STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ASSOCIATION OF CALIFORNIA STATE ATTORNEYS AND ADMINISTRATIVE LAW JUDGES,	)	
Charging Party,	)	Case No. S-CE-410-S
v.	)	PERB Decision No. 823-S
STATE OF CALIFORNIA, DEPARTMENT OF PERSONNEL ADMINISTRATION,	)	June 29, 1990
Respondent.	)	

Appearances: Ernest F. Schulzke, Attorney, for Association of California State Attorneys and Administrative Law Judges; Christopher W. Waddell, Chief Counsel, for the State of California, Department of Personnel Administration.

Before Shank, Camilli and Cunningham, Members.

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Association of California State Attorneys and Administrative Law Judges (ACSA) to a proposed decision (attached hereto) issued by a PERB administrative law judge (ALJ). The ALJ held that the State of California, Department of Personnel Administration (DPA), did not violate section 3519(c) of the Ralph C. Dills Act (Dills Act or Act)[1] when it delayed making a definite salary

[1]Ralph C. Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519 provides, in pertinent part:

It shall be unlawful for the state to:

proposal, or a firm response to ACSA's salary proposal until August 23, 1988.[2] Accordingly, ACSA's allegation that DPA failed to bargain in good faith was dismissed.

ACSA filed a variety of exceptions to the proposed decision contending the ALJ erred in making numerous findings of fact, procedural findings, and several legal conclusions.

We have carefully reviewed the entire record, including the proposed decision, transcript, exceptions and responses, and, finding the ALJ's findings of fact and conclusions of law to be substantially free of prejudicial error, we adopt the ALJ's proposed decision as the decision of the Board itself, insofar as it is consistent with the factual summary and discussion below.

FACTUAL SUMMARY

ACSA is the exclusive representative for state employees in Bargaining Unit No. 2 comprised of state attorneys and administrative law judges. DPA is the state employer's representative for purposes of bargaining and contract administration under the Dills Act.

Early in 1988, the Governor delivered his budget to the Legislature for fiscal year 1988-89. This proposal contained a 4-percent increase for state employee salaries to be effective January 1989. The proposal, however, was not a bargained-for

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

[2]Unless otherwise indicated all dates refer to 1988.

contract with state employees, but rather, the opening round in the development of the state budget with the Legislature.

Negotiations between ACSA and DPA under the Dills Act commenced on March 31 with ACSA presenting its initial proposal to DPA. The proposal was made in general terms and asked for "increased salaries and compensation," with no percentage stated. DPA presented its initial response on April 14, indicating it was willing to negotiate salaries.

Negotiations began in earnest on May 17, when ACSA made a detailed proposal to DPA which included a specific salary proposal. At the next bargaining session, on May 31, DPA made a detailed counterproposal. Although the counterproposal contained specific responses to much of ACSA's proposal, it did not contain a specific counterproposal on salary. Rather, DPA's response was that it would make a "proposal later" on the salary range increase.[3] When questioned about when DPA would move on salary, DPA's representative, Michael Canar (Canar), replied, "[After he had an opportunity to] see how the budget came out."

Additional negotiation sessions were held on June 14, June 28, July 12, August 8 and 23. Detailed proposals were exchanged on numerous items at each of these sessions and movement toward a final agreement was made on various subjects.

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[3]ACSA excepts to the ALJ's finding that "proposal later" indicates on its face the intent to bargain. While we agree an intent to bargain may not always be reflected from the use of this phrase, we do not agree with ACSA's argument that its use constitutes "a refusal to bargain within the time prescribed by section 3517."

With the exception of the August 23 bargaining session, DPA continued to include in each of its counterproposals to ACSA's salary item the language "proposal later." Canar testified this language was used in the salary discussions because he did not want to reject out-of-hand ACSA's proposal when he had little information on the state's fiscal condition until after the final budget was signed.

