STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Respondent.	Case No. SA-CE-1650-S PERB Decision No. 1985-S November 20, 2008

Appearances: Carroll, Burdick & McDonough by Natalie Leonard and Gregg McLean Adam, Attorneys, for California Correctional Peace Officers Association; Christopher E. Thomas, Labor Relations Counsel, for State of California (Department of Personnel Administration).

Before Neuwald, Chair; McKeag and Dowdin Calvillo, Members.

DECISION

NEUWALD, Chair: This case comes 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 (attached) of its unfair practice charge. The charge alleged that the State of California (Department of Personnel Administration) (State) violated the Ralph C. Dills Act (Dills Act)[1] by instructing the State Controller's Office to stop collecting fair share fees of nonmembers in State Bargaining Unit 6 after implementing its last, best and final offer (LBFO). CCPOA alleged that this conduct constituted a violation of Dills Act section 3515.7.

The Board agent found that CCPOA failed to allege a violation of the Dills Act by the State and dismissed the case because, pursuant to Sections 3515.7 and 3517.8, the State is not

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

required to collect fair share fees after implementing the LBFO. The Board agent reasoned that after the expiration of a collective bargaining agreement, the union's right to receive union dues survives. However, as noted by the Board agent, this right is not absolute and ends upon the State's implementation of its LBFO, irregardless of whether the State fully implements the entire LBFO. Purusant to Section 3517.8(b) the State is not required to implement the entire LBFO.

We reviewed the entire record in this matter. The Board hereby adopts the Board agent's dismissal subject to the following discussion.

CCPOA'S APPEAL

CCPOA filed an appeal to the Board agent's dismissal. CCPOA first excepted to the dismissal letter because it presumed that agency fee agreements cannot exist absent an entire collective bargaining agreement. CCPOA argues that such a holding is at odds with the plain language of the Dills Act because Section 3515.7(a) permits a fair share agreement outside of a collective bargaining agreement. CCPOA further argues that any other fair share agreement under Section 3515.7(a) would be obliviated were the Board to hold that fair share agreements end as a matter of law upon the expiration of a collective bargaining agreement or the implementation of a LBFO. CCPOA further argues that were the Board to find that fair share agreements end as an operation of law, the Board would be undermining the integrity of the bargaining process by creating an imbalance in bargaining power: "[a] labor union dependent on a fair share agreement could be held hostage to accept unfavorable contract terms for employees it represents, knowing that if it does not, it would lose dues as soon as any LBFO were implemented."

Second, CCPOA argued that even if an agency fee agreement cannot survive the expiration of a collective bargaining agreement, the State did not satisfy Section 3515.7(b). The State failed to gain legislative approval of any part of the LBFO.

RESPONSE

The State filed a response to CCPOA's exceptions arguing that the Board agent appropriately dismissed the unfair practice charge in accordance with Section 3515.7(b) which expressly provides that after a collective bargaining agreement expires, "fair share fee deductions shall continue until the effective date of a successor agreement or implementation of the state's [LBFO], whichever occurrs first." The State also argues that:

(1) Even if the Board were to recognize that an agency fee agreement can exist outside a memorandum of understanding, there was no such agreement here;

(2) It may impose only some of its LBFO in accordance with Section 3517.8;

(3) The policy arguments raised by CCPOA are unpersuasive; and

(4) The State properly implemented its LBFO.

DISCUSSION

This is a case of first impression for the Board: whether Section 3515.7 requires the State to continue to collect fair share fees after the State implements its LBFO. We agree with the Board agent and hold that the State's obligation to collect fair share fees terminates upon implementation of the LBFO even if the State does not fully implement the entire LBFO. As such, we adopt the warning and dismissal letters as a decision of the Board itself.

CCPOA argues that the dismissal letter erroneously interprets the Dills Act to preclude fair share fee provisions where no "master" collective bargaining agreement exists. The Board makes no finding regarding this issue because CCPOA failed to demonstrate that there was an agreement outside a memorandum of understanding regarding fair share fees.

