H.) Moreover, "an employer's failure to provide notice and an opportunity to bargain before implementation does not constitute an unlawful unilateral change when there is no evidence of negotiable effects resulting from the decision." (*Beverly Hills Unified School District* (2008) PERB Decision No. 1969 (*Beverly Hills*), citing *Oakland Housing Authority* (2005) PERB Decision No. 1753-M (*Oakland Housing Authority*) [upholding dismissal of charge because charging party failed to identify any negotiable effects resulting from employer's non-negotiable decision].)

In order to make a prima facie case of violation of the duty to bargain in good faith over the effects of a non-negotiable decision, the employee organization must demonstrate that it made a valid request to bargain the negotiable effects of the employer's decision. (*State of California (Department of Corrections)* (2006) PERB Decision No. 1848-S (*Department of Corrections*); *County of Riverside*; *Sylvan*.) The request must clearly identify negotiable areas

of impact and must clearly indicate the employee organization's desire to bargain over the effects of the decision, as opposed to the decision itself. (*County of Riverside*; *Sylvan*; *Newman-Crows Landing*; *Allan Hancock Community College District* (1989) PERB Decision No. 768; *Beverly Hills*.) In the absence of such an identification, the employer has no duty to bargain. (*Trustees of the California State University* (2009) PERB Decision No. 1876a-H (*Trustees*); *Beverly Hills*.) Furthermore, the employee organization must show that the change had an actual effect or impact on a negotiable matter. (*Trustees*, citing *Regents of the University of California* (1999) PERB Decision No. 1316-H.)

1. Notice of Non-Negotiable Change

There is no dispute that CDCR did not provide CCPOA with formal notice of its intention to implement OP 38.[5] However, it is apparent that CCPOA had actual notice by at least May 2009, when CDCR began performing inspections under OP 38 at ASP.[6] Therefore, the failure to give formal notice is of no legal import. (*Sylvan*; *Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778.)

2. Failure to Request Effects Bargaining

As indicated above, in order to state a prima facie case of failure to bargain over the effects of a non-negotiable management decision, the employee organization must demonstrate that it made a valid request to negotiate over identifiable, reasonably foreseeable, and negotiable

[5] The amended charge alleges that OP 38 altered the past practice set forth in DOM section 52050.15 regarding unannounced searches by removing the requirement of reasonable suspicion as well as the requirement that employees be advised of the reason for the search and the name of the official ordering the search. Accordingly, for purposes of this decision, it is assumed that a change in policy occurred.

[6] Indeed, it appears from the documents filed with the amended charge that CCPOA had actual notice prior to May 2009, as it asserts that sign-in/out sheets dated April 19 and 20, 2009 attached to the amended charge "document[] the late relief due to random unannounced searching of all first watch BU6 employees arriving at ASP."

effects of the decision. (*Department of Corrections*; *Riverside*.) Because the charge fails to allege that CCPOA requested bargaining at all, the charge was properly dismissed.

CCPOA argues that because OP 38 was implemented without prior notice, its failure to request bargaining did not result in the waiver of its right to bargain, citing *Department of Personnel Administration*. The issue here, however, is not whether CCPOA waived its right to bargain over the effects of CDCR's non-negotiable decision to implement OP 38, but rather whether CCPOA has met its burden of establishing a prima facie case that CDCR unlawfully failed to bargain over the effects of that decision. As part of its burden, CCPOA was required to show that it made a request to bargain the effects of the decision. (*Sylvan* [noting that waiver is no longer an affirmative defense and that the charging party must show, as part of its prima facie case, that it made a request to bargain the effects of the decision].) Having failed to do so, it cannot establish a prima facie case.

Department of Personnel Administration is distinguishable. That case did not concern effects bargaining but instead involved the allegation that the State unlawfully refused to bargain over a decision to modify an agreement concerning the provision of paid union leave. Although the administrative law judge dismissed the charge, the employer filed an exception asserting that the charge was barred because the union waived its right to negotiate over the alleged change in union leave policy when it cancelled a scheduled bargaining session over the subject. In rejecting this exception, the Board noted, "[w]hen an employer does not provide notice and the opportunity to bargain over an alleged change, the exclusive representative's failure to pursue bargaining is not considered a waiver." (*Department of Personnel Administration*, citing *Beverly Hills*.) The Board further stated, "[s]imilarly, when an alleged unilateral change has already been implemented, or if the employer has already made a firm decision to implement the change, the exclusive representative does not waive its right to

bargain by not pursuing negotiations." (*Ibid.*, citing *San Francisco Community College District* (1979) PERB Decision No. 105; *Arcohe Union School District* (1983) PERB Decision No. 360; and *Morgan Hill Unified School District* (1986) PERB Decision No. 554a.)

Here, there is no assertion that CCPOA waived its right to bargain over the effects of implementation of OP 38. Rather, CCPOA has failed to establish, as part of its prima facie case, that it made a request to bargain. Therefore, the charge was properly dismissed.