The Legislature passed the state budget on June 30 and the Governor signed it into law on July 8. At the next regularly scheduled bargaining session, on July 12, ACSA inquired as to whether DPA would make a firm salary offer. Canar replied that he had authority to offer only a 2-percent increase and inquired whether ACSA was interested in such an offer. Although ACSA disputes this inquiry constituted a valid proposal under the bargaining ground rules, the evidence supports the ALJ's finding that the 2-percent "offer" was rejected by ACSA.[4] Canar testified DPA's salary proposal was limited to 2-percent because it was unclear how much above that figure would be available for further negotiations until after he had an opportunity to review the budget in detail.

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[4]We find sufficient evidence in the record to support the ALJ's finding that ACSA did not wish to consider a 2-percent proposal and, therefore, declined to commence negotiations at that figure. (Santa Clara Unified School District (1979) PERB Decision No. 104.) Further, the fact ACSA viewed Canar's statement as a "casual comment" does not preclude ACSA from at least considering it as a starting point for more substantive negotiations leading to a substantive counterproposal by DPA, and so on.

At the next bargaining session, on August 8, ACSA significantly changed its position and proposed a 3-year agreement.[5] On August 23, DPA made its first detailed written counterproposal on salary, offering ACSA 6-percent, 4-percent, and 4-percent increases over a 3-year contract. Subsequent negotiating sessions were held on September 20, October 4, 20, and 26-28 in which the parties continued to negotiate on numerous issues[6] including salary. A tentative agreement was reached October 28, and the contract was signed November 7, 1988. The salary proposal agreed to in that contract was the same as the offer made by DPA on August 23.

This case originally came before the Board on an appeal of a Board agent's decision dismissing ACSA's complaint. The Board, however, in State of California (Department of Personnel Administration) (1989) PERB Decision No. 739-S (herein ACSA II)

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[5]ACSA excepts to this finding by the ALJ and argues the initiative for the proposal came from ACSA's observation that other employee organizations were reaching agreements on 3-year contracts. Thus, ACSA viewed the 3-year contract proposal as a means of motivating DPA to make a firm salary offer.

In our view, however, the origination of the proposal is irrelevant. The fact that ACSA "noticed" other bargaining units were reaching agreements on 3-year contracts does not indicate DPA was bargaining in bad faith. Such proposals, made by either side, are legitimate bargaining strategies. In this case, ACSA expressed its interest in obtaining a contract extending over three years. DPA similarly was receptive to such a contract. Accordingly, there is no evidence that the ALJ's finding is incorrect.

[6]We find sufficient evidence in the record to support the ALJ's finding that the parties negotiated and, in some instances, reached agreement on a variety of subjects other than salary. (See discussion, infra.)

reversed that decision and remanded ACSA's complaint for hearing. The instant case is an appeal of an ALJ's proposed decision concerning that hearing.

DISCUSSION

ACSA's allegation of bad faith bargaining is based on two theories: (1) that DPA's delay in making a firm salary proposal until August 23 is a per se violation of its duty to bargain in good faith;[7] and (2) alternatively, under the totality of the circumstances, the delay indicates DPA lacked the subjective intent to reach an agreement.

Per Se Analysis

Ordinarily "per se" violations occur where the "bargaining conduct [is] so obstructive of the negotiating process" that it undermines the bargaining agent's ability to reach an agreement. (State of California (Department of Personnel Administration) (1986) PERB Decision No. 569-S, p. 11 (herein ACSA I); Pajaro Valley Unified School District (1978) PERB Decision No. 51, pp. 4-6; Lake Elsinore School District (1986) PERB Decision No. 603; see generally, Morris, The Developing Labor Law, (2d ed. 1983) pp. 562-570.) In this case, however, ACSA contends a per

[7]We do not adopt footnote 5 of the ALJ's proposed decision interpreting our decision in ACSA II. As noted above, in ACSA II, we reversed the ALJ's dismissal of ACSA's complaint and remanded this case for hearing. In determining whether DPA violated section 3519(c), the ALJ interpreted ACSA II as directing her to apply the "totality of conduct" as opposed to the "per se" test. However, while we could have decided, when this case was before us on a dismissal, whether the per se test was appropriate, we declined to do so and merely decided that the case as plead was sufficient to go to hearing.

se violation occurred because DPA did not meet its statutory obligation under section 3517[8] of the Act to make a firm salary-offer prior to adoption of the final budget.[9]

A similar issue was decided by the PERB in ACSA I. In that decision the Board reviewed, in part, DPA's bargaining obligation under section 3517 to determine whether that section, in conjunction with Article IV, section 12(c) of the California

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[8]Section 3517 states:

> 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, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
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> "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 promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses. (Emphasis added.)

