STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT,	)	
Charging Party,	)	Case No. SA-CE-775-S
v.	)	PERB Decision No. 1213-S
STATE OF CALIFORNIA (DEPARTMENT OF TRANSPORTATION),	)	June 26, 1997
Respondent.	)	

Appearances: Steven B. Bassoff, Attorney, for Professional Engineers in California Government; State of California (Department of Personnel Administration) by Robert J. Allen, Labor Relations Counsel, for State of California (Department of Transportation).

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

JOHNSON, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the State of California (Department of Transportation) (State or Caltrans) to a PERB administrative law judge's (ALJ) proposed decision. The ALJ concluded that the dispute should not be dismissed and deferred to arbitration, and that Caltrans breached its obligation to negotiate with the Professional Engineers in California Government (PECG) about a change in the Caltrans policy governing home storage of state-owned vehicles, in

violation of section 3519(a), (b) and (c) of the Ralph C. Dills Act (Dills Act).[1]

The Board has reviewed the entire record including the unfair practice charge, the complaint, the proposed decision and the filings of the parties. The Board reverses the ALJ's proposed decision and orders that the charge be dismissed and deferred to the parties' contractual grievance procedure.

BACKGROUND

Contract Provisions

PECG is the exclusive representative of an appropriate unit of employees (Unit 9) within the meaning of Dills Act section 3513(b). Caltrans is an employer within the meaning of Dills Act section 3513(j). The most recent memorandum of understanding (MOU) covered the period from September 1, 1992 through June 30,

---

[1]The 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 states, 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.

1995. Section 19.1 of the expired MOU contained an entire agreement clause which provided:

a. This MOU sets forth the full and entire understanding of the parties regarding the matters contained herein, and any other prior or existing understanding or MOU by the parties, whether formal or informal, regarding any such matters are hereby superseded. Except as provided in this MOU, it is agreed and understood that each party to this MOU voluntarily waives its right to negotiate with respect to any matter raised in negotiations or covered in this MOU, for the duration of the MOU.

With respect to other matters within the scope of negotiations, negotiations may be required during the term of this MOU as provided in Subsection b. below.

b. The parties agree that the provisions of this Subsection shall apply only to matters which are not covered in this MOU.

The parties recognize that during the term of this MOU, it may be necessary for the State to make changes in areas within the scope of negotiations. Where the State finds it necessary to make such changes, the State shall notify PECG of the proposed change 30 days prior to its proposed implementation.

The parties shall undertake negotiations regarding the impact of such changes on the employees in Unit 9. when all three of the following exist:

(1) Where such changes would have an impact on working conditions of a significant number of employees in Unit 9;

(2) Where the subject matter of the change is within the scope of representation pursuant to the Dills Act;

(3) Where PECG requests to negotiate with the State.

. . . If the parties are in disagreement as to whether a proposed change is subject to this Subsection, such disagreement may be submitted to the arbitration procedure for resolution. The

arbitrator's decision shall be binding. . . .
[Emphasis, added.]

The MOU contains a grievance[2] procedure which culminates in binding arbitration.[3]

Home Storage Permits

Many Unit 9 employees use State vehicles and possess a permit known as a home storage permit (HSP). An employee who has a HSP is allowed to store a State-owned vehicle at his or her home overnight on a daily basis.[4] Thus, the employee may go directly to a field assignment each day, rather than to another location to pick up a State vehicle for use before reporting to a field assignment. In general, the purpose in granting HSPs is to save the State money in miles driven and time spent by employees while commuting to and from the work site.

Prior to the dispute that gives rise to this unfair practice charge, Caltrans used guidelines issued on October 16, 1992 to determine which employees should obtain or keep an HSP. During the spring of 1994, it became apparent to Caltrans that the 1992

---

[2]Article 12.2(a) defines a grievance as a "dispute of one or more employees, or a dispute between the State and PECG, involving the interpretation, application, or enforcement of the express terms of this Agreement."