3. Evidence of Negotiable Effects

Even if CCPOA were relieved of the obligation to request bargaining, the charge was properly dismissed because CCPOA failed to identify any negotiable effects arising out of the decision. In support of its argument that implementation of OP 38 resulted in negotiable effects, CCPOA asserts that the language of OP 38 itself "clearly appreciated that there would be impacts within the scope of representation" and that the sign-in/out sheets attached to the amended charge document the impact of implementation on late relief and overtime. We find no such clear indication. The language of OP 38 relied upon states that management should "be mindful of potential overtime costs, delays in service, and the appearance of fundamental fairness," but does not clearly identify any actual negotiable impacts. While the sign-in/out sheets contain notations that appear to refer to changes in start times due to searches at the entrance gate prior to the commencement of a shift, they fail to clearly identify any employee who suffered a loss in pay or increased overtime as a result of the conduct of an unannounced, random search pursuant to OP 38. Thus, they do not provide the necessary specificity sufficient to constitute a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (PERB Reg. 32615(a)(5); *State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944 [The charging party's burden includes alleging the

"who, what, when, where and how" of an unfair practice.].) Accordingly, the charge fails to state a prima facie case of failure to bargain.

We disagree with our dissenting colleague that PERB's longstanding precedent governing effects bargaining should be replaced with a new test. Under existing law, the employer has an obligation to bargain over the negotiable effects of a nonnegotiable management decision, provided that the union makes a valid request to bargain that identifies reasonably foreseeable effects within the scope of representation, thereby triggering the employer's duty to bargain. (*Newman-Crows Landing*; *Beverly Hills*; *County of Riverside*; *Department of Corrections*.) In the absence of such a request, an employer who implements a nonnegotiable decision without prior notice does not violate the duty to bargain. (*Beverly Hills*; *Oakland Housing Authority*.)

Under the dissent's proposal, however, an employer who fails to provide pre-implementation notice of "changes foreseeably impacting employment conditions" would be deemed to have committed an unfair practice regardless of whether the employee organization requests bargaining and identifies any negotiable effects. We do not believe that this test would provide a "common sense and easily applied bright line" in cases involving the duty to bargain over the effects of a nonnegotiable management decision. Instead, it would require the employer to possess unusual clairvoyance in anticipating that the employee representative might identify some negotiable effects, even though—as the dissent points out—the employer foresees few or no impacts on employment conditions. Such a rule would effectively require the employer to give notice of every management decision it makes, no matter how small or insignificant, for fear that the union will identify some effect that it believes requires negotiation. We do not believe the law was intended to tie management's hands in this manner.

Our decision strikes an appropriate balance between the right of the employer to implement a nonnegotiable decision and the right of the union to demand bargaining over the negotiable effects of such a decision. Ideally, if the employer reasonably anticipates that its decision will have negotiable effects, it will provide sufficient notice prior to implementation to afford an opportunity for negotiation. This is particularly important in cases where it would be difficult to undo the effects of implementation, such as a layoff. However, where the employer does not reasonably anticipate any negotiable effects and therefore implements with little or no prior notice, the union may still demand bargaining after implementation, provided it can identify any negotiable effects. In such cases, once the union is aware of the change, the failure to give formal notice is of no legal import. (*County of Riverside.*) Moreover, the union does not waive its right to bargain by failing to request bargaining prior to implementation. (*Department of Personnel Administration.*) Nonetheless, the union must still make a valid request to negotiate that clearly identifies the negotiable effects of the decision. (*Department of Corrections*; *County of Riverside.*) Otherwise, in the absence of evidence of negotiable effects, there can be no unilateral change. (*Beverly Hills.*)

ORDER

The unfair practice charge in Case No. SA-CE-1830-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member McKeag joined in this Decision.

Member Huguenin's dissent begins on page 14.

HUGUENIN, Member, dissenting: In my view, the California Correctional Peace Officers Association (CCPOA) has stated a prima facie case. Accordingly, I would remand to the Public Employment Relations Board (PERB or Board) General Counsel's Office for issuance of a complaint.

Standard of Review

We stand here in the shoes of a Board agent. We must accept as true the allegations of CCPOA, regardless of contrary, perhaps even more persuasively stated, allegations of the State of California (Department of Corrections & Rehabilitation, Avenal State Prison) (CDCR). (*San Juan Unified School District* (1977) EERB Decision No. 12;[1] *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755-H.) A Board agent may not resolve factual disputes but must instead leave them for an administrative law judge in a hearing. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489.) On review of a dismissal, the Board is likewise limited.

Moreover, our regulations require both parties to an unfair practice charge case to proffer allegations under oath. (PERB Regulation 32620(c).) Thus, a Board agent, and the Board when reviewing a Board agent's dismissal, may consider only those allegations proffered under oath. (*United Educators of San Francisco (Banos)* (2005) PERB Decision No. 1764.) Here, CCPOA so proffered its allegations, while CDCR did not. Accordingly, we may consider here only the allegations of CCPOA.