[9]The parties do not dispute that DPA failed to make a detailed or firm counterproposal to ACSA's salary proposal until nearly two months after final adoption of the state budget.

Constitution[10] required DPA to make a firm salary proposal prior to June 15, the date the Legislature is required to pass the budget. In ACSA I, the budget was not passed by the Legislature until July 19, 1986, nor signed by the Governor until July 21, 1986. However, on June 30, 1986, DPA, "[b]elieving that continued negotiations with the Legislature would not be forthcoming . . . made its proposal [to ACSA] concerning economic offers." (ACSA I, p. 4.) ACSA points out that, in ACSA I, DPA took the position that "so long as the parties exchange [firm] proposals prior to final adoption of the state budget, whenever that occurs, the good faith negotiating standard has been met." (ACSA I, p. 6; emphasis added.) ACSA then emphasizes that, in the instant case, DPA did not make a firm salary proposal until after the Governor signed the budget. Thus, ACSA contends,

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[10]Section 12(c) of the California Constitution reads:

> The budget shall be accompanied by a budget bill itemizing recommended expenditures. The bill shall be introduced immediately in each house by the persons chairing the committees that consider appropriations. The Legislature shall pass the budget bill by midnight of June 15 of each year. Until the budget bill has been enacted, the Legislature shall not send to the Governor for consideration any bill appropriating funds for expenditure during the fiscal year for which the budget bill is to be enacted, except emergency bills recommended by the Governor or appropriations for the salaries and expenses of the Legislature.

ACSA I does not control the resolution of this case and asserts such a delay constitutes a refusal to bargain and, therefore, a per se violation of the Act.[11]

While ACSA correctly distinguishes the facts in ACSA I from the instant case, we nevertheless find the rationale supporting our decision in ACSA I persuasive in deciding this case. In the present case, ACSA again attempts to link the negotiation process to the timeliness imposed for adoption of the state budget. The Board, however, has previously recognized that the state's

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[11]ACSA also excepts to the ALJ's analysis of the Board's holding in ACSA II. Specifically, ACSA argues the ALJ misstates the Board's analysis in ACSA II interpreting ACSA I as follows: "The Board [in ACSA III noted that a refusal to negotiate salaries prior to adoption of the budget was 'not always a per se refusal to bargain.'" (Emphasis added.) We agree that the ALJ's characterization of our holding is inaccurate and, therefore, do not adopt that portion of her analysis. What the Board stated in ACSA II was:

> In [ACSA I], the Board, in a narrowly drawn decision, held that, although the state was under an obligation pursuant to section 3517 of the Act "to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year," a failure to negotiate salaries prior to the date the Legislature must pass the budget was not always a per se refusal to bargain. (Emphasis added.)

Read in context, the phrase "prior to the date the Legislature must pass the budget" refers to June 15. Thus, ACSA I addressed facts in which the proposal was made after June 15 but before the budget was in fact passed by the Legislature. On those facts it was determined that the delay was not always a per se refusal to bargain.

Also for the reasons stated above, we do not adopt the ALJ's conclusion that "In [ACSA 11] PERB held that the employer's refusal to make a monetary offer until the budget was finalized was not a per se violation". (Emphasis added.)

obligation to meet and confer in good faith does not bind the collective bargaining process to the budget. (State of California (Department of Personnel Administration) (1988) PERB Decision No. 706-S.) Moreover, section 3517 merely establishes the budget as a "point of reference" and not a statutory deadline for negotiations. (ACSA I, p. 7) Accordingly, in ACSA I we held:

> . . . the language of section 3517 imposing an obligation "to endeavor" exhorts the parties to attempt or to strive in earnest to attain a certain end. Thus, the statutory mandate is violated where either party's conduct fails to demonstrate such effort. However, the statutorily imposed obligation "to endeavor" can by no means be interpreted to create an absolute standard pursuant to which a failure to present proposals by June 15 must be judged a per se violation.
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> . . . . . .
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> In sum, SEERA's statutory provisions do not specifically mandate that negotiations with the employee organization must precede or follow final legislative action.
> (ACSA I, pp. 8-12; emphasis added.)