CCPOA argues for the first time on appeal that the State's failure to achieve legislative approval of the LBFO bars it from ending the agency fee agreement. PERB Regulation 32635(b)[2] precludes a charging party from raising new allegations or new supporting evidence on appeal without good cause. CCPOA fails to demonstrate good cause for the presentation of new allegations and/or supporting evidence on appeal, and nothing in the documents filed related to the appeal indicates there is good cause. Additionally, this argument is without merit because in its amended complaint CCPOA stated:

> CCPOA understands that, upon reaching impasse, the State may implement all or part of its entire last, best and final offer under section 3517.8(b) of the Dills Act. While CCPOA objects to the way that the purported impasse was determined, and disputes whether the LBFO was ever lawfully implemented, these items are not the subject of this charge. For the purposes of this charge, CCPOA will assume that the State lawfully implemented a portion of its LBFO. That is not the subject of this charge.

As such, this argument goes against the facts, and the Board does not address this issue.

ORDER

The unfair practice charge in Case No. SA-CE-1650-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Dowdin Calvillo joined in this Decision.

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

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-7242
Fax: (916) 327-6377

July 21, 2008

Gregg McLean Adam, Attorney
Carroll, Burdick & McDonough LLP
44 Montgomery Street, Suite 400
San Francisco, CA 94104

Re: California Correctional Peace Officers Association v. State of California (Department of Personnel Administration)
Unfair Practice Charge No. SA-CE-1650-S
DISMISSAL LETTER

Dear Mr. Adam:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 14, 2008 (original charge) and amended on June 17, 2008 (First Amended Charge). The California Correctional Peace Officers Association (CCPOA or Union) alleges that the State of California (Department of Personnel Administration) (State) violated the Ralph C. Dills Act (Dills Act or Act)[1] at section 3515.7 by instructing the Office of the California State Controller to stop collecting fair share fees of nonmembers in Bargaining Unit 6 (BU 6).

CCPOA was informed by the attached Warning Letter, dated June 3, 2008, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to June 17, 2008, the charge would be dismissed. On June 17, 2008, a First Amended Charge was filed with PERB.

According to the First Amended Charge, the State allegedly never discussed ending collection of fair share fees either during negotiations, in any proposed successor Memorandum of Understanding (MOU), or in its written last, best, and final offer (LBFO). In addition, according to the First Amended Charge, the State allegedly did not implement the portion of the LBFO that involved collection of fair share fees. CCPOA asserts that, under these circumstances, the State should continue to deduct fair share fees.

In the Warning Letter, you were advised of the legislative history of Government Code section 3515.7. Beginning with Litton Financial Printing Div. v. NLRB (1991) 501 U.S. 190, the United States Supreme Court stated that, with the exception of union security provisions, a unilateral change in existing terms and conditions cannot be effectuated after the expiration of

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

a collective bargaining agreement. Notably, in 2000, the California Legislature amended Government Code section 3515.7 and added Government Code section 3517.8 such that, after the expiration of the collective bargaining agreement, the union's right to receive union dues survives. However, this right is not unlimited as the State's duty to collect fair share fees extinguishes upon the State's implementation of its last, best, and final offer. Specifically, section 3515.7(b) of the Government Code provides that "fair share fee deduction shall continue until the effective date of a successor agreement or implementation of the State's last, best, and final offer, whichever occurs first."

You were also advised in the Warning Letter that Government Code section 3517.8(b) does not require the State to fully implement the entire LBFO. Furthermore, the language of Government Code section 3515.7 does not specify that fair share fees must continue unless and until the State implements its entire LBFO. Given these statutory provisions, the State may discontinue giving effect to the provisions of the expired contract, including fair share fee provisions, upon implementing any or all of its LBFO. Accordingly, based on the history and language of the pertinent provisions of the Dills Act, the State is not required to continue to collect fair share fees after implementing the LBFO.

Conclusion

For the reasons set forth above and in the June 3, 2008 Warning Letter, this charge is dismissed.