The Charge

CCPOA alleged that CDCR failed to provide CCPOA any prior notice whatsoever of its adoption and implementation in late May 2009, of a new operational procedure (38) requiring

[1] Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.

additional searches of employees for forbidden materials. CCPOA further alleged that new search protocols in the new operational procedure foreseeably impacted employee terms and conditions of employment, and that the new procedure itself referred to this impact. CCPOA did not allege that it made a demand to bargain the foreseeable impact of the new procedures search protocols on employee terms and conditions of employment. The Board agent dismissed the charge because CCPOA failed to allege an impact bargaining demand.

Prima Facie Case

This case arises under the Ralph C. Dills Act (Dills Act). The Dills Act requires an employer, which proposes to adopt or change a law, rule, resolution or regulation directly relating to matters within the scope of representation, to give the union ("recognized employee organization") prior written notice and an opportunity to negotiate ("meet and confer"). (Dills Act § 3516.5.) An employer's notice must be timely, that is, provided early enough for the union to demand and engage in bargaining prior to the employer reaching a firm decision. And, as to an employer decision concerning a non-negotiable matter having foreseeable impact on terms and conditions of employment, notice is timely if provided to the union sufficiently before the employer implements the change so the union may seek and engage in impact bargaining prior to implementation.

Further, the notice must be written and provided to the union. (*Id.*) Mere discussion with employees represented by the union is insufficient. (*State of California (Department of Consumer Affairs)* (2005) PERB Decision No. 1762-S.) If any party claims that an employee is an agent of the union, that party bears the burden of establishing the agency relationship. *(Mount Diablo Unified School District, et al.* (1977) EERB Decision No. 44; *Inglewood Unified School District* (1990) PERB Decision No. 792.) Here, CCPOA alleged that no notice was given. Contrary suggestions made by CDCR are not cognizable here.

Unilateral Changes

Unilateral changes to employment conditions, whether directly or by impact of an otherwise non-negotiable decision, disrupt employer-employee communication and destabilize employer-employee relations. Such changes deny to employees the right to be represented by their designated organizations, and deny to those organizations the right to represent employees.

Our statutes promote the improvement of employer-employee relations through open and frequent communication between employers and the unions designated by the employees. That communication includes timely notice to a union of anticipated employer changes to, or firm employer decisions impacting, employment conditions of employees represented by the union.

An employer is obligated to communicate with the union regarding consideration of a possible change relating to employment conditions, and to bargain, upon request, with the union. (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900.) An employer failing to provide the union timely notice of a proposed change, and thereafter changing employment conditions, acts in derogation of its dual obligations to communicate with the union and to bargain, upon request, with the union. (*Id.*) Where the change to employment conditions arises as an impact of a firm but otherwise non-negotiable decision, the same result obtains: failure to provide timely notice of the firm decision, or to bargain upon request regarding the foreseeable impacts, derogates the employer's obligations. (*Mt. Diablo Unified School District* (1983) PERB Decision No. 373.)

DISCUSSION

Our precedents hold that a union need not demand bargaining if it does not receive timely notice of an employer's change in a matter subject to negotiation, and that such a union does not, by failing to request bargaining, waive its bargaining rights. (*State of California (Department of Personnel Administration)* (1999) PERB Decision No. 1313-S and cases cited therein.) I would apply that principle to cases involving impact bargaining as well. Thus, I would hold that an employer, which fails to provide pre-implementation notice of changes foreseeably impacting employment conditions, implements such changes unlawfully, and that a union does not, by failing to request impact bargaining, waive its impact bargaining rights.

Impact bargaining cases are of two varieties. Frequently, a public employer acts publicly when considering extensive changes to its operations which may give rise to foreseeable effects on employees. The prime example is a layoff or reduction in force. In such cases the employer often seeks public input concerning budgetary priorities and possible program or service reductions, and invites employee organizations as well as other stakeholders to participate by suggesting alternatives. A firm decision is taken in public, and notice is given to interested employee organizations. Most of our precedents dealing with impact bargaining have arisen in these circumstances, in which the union has notice and the employer's firm decision precedes by weeks the employer's implementation.

In some impact bargaining cases, however, the employer acts within its perceived discretion and without public notice, seeking to accomplish the change with a minimum of fanfare and as little employee blow back as possible. The requisite notice to the union is overlooked, or deemed unnecessary. The employer foresees few or no impacts on employment conditions, or seeks to avoid or at least delay anticipated employee dissatisfaction. Confidentiality trumps candor. Implementation precedes notice. The union first learns of the

change after implementation and cannot interpose a timely demand to bargain over the impacts. In these circumstances, requiring a union to make a post-implementation bargaining demand as a condition to remedying the employer violation is unreasonable.

I would apply the same test of notice in both decision and impact bargaining cases. It would promote communication by employers with employees and their organizations over matters of interest to both as envisioned by the Legislature in Section 3512. Moreover, it would encourage more timely discussion of issues and tend to avoid disputes over the impacts of employer changes in the organization and delivery of public services. Finally, it would provide practitioners a common sense and easily applied bright line for measuring whether an employer has complied with its duty to communicate with the union regarding a proposed change possibly impacting employment conditions of employees.

For these reasons, I would remand this case to the General Counsel's Office for issuance of a complaint.