[3]Grievances may be filed no later than 21 calendar days after the grievant can reasonably be expected to have known of the event occasioning the grievance. Also, grievants have the right to appeal unsatisfactory responses and seek arbitration.

[4]HSPs were reviewed by Caltrans at least once a year to verify that the criteria under which the permit was originally issued had not changed.

guidelines needed modification.[5] PECG representatives became aware of Caltrans' intention during that same time period, and they were concerned that the revisions could result in the cancellation or denial of unit members' HSPs.[6] Accordingly, PECG's Executive Assistant Bruce Blanning (Blanning) submitted a letter of inquiry to Caltrans in June 1994, to which Caltrans Chief of Labor Relations Dave Brubaker (Brubaker) responded by acknowledging that new guidelines were being developed, but stating that in the interim the existing (1992) guidelines would continue to be used.

Brubaker gave Blanning official notice of the proposed change in HSP policy on November 23, 1994, included a draft copy of revised guidelines, and offered to begin meeting and negotiating this topic. A deadline of January 3, 1995 was established for PECG to submit a request to negotiate and Blanning sent written questions to Brubaker on December 23, 1994. Among other questions, Blanning made reference to Article 19.1 of the MOU and questioned Caltrans' authority to change the HSP policy without negotiating. After sending PECG a newly-revised copy of the draft guidelines in early January, Brubaker responded

---

[5]A May 1994 internal audit identified problems with the HSP process, including various types of noncompliance.

[6]In fact, PECG complained, in the spring of 1994, that "home storage permits were being yanked." According to undisputed testimony, it is evident that the number of HSPs was sharply reduced from May 1994 to the time of the hearing in this case (March 1996). At the time of the May 1994 audit, approximately 1,984 HSPs were issued. By February of 1995, the number of HSPs had been reduced to 1,365, and by the date of the hearing, the number of HSPs was further reduced to 1,003.

to Blanning's December 23 letter on January 11, 1994 and continued to express willingness to meet and discuss any specific concerns. The parties met on January 20, 1994 and discussed the proposed changes for some time, but the meeting was not considered by either party as a negotiating session.

In a March 13, 1995 letter to PECG, Brubaker stated that the parties were at an "apparent impasse" over the HSP issue. On March 27, Blanning wrote back saying that he disagreed and made new allegations that unit members were being required to comply with the changed policy. Blanning then requested that Caltrans rescind those requirements until bargaining could be completed.

On April 10, 1995, Brubaker responded by stating that "administration of the revised policy is now vested with the District vehicle pool managers," but that requests for exemptions from the policy would be considered on a case-by-case basis. He concluded by stating that, "we intend to implement the new [HSP] policy effective April 14, 1995."

PECG responded by letter on May 9, 1995, asking whether the "apparent change in policy is authorized by Article 19.1.b of the current MOU."[7] PECG requested an early response and reminded Caltrans that "it is an unfair practice under the Dills Act to

[7]Also in this letter (to which Caltrans never responded), PECG complained that "some employees who had been parking state vehicles at their residences are now required to park them at other locations and provide their own transportation to and from that location" and that "our members are being required to undergo significant expense and inconvenience in complying with what appears to be Caltrans' new policy."

make a unilateral change in conditions of employment during negotiations[8] on a new MOU."

On July 21, 1995, Caltrans issued a document entitled "Procedural Standards for Home Storage Permits." According to the cover memorandum, the standards "take effect immediately."

On October 10, 1995, PECG filed an unfair practice charge, alleging that:

> a. On or about September 25, 1995, PECG received a copy of a July 21, 1995 memorandum entitled "Standards for Home Storage Permits" in the mail. This new document had not been previously provided to PECG and was being implemented without a discussion or negotiations.
>
> b. The new standards were significantly changing the working conditions for employees in Bargaining Unit 9 by eliminating up to 99% of the existing home storage permits. Employees were being required to undergo significant expense and inconvenience as a consequence of this new policy.
>
> c. Caltrans did not negotiate the new policy in good faith and did not negotiate the impact of this new policy.
>
> d. The declaration of intent to implement a unilateral change in the working conditions, contained in the April 10, 1995 letter from the Department of Transportation, constituted an unfair practice charge because it occurred during contract bargaining and it occurred without good faith negotiations. (Emphasis added.)