Right to Appeal

Pursuant to PERB Regulations,[2] you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Regulation 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Regulations 32135(a) and 32130; see also Government Code section 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Regulations 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

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[2] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Regulation 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Regulation 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Regulation 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Regulation 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Yaron Partovi
Regional Attorney

Attachment

cc: Christopher Thomas

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-7242
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June 3, 2008

Gregg McLean Adam, Attorney
Carroll, Burdick & McDonough LLP
44 Montgomery Street, Suite 400
San Francisco, CA 94104

Re: California Correctional Peace Officers Association v. State of California (Department of Personnel Administration)
Unfair Practice Charge No. SA-CE-1650-S
WARNING LETTER

Dear Mr. Adam:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 14, 2008. The California Correctional Peace Officers Association (CCPOA or Union) alleges that the State of California (Department of Personnel Administration) (State) violated the Ralph C. Dills Act (Dills Act or Act)[1] at section 3515.7 by instructing the Office of the California State Controller to stop collecting fair share fees of nonmembers in Bargaining Unit 6 (BU 6).

Investigation of the charge revealed the following information. CCPOA is the exclusive representative of BU 6 employees of the State. CCPOA and the State were parties to a Memorandum of Understanding (MOU) that expired by its terms on June 30, 2006.

MOU section 3.02 (Agency Shop) provides, in relevant part:

> The fair share shall operate in accordance with the following:
>
> A. The State employer agrees to deduct and transmit to CCPOA all deductions authorized on a form provided by CCPOA, and pursuant to Government Code Section 3515.7, to deduct and transmit to CCPOA all fair share fees from State employees in Unit 6 who do not elect to become members of CCPOA. The State employer agrees to deduct and transmit all deductions and fair share fees during the life of this MOU and after the expiration of this MOU until: (1) a successor agreement is reached, or (2) implementation of the State's last, best, and final offer after negotiations, whichever comes first.

[1] The Dills Act is codified at Government Code section 3512 et seq. The text of the Dills Act and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

From July 2006 through September of 2007, the parties were negotiating a successor MOU. During this period, the State deducted, and transmitted to CCPOA, fair share fees from nonmember BU 6 employees. Further, the State never discussed ending collection of fair share fees under any proposed successor MOU.

On September 12, 2008, the State presented its last, best, and final offer (LBFO) to CCPOA. CCPOA did not accept the State's LBFO.

On September 18, 2007, the State notified CCPOA that, "[p]ursuant to the Ralph C. Dills Act, Government Code Section 3517.8, the State is exercising its right to implement. . . its last, best, and final offer. . . ."

It is alleged that effective October 2007, the State instructed the Office of the State Controller to stop collecting fair share fees of BU6 employees that have not joined CCPOA.

DISCUSSION

The applicable statutory provisions in this case read as follows:

> 3515.7. **Maintenance of membership or fair share fee deductions**
>
> (b) The state employer shall furnish the recognized employee organization with sufficient employment data to allow the organization to calculate membership fees and the appropriate fair share fees, and shall deduct the amount specified by the recognized employee organization from the salary or wages of every employee for the membership fee or the fair share fee. These fees shall be remitted monthly to the recognized employee organization along with an adequate itemized record of the deductions, including, if required by the recognized employee organization, machine readable data. Fair share fee deductions shall continue until the effective date of a successor agreement or implementation of the state's last, best, and final offer, whichever occurs first. The Controller shall retain, from the fair share fee deduction, an amount equal to the cost of administering this section. The state employer shall not be liable in any action by a state employee seeking recovery of, or damages for, improper use or calculation of fair share fees.

3517.8. **Expiration of memoranda of understanding; continued effect.**

(a) If a memorandum of understanding has expired, and the Governor and the recognized employee organization have not agreed to a new memorandum of understanding and have not reached an impasse in negotiations, subject to subdivision (b), the parties to the agreement shall continue to give effect to the provisions of the expired memorandum of understanding, including, but not limited to, all provisions that supersede existing law, any arbitration provisions, any no strike provisions, any agreements regarding matters covered in the Fair Labor Standards Act of 1938 (Chapter 8 (commencing with Section 201) of Title 29 of the United States Code)), and any provisions covering fair share fee deduction consistent with Section 3515.7.