Although the "uncertain financial picture" in ACSA I in part justified DPA's "postponing the inception of negotiations," that picture may not become clear until after final adoption of the budget. Consequently, it is not necessarily inappropriate for the Governor's representative, as a part of his bargaining strategy, to delay making a firm proposal until he has had an opportunity to review the final budget in good faith in order to determine the funds potentially available for salary increases.

ACSA also argues support for finding a per se violation is found in Cumero v. Public Employment Relations Board (1989) 49 Cal.3d 575. According to ACSA, the California Supreme Court, in commenting on lobbying activities under the Dills Act, recognized that the legislature intended and expected state employees would lobby the legislature after meeting and conferring with the governor's representative. ACSA contends these observations by the court in Cumero further demonstrate that DPA's refusal to bargain until after the Legislature has acted frustrates the intent of the Act, subverts the bargaining process, and renders subsequent negotiations virtually meaningless.

ACSA's interpretation of Cumero, supra, is rejected. We do not agree that DPA's delay in making a firm proposal prevents ACSA from lobbying the legislature while simultaneously negotiating with the governor's representative. ACSA's freedom to engage in lobbying efforts designed to influence the amount of money designated in the budget for salary increases, or any other purpose, is simply not impaired by a delayed salary proposal.[12]

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[12]DPA's argument that the lobbying referred to in the Act is limited to ratification of the memorandum of understanding (MOU) is also rejected. Nothing in Cumero, supra, or the Act itself warrants such a narrow interpretation. Moreover, the California Court of Appeal, in Lillebo v. Davis (1990) 218 Cal.App.3d 1588, while commenting on Cumero, and whether service fees could be collected from nonunion members, recognized the "union's broader right to represent its members in employment relations with the state [citation], including not only the executive branch but also the legislative." (Emphasis in original.) Accordingly, the court held that the collection of such fees is appropriate since the exclusive representative lobbies the Legislature for improved working conditions "in addition to those secured through meeting and conferring with the state employer." (A petition for review was filed with the California Supreme Court by the appellant,

Accordingly, DPA's delay in making a firm salary proposal does not constitute conduct so obstructive of the negotiating process that it undermined the parties ability to reach an agreement. Further, we agree with the ALJ that, in this case, DPA's conduct indicates caution, not contempt, for the negotiating process and, therefore, reject the application of the per se test to these facts.

Totality of Conduct Analysis

While it is not a per se violation to delay making a firm salary proposal until after final adoption of the budget, a violation may nevertheless occur if negotiations are conducted in such a manner that, based on the totality of conduct, it is apparent DPA lacked the subjective intent to reach an agreement. (Oakland Unified School District (1982) PERB Decision No. 275; Fremont Unified School District (1980) PERB Decision No. 136.) Here, however, DPA's delay until August 23 in making a firm salary proposal does not, by itself, indicate such an intent. Moreover, we find that the totality of the conduct of the parties evidences "an endeavor to reach agreement" consistent with our interpretation in ACSA I of section 3517 of the Act. Ground rules were agreed upon promptly, negotiations were scheduled and regularly held, counterproposals were presented at bargaining sessions, and the parties reached tentative agreements on several issues at various points in the bargaining process. The record also establishes that contract extensions were granted to ACSA in

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Lillebo, on May 1, 1990.)

order to keep the MOU in place during negotiations and the state agreed to increase health benefit contributions to Unit 2 members during the course of negotiations in order that employees could avoid paying the increases out-of-pocket. Accordingly, we agree with the ALJ's analysis that, under the totality of circumstances, DPA bargained with the intent to reach an agreement.