PECG alleged that by these actions, Caltrans violated section 3519(a), (b) and (c) of the Dills Act. PERB issued a complaint on November 30, 1995. After a hearing, the ALJ issued a proposed decision in which he made two conclusions. First, he

[8]The file indicates that successor negotiations for a new MOU were underway at the time of the May 9 letter.

found that the dispute should not be dismissed and deferred to arbitration because he found that the disputed conduct occurred on July 21, 1995, after the contract expired. Second, he concluded that Caltrans violated the Dills Act because it breached its obligation to negotiate with PECG about a change in the Caltrans HSP policy. Since we disagree with the ALJ's first conclusion, and find that this charge must be dismissed and deferred to the parties' grievance procedure, we lack jurisdiction to discuss the ALJ's second conclusion.

CALTRANS' EXCEPTIONS

Most of Caltrans' exceptions challenge the ALJ's refusal to defer this dispute to arbitration. Caltrans asserts that its March 13, 1995 and April 10, 1995 letters clearly indicate its firm intent to implement the changes on April 14, and not on July 21, 1995, as the ALJ found. Thus, according to Caltrans, since PECG's unfair practice charge alleges violations of the MOU, deferral is appropriate.

PECG'S RESPONSE

PECG argues that it had no basis for filing a grievance ' before June 30, 1995, and therefore its remedy derives from the Dills Act rather than the parties' MOU.[9]

[9]Since we agree that this case should have been deferred, we will not discuss other exceptions or responses in this Decision.

DISCUSSION

Lake Elsinore Unified School District (1987) PERB Decision No. 646 and its Dills Act progeny[10] have established a longstanding jurisdictional rule which requires that a charge must be dismissed and deferred to arbitration if: (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration, and (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties.

When assessing the deferrability of a charge that alleges a unilateral change, the important date is when the employer takes an official action, not a subsequent date when the action becomes effective. (DPA, warning letter at p. 5.) For example, in DPA, certain allegations[11] of violations occurred during the term of the agreement. The Board held that those allegations were subject to the contractual grievance and arbitration procedure and ordered that the charge be dismissed and deferred to that procedure.

Likewise, in the case at bar, Caltrans wrote to PECG on April 10, 1995, expressly stating that "we intend to implement the new [HSP] policy effective April 14, 1995." This date was

---

[10]See, e.g., State of California (Department of Personnel Administration) (1996) PERB Decision No. 1145-S (DPA).

[11]In DPA, the State announced that it intended to transfer State police employees to another bargaining unit effective July 1, 1995, which would be the day after the contract expired. On June 13, 1995, the State allegedly refused a demand to bargain the transfer, a date on which the agreement was still in effect.

well before the June 30 expiration date of the MOU, a fact which is reflected in PECG's unfair practice charge, which alleges that Caltrans declared its "intent to implement a unilateral change in the working conditions contained in the April 10, 1995 letter" which constituted "an unfair practice charge because it occurred during contract bargaining and it occurred without good faith negotiations." (Emphasis added.)

The Lake Elsinore standard has been met in this case. First, the grievance machinery in the parties' MOU provides for resolution of this dispute and culminates in binding arbitration. Second, the conduct complained of in the charge, that the State changed working conditions by unilaterally changing the HSP policy, is arguably prohibited by the entire agreement clause in the MOU (Article 19.1). Therefore, PERB is without jurisdiction in this matter and the charge must be dismissed and deferred to the contractual grievance and arbitration procedure.

ORDER

The Board hereby reverses the administrative law judge's proposed decision, DISMISSES the unfair practice charge and defers it to the parties' contractual grievance procedure.

Member Dyer joined in this Decision.

Chairman Caffrey's concurrence begins on page 11.