(b) If the Governor and the recognized employee organization reach an impasse in negotiations for a new memorandum of understanding, the state employer may implement any or all of its last, best, and final offer. Any proposal in the state employer's last, best, and final offer that, if implemented, would conflict with existing statutes or require the expenditure of funds shall be presented to the Legislature for approval and, if approved, shall be controlling without further legislative action, notwithstanding Sections 3517.5, 3517.6, and 3517.7. Implementation of the last, best, and final offer does not relieve the parties of the obligation to bargain in good faith and reach an agreement on a memorandum of understanding if any circumstances change, and does not waive any rights that the recognized employee organization has under this chapter.

A. The State is not required to collect fair share fees after implementing its LBFO.

CCPOA argues that the State has an obligation to continue collecting fair share fees of nonmembers in BU6 and remitting them to CCPOA in the same manner that occurred under the parties' expired MOU.

The primary issue here is whether Dills Act section 3515.7 requires the State to continue to collect fair share fees after the State implemented its LBFO. Generally, the provisions of an expired agreement that affect terms and conditions of employment must be maintained until the parties reach impasse in successor negotiations. (State of California (Board of Prison Terms) (2005) PERB Decision No. 1758-S.) However, as the legislative history below demonstrates, an exception was created such that the State is not obligated to collect fair share fees after the State implements its last, best, and final offer.

In Litton Financial Printing Div. v. NLRB (1991) 501 U.S. 190, the United States Supreme Court discussed the principle that an employer cannot, after expiration of a collective bargaining agreement and without bargaining to impasse, effect a unilateral change of an existing term or condition of employment. (Id. at 198.) Many terms and conditions of employment are subject to this prohibition on unilateral changes, which derives from the statutory requirement to bargain in good faith. (Id. at 203.) However, the Supreme Court identified three exceptions to the prohibition on unilateral changes. The exceptions are union security and dues-checkoff provisions, no-strike clauses, and arbitration clauses. (Id. at pp. 199-200.) These provisions do not continue in effect during bargaining without the consent of both parties. (Los Angeles County Association of Environmental Health Specialists v. County of Los Angeles (2002) 102 Cal.App.4th 1112.) With respect to each of the three exceptions, the basis for requiring consent of both the employer and union to the continuation of the provision after expiration of the collective bargaining agreement is statutory. (Ibid.) (See, e.g., Roman Iron Works 292 NLRB 1292, 1293 [Even after the expiration of a collective bargaining agreement, an employer, (and a union), must continue, with the exception of union security and checkoff clauses, the existing terms and conditions of employment, (as represented by the terms of the collective bargaining agreement), until such time as the parties reach an impasse in bargaining, reach a new agreement modifying those terms, or until the employer is legally discharged from its obligation to bargain with the union]; McClatchy Newspapers (1996) 321 NLRB 1386 at 1390 [union security, dues-checkoff, and no-strike provisions are "contract bound" or involve a "statutorily guaranteed right" and could not appropriately be unilaterally thrust upon a party without agreement to be bound].)

Prior to the year 2000, the law under the Dills Act section 3515.7(b) relating to fair share fee deductions stated the following:

> Fair share fee deductions shall continue for the duration of the agreement, or a period of three years from the effective date of the agreement, whichever comes first.

On February 24, 1999, Senate Bill 683 (SB 683) was introduced to amend Government Code section 3515.7 and to add Government Code section 3517.8. In considering the enactment of section 3517.8, the Third Reading analysis of the bill prepared for the Assembly Committee on Public Employees, Retirement and Social Security noted that:

> In the case of DPA v.Greene (1992) [5 Cal.App.4th 1551], the court considered whether the state could unilaterally implement its last, best, and final offer after declaring "impasse" at the bargaining table. The court held that, where the terms are the subject of Government Code provisions which were superceded by the MOU, once the MOU expired, the Government Code provisions spring back into existence, and DPA must implement those provisions. Therefore, DPA can implement its last, best, and final offer only as to those terms not covered by government codes.