Based upon the foregoing analysis, we affirm the ALJ's dismissal of a violation of section 3517(c) of the Act and, in accord with our decision in Los Angeles Unified School District (1982) PERB Decision No. 218, we also dismiss the (a) and (b) violations which were alleged derivatively.

ORDER

The complaint in Case No. S-CE-410-S is hereby DISMISSED.

Members Shank and Cunningham joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ASSOCIATION OF CALIFORNIA STATE ATTORNEYS AND ADMINISTRATIVE LAW JUDGES (ACSA),	)	
Charging Party,	)	Unfair Practice Case No. S-CE-410-S
v.	)	**PROPOSED DECISION** (1/11/90)
STATE OF CALIFORNIA, DEPARTMENT OF PERSONNEL ADMINISTRATION (DPA),	)	
Respondent.	)	

Appearances: Ernest F. Schulzke, Attorney, for the Association of California State Attorneys and Administrative Law Judges; Christopher W. Waddell, Chief Counsel, for the Department of Personnel Administration.

Before Martha Geiger, Administrative Law Judge.

PROCEDURAL BACKGROUND

The charge in this case was filed by the Association of California State Attorneys and Administrative Law Judges (ACSA) against the State of California, Department of Personnel Administration (DPA) on October 3, 1988. ACSA alleged that DPA violated section 3519(a), (b) and (c) of the Dills Act[1] by

[1]The Dills Act is codified at Government Code section 3512 et seq. Section 3519(a), (b) and (c) read in relevant part:

> 3519. ILLEGAL ACTS OR CONDUCT OF STATE
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> It shall be unlawful for the state to:
>
> (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.

refusing to make a definite salary proposal, or a firm response to ACSA's salary proposal, until five months after ACSA's initial proposal, three months after ACSA had made its detailed salary proposal to DPA, and nearly two months after the adoption of the State budget by the Legislature. Based on the allegations in the charge, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint against DPA, alleging that DPA's conduct violated section 3519(0), and derivatively (a) and (b) of the Dills Act. After a timely answer was filed by DPA, a settlement conference was scheduled before PERB. The matter not being resolved, a formal hearing was scheduled.

Prior to the hearing, however, DPA moved to dismiss the charge and complaint on the ground that no prima facie case of bad faith bargaining had been stated. The administrative law judge (ALJ) analyzed the actions of DPA as alleged and held that, even if the facts as alleged were true, DPA's behavior at the table constituted neither a per se violation of the duty to bargain in good faith, nor a violation using the "totality of circumstances" test. Thus, he dismissed the charge and complaint.

(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.

ACSA appealed the dismissal to the Board itself. On June 8, 1989, the Board reversed the ALJ's dismissal and ordered the matter set for hearing. In its decision, the Board touched only briefly on the two types of violations. The Board noted that a refusal to negotiate salaries prior to adoption of the budget was "not always a per se refusal to bargain." In spite of this language the Board nonetheless remanded this case for hearing because "the allegations are sufficient to state a prima facie case. . . ." The ALJ's analysis of whether the facts as alleged could violate the "totality of the circumstances" test was not addressed.

Pursuant to the Board's decision, this case was again set for a formal hearing before the undersigned, and was held on September 19, 1989. The parties briefed the issues at the close of the hearing, and the matter was submitted on December 15, 1989. This decision is based on the entire record of this case, including the testimony and evidence submitted at the formal hearing.

FINDINGS OF FACT

ACSA is the exclusive representative for State employees in Bargaining Unit Number 2. DPA is the State employer's representative for purposes of bargaining and contract administration under the Dills Act.

Early in 1988, the Governor delivered his budget proposal to the Legislature for the fiscal year 1988-89. This proposal contained a four percent increase for State employee salaries in

January 1989. This proposal by the Governor, however, was not a bargained-for contract with State employees. It was merely the opening gambit in the extensive budget process.[2]

The State Constitution requires that a budget bill shall be passed by the Legislature by midnight on June 15 each year. The Governor may sign, veto, or (most commonly) line-item veto the bill passed by the Legislature. Until the budget bill is actually signed by the Governor, however, the total amount of money in the budget is not known.