CAFFREY, Chairman, concurring: The Ralph C. Dills Act (Dills Act) section 3514.5(a) states, in part, that the Public Employment Relations Board (Board) shall not:

> . . . issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

This section establishes a jurisdictional rule under which the Board must dismiss an unfair practice charge and defer it to arbitration if: (1) the complained of conduct is arguably prohibited by the provisions of the parties' collective bargaining agreement (CBA); and (2) the contractual grievance machinery covers the matter at issue and culminates in binding arbitration. (Lake Elsinore School District (1987) PERB Decision No. 646; State of California (Department of Personnel Administration) (1996) PERB Decision No. 1145-S.)

The State of California (Department of Transportation) (State or Caltrans) and the Professional Engineers in California Government (PECG) are parties to a CBA which covered the period of September 1, 1992 to June 30, 1995. The CBA contains a grievance procedure which culminates in binding arbitration. The "Entire Agreement" clause of the CBA at Article 19.1.b states, in pertinent part:

> b. The parties agree that the provisions of this Subsection shall apply only to matters which are not covered in this MOU.
>
> The parties recognize that during the term of this MOU, it may be necessary for the State

> to make changes in areas within the scope of negotiations. Where the State finds it necessary to make such changes, the State shall notify PECG of the proposed change 30 days prior to its proposed implementation.
>
> The parties shall undertake negotiations regarding the impact of such changes on the employees in Unit 9, when all three of the following exist:
>
> (1) Where such changes would have an impact on working conditions of a significant number of employees in Unit 9;
>
> (2) Where the subject matter of the change is within the scope of representation pursuant to the Dills Act;
>
> (3) Where PECG requests to negotiate with the State.
>
> . . . If the parties are in disagreement as to whether a proposed change is subject to this Subsection, such disagreement may be submitted to the arbitration procedure for resolution. The arbitrator's decision shall be binding.

Note that under this article, Caltrans has the authority to make changes in terms and conditions of employment provided that it notifies PECG 30 days prior to implementation and undertakes impact negotiations when the enumerated conditions are met. A change made in accordance with this provision is not a "unilateral change," but rather a change made pursuant to a bilaterally-negotiated article of the CBA. Any disagreement between the parties as to whether a proposed change is subject to this provision may be submitted to binding arbitration.

The parties engaged in an extended series of communications and discussions concerning proposed changes to Caltrans' policy

governing home storage permits for state-owned vehicles. These communications included:

- A March 13, 1995, letter from Caltrans to PECG addressing the "apparent impasse at the recent two home storage permit meetings."

- A March 27, 1995, response from PECG asserting that the meet and confer process is at a preliminary stage and the parties are not at impasse. PECG specifically requests that a meet and confer session be scheduled.

- An April 10, 1995, letter from Caltrans to PECG asserting that the "only concern that deals with policy changes that impact your membership" has been addressed. Consequently, Caltrans states "we intend to implement the new policy effective April 14, 1995" and indicates that Caltrans sees no reason to continue to meet on the issue.

- A May 9, 1995, response from PECG asking if Caltrans was refusing to meet and confer and had implemented the policy. The letter specifically asks if Caltrans believes the policy change is authorized by CBA Article 19.1.b, and, if so, how PECG was provided 30-day notice of the proposed change.

In my view, it is absolutely clear that in April and May 1995, Caltrans was proceeding with implementation of a change in home storage permit policy; and it is equally clear that PECG was or should have been aware of it. Whether Caltrans was permitted to do so under Article 19.1.b, a question directly referenced by PECG, is a matter subject to binding arbitration under the very terms of that article. Furthermore, PECG's expressed concern that Caltrans had not provided the 30-day notice of the proposed change before implementation and refused to meet and confer, contrary to the requirements of Article 19.1.b, also describes

conduct arguably prohibited by the CBA and subject to its grievance and arbitration procedure. Accordingly, Dills Act section 3514.5(a) requires that the unfair practice charge in this case be dismissed and deferred to the contractual grievance and arbitration procedure.