Aside from the discussion of the implications of the Greene decision, the legislative history regarding the enactment of this new provision focused on the policy reasons for providing for the continuation of binding grievance arbitration and fair share fees following the expiration of a negotiated agreement. In this respect, the bill analyses prepared for the legislative committees noted the Board's decision in State of California, Department of Youth Authority (1992) PERB Decision No. 962-S. In that case, the Board adopted the holding of Litton Financial Printing v. NLRB, supra, 501 U.S. 190, that negotiated grievance arbitration provisions do not survive the expiration of the agreement.

In 2000, following approval of SB 683, Government Code section 3515.7 was amended and section 3517.8 was added to the Dills Act. In considering the addition of section 3517.8, the sponsor of the bill, CCPOA, noted that:

> The most important, time consuming, and often expensive service a union performs for its bargaining unit is usually the negotiations of a new MOU. . . It is precisely during this period that the union is incurring the expenses which entitle it to the fair share fees of nonmembers who are in the bargaining unit. The union should not be prevented from collecting fees for this representation work.

SB 683 amended the Dills Act to, *inter alia*, provide for the continuation of both binding arbitration and fair share fees upon the expiration of memoranda of understanding but only until a successor agreement has been reached or a last, best, and final offer has been implemented, whichever occurs first. (Gov. Code, § 3515.7(b).)

Here, under Litton Financial Printing v. NLRB, supra, 501 U.S. 190, the State's obligation to collect fair share fees and CCPOA's right to receive them would have otherwise ended when the parties' MOU expired in July 2006. However, because of the amendment to Government Code section 3515.7 and addition of Government Code section 3517.8, CCPOA continued to receive fair share fees deductions for an additional 14 months. While the sponsor of SB 683 emphasized the importance of collecting fair share fees during negotiations when the MOU expires, that duty applies only to the period after the MOU has expired and the parties have not yet reached an impasse in negotiations. (See Gov. Code, §§ 3515.7(b); 3517.8(a).) Accordingly, when the MOU expired in July 2006, the State continued to collect the fair share fees of nonmembers during negotiations in compliance with the Dills Act. The Legislature was clear that that the duty to collect fair share fees is legally discharged upon the State's implementation of its last, best, and final offer. Since the State implemented its LBFO on September 18, 2007, the State's obligation to collect fair share fees terminated.

The same conclusion must be drawn when the above facts are applied to the provision of the MOU relating to fair share fee collection. Here, MOU section 3.02(A) incorporates Dills Act 3515.7 such that, upon the expiration of the MOU, the State is not obligated to deduct and transmit fair share fees to CCPOA when either of the following conditions occurs first: (1) a successor agreement is reached, or (2) implementation of the State's last, best, and final offer

after negotiations. As such, even if one were to argue in this case that the terms and conditions of the agreement survive expiration, the State was discharged from its legal duty to collect fair share fee on September 18, 2007 due to the LBFO implementation.

Therefore, the State's failure to collect fair share fees and remit them to CCPOA does not constitute to an unfair labor practice within the meaning of the Dills Act.

B. The State is not required to implement a fair share fee provision in the LBFO.

Although not clear from the charge, it appears that CCPOA is also alleging that the State must fully implement the entire LBFO and cannot exclude implementation of a portion of the LBFO involved in collecting fair share fees.

Assuming *arguendo* that the State failed to implement the portion of the LBFO relating to fair share fees, Government Code section 3517.8(b) specifically states that upon impasse for a successor MOU, the State "may implement ***any or all*** of its last, best, and final offer." (Emphasis added.) This language in its plain meaning does not require the State to fully implement the entire LBFO. Therefore, the State's alleged failure to implement any fair share fee proposals in its 2007 LBFO does not demonstrate a prima facie violation of the Dills Act.

CONCLUSION

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not received from you before June 17, 2008, your charge shall be dismissed. If you have any questions, please call me at the above telephone number.

Sincerely,

Yaron Partovi
Regional Attorney
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