After the budget has been signed, DPA and the various unions representing State employees typically meet and negotiate in earnest subjects of bargaining with fiscal implications (salaries and benefits). Thus, while negotiations begin in the spring, non-monetary items are likely to be agreed upon first, and monetary items after the budget bill is signed.

In this case, ACSA made its initial proposal to DPA on March 31, 1988. The proposal made was general in nature and asked for only "increased salaries and compensation," with no percentage stated. DPA presented its initial response on April 14, indicating it was willing to negotiate salaries.[3]

[2] In a prior case before PERB, ACSA had alleged that DPA's failure to bargain with ACSA prior to the legislative passage of the budget on June 15 of each year was a per se refusal to bargain in good faith. PERB, however, rejected this argument.

[3] These two proposals are colloquially called the "sunshine" proposals and are made to conform to section 3523 of the Dills Act.

Negotiations began in earnest on May 17 when ACSA made a detailed proposal to DPA, including a specific salary proposal. At the next negotiating session, on May 31, DPA made a detailed counter-proposal. The counter-proposal, although it made specific counter-proposal language to much of ACSA's proposal, did not contain a specific counter-proposal on salary. Rather, DPA's offer was that it would make a "proposal later" on the Salary Range Increase. At the table, DPA's representative was Michael Canar. When queried about when DPA would move on salary, Canar said "after the budget came down."

Negotiation sessions continued to be held. The parties met on June 14, June 28, July 12 and August 8. At each of these sessions, detailed proposals were exchanged on various items. With each counter-proposal, movement toward a final agreement was reached on various subjects. In each DPA proposal, however, the Salary Range Increase item was noted with the same "proposal later" language.

On July 8, 1988, the Governor signed the final budget. At the July 12 bargaining session, ACSA inquired whether DPA would now make a salary offer. Canar told the ACSA bargaining team that he had the authority at that point only to offer a two percent increase, and asked whether ACSA was interested in a two percent offer. The members of the team shook their heads to indicate, no, they were not interested in a two percent proposal.

Canar testified that the State used the language "proposal later" in the salary discussions because he did not want to

reject out-of-hand ACSA's proposal when he, Canar, had little information on the State's fiscal condition until after the final budget was signed. Only after July 8 did the picture begin to clear. At that point, Canar knew the State could offer a minimum of a two percent increase, but he did not know how much more he would have to offer. Hence, he asked ACSA whether they wanted a two percent offer, the implication being that a larger offer would come a little later when DPA fully understood its fiscal condition after analyzing the budget bill. ACSA, by indicating it did not want a two percent offer, chose to wait until Canar said DPA would have full authority to negotiate salary.

On August 8, the parties again met. ACSA significantly changed its position to propose a three-year agreement. On August 23, DPA made its first counter-proposal on salary, offering ACSA six, four and four percent over a three-year contract.

The parties continued to negotiate on all issues (including salary). Sessions were held September 20, October 4, October 20, October 26, 27 and 28. Tentative agreement was reached October 28, and the contract was signed November 7, 1988. The salary proposal in that contract was the offer made by DPA on August 23.

ISSUE

Did the failure of DPA to make a specific salary proposal until August 23, 1988, constitute bad faith bargaining, and thus violate section 3519(c)?

CONCLUSIONS OF LAW

As noted by the ALJ who ruled on the original Motion to Dismiss, bad faith bargaining can be evidenced either by an act that is a per se violation, or by actions that, in the totality of circumstances, indicate a party lacks the requisite intent to reach an agreement.

The Charging Party has focused on the failure of DPA to make a specific salary proposal until August 23 and argues that this action constitutes a per se violation of the duty to bargain.[4] In State of California (DPA) (1986) PERB Decision No. 569-S (hereinafter DPA(ACSA) I), PERB held that the employer's refusal to make a monetary offer until the budget was finalized was not a per se violation. Thus, DPA's actions until July 8 when the bill was signed are not per se bad faith bargaining. Left unanswered by the Board itself in its order remanding this decision is whether DPA's refusal to make a salary offer between July 8 and August 23 is a per se violation.

Analysis of the case law and facts, however, presents convincing evidence there was no per se violation at any time here. A per se violation is one which, by its very nature, so destroys or avoids the bargaining process that the negotiations are rendered meaningless. An employer who makes a unilateral change without bargaining has deprived the union of any

[4] For example, a per se violation will be found, regardless of the motive behind the act, when a party makes a unilateral change in the terms and conditions of employment prior to bargaining to impasse. (Grant Joint Union High School District (1982) PERB Decision No. 196).

participation in negotiating about that subject, and has changed the union from a participant in the process to a mere recorder of the employer's action. Is the failure of DPA to put forth a firm salary proposal between July 8 and August 23 akin to this type of disruptive action? No.

Here, the parties continued to meet and negotiate on many of the issues still "on the table". DPA took no action on salaries that would preclude ACSA from having any meaningful negotiations. Indeed, DPA's entire posture was one of conciliation because, rather than offer nothing, it delayed offering anything. Such behavior indicates caution, not contempt, for the negotiating process. Thus the action of DPA cannot reasonably be seen to be a per se violation of section 3519(c).[5]

This determination, however, answers only part of the question. ACSA can still prove that DPA bargained in bad faith if it can show that, under the totality of the circumstances, it was apparent that DPA lacked the subjective intent to reach an agreement. DPA(ACSA) I, supra. Presumably, such an analysis of the facts is what the Board itself referred to in its order

[5] Support for this finding is found in the lack of instruction to the ALJ in the remand order. If the Board itself had meant to find that DPA's then-alleged behavior could have constituted a per se violation, then the sole purpose for remand would be to determine the bare facts of whether the salary proposal was, indeed, delayed. The order, however, remanded this matter for more than a bare factual finding. The order itself directs the ALJ to determine "whether or not DPA failed to meet and confer in good faith." Such is an order for a legal conclusion, based on the facts as a whole, and not a request for the finding of facts which would support a per se conclusion.

directing that the merits be examined to determine if the facts supported a finding of bad faith bargaining.

In this particular case, the parties do not present the typical indicia of bad faith bargaining. Ground rules were agreed upon promptly. Negotiations were scheduled and regularly held. Both sides presented counter-proposals at every session. Tentative agreement on various issues was reached at various intervals in the bargaining process. The sole incident argued by ACSA to be bad faith bargaining was DPA's refusal to make a specific salary proposal until August 23. Given the pace and progress of negotiations, this incident is not bad faith bargaining.

The standard to be applied is whether DPA had, in the totality of circumstances, the requisite intent to reach agreement. The entire course of negotiations shows they did. That DPA and ACSA met and negotiated on all other issues certainly indicated an intent to reach agreement.

Furthermore, DPA's use of the "proposal later" language in its various counter-proposals indicates on its face the intent to bargain.

Finally, and most damning of all to ACSA's argument is the fact that a salary proposal was made, informally, on July 12. That it was not made formally was due solely to ACSA's actions in telling Canar ACSA did want a low offer. ACSA seemed to want not only a salary offer when the budget was signed, but the last, best and final offer the employer could make at the very next

negotiating session. Such naivety about bargaining ill-suits these parties. Negotiation is a give-and-take process of compromise that the parties hope will result in final offers close to what both sides can be comfortable with. Such a process demands and anticipates the exchange of proposals (as these parties did on every other article of the contract). ACSA expected a detailed proposal on July 12, and could have had one, albeit a low offer. Had they taken such a proposal, they could easily have countered at the next session, which would have then led to another DPA counter-proposal, etc. In all likelihood, the salary agreement would have been reached no sooner, and no later, than it actually was. Thus, based on the totality of circumstances, DPA's action in delaying a formal salary proposal until August 23 did not constitute bad faith bargaining.

HOLDING AND ORDER

Based upon the above findings of fact and conclusions of law, the allegation that DPA violated section 3519(c) of the Dills Act is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative

Code, title 8, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." See California Administrative Code, title 8, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, sections 32300, 32305 and 32140.

Dated: January 11, 1990

MARTHA GEIGER
Administrative Law Judge