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-1621-S PERB Decision No. 2017-S April 1, 2009

Appearances: Carroll, Burdick & McDonough by Gregg McLean Adam, Attorney, for California Correctional Peace Officers Association; Paul M. Starkey, Labor Relations Counsel, for State of California (Department of Personnel Administration).

Before McKeag, Neuwald and Wesley, Members.

DECISION

WESLEY, 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 partial dismissal (attached) of its unfair practice charge. The charge alleged that the State of California (Department of Personnel Administration) (State or DPA) violated the Ralph C. Dills Act (Dills Act)[1] by: (1) failing to provide necessary and relevant information; (2) implementing a last, best, and final offer (LBFO) that "supersedes and cancels" prior bargaining history, past practices, and "articulations, understandings, interpretations and/or applications" of the parties' entire agreement article (Section 27.01 of the expired memorandum of understanding), and by placing artificial barriers on future negotiations; (3) implementing the State's LBFO with a three-year duration; (4) implementing

[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.

changes to Chapter President Release Day, the Release Time Bank, and Vice President's Leave that were not reasonably comprehended in the State's LBFO; (5) interfering with CCPOA's protected activity and discriminating against CCPOA in retaliation for prior protected activity; and (6) implementing the LBFO without PERB making a determination of impasse. The Board agent issued a complaint covering certain allegations and dismissed the remaining allegations.[2]

The Board has reviewed the entire record in this case, including but not limited to, the original and amended unfair practice charge; CCPOA's injunctive relief requests, supporting documents and the responses thereto; DPA's position statements; the Board agent's partial warning and dismissal letters; CCPOA's appeal[3] and DPA's response. Based on this review, the Board finds the Board agent's partial warning and dismissal letters to be a correct statement of the law and well reasoned, and therefore adopts them as the decision of the Board itself, as supplemented by the discussion below.[4]

DISCUSSION

The Board agrees with the Board agent's analysis and conclusions regarding the timeliness and merits of the charge allegations on appeal based on the facts alleged in the original and amended charge. Accordingly, we address only the new issues raised on appeal.

---

[2] A complaint issued alleging the State breached its duty to bargain in good faith and interfered with employee and union rights when it implemented a LBFO with a three-year duration and failed to include Vice President's Leave in the implementation plan.

[3] CCPOA did not appeal the dismissal of its allegations regarding the June and August 2007 information requests, post-impasse surface bargaining, entire agreement provision and failure to implement union leave. Therefore, the Board did not consider these charge allegations. Further, CCPOA's request for oral argument is denied.

[4] In *Long Beach Community College District* (2009) PERB Decision No. 2002, the Board held that the statute of limitations is not an affirmative defense but an element of the charging party's prima facie case. In light of this holding, the Board declines to adopt the statement on page 7 of the attached warning letter that states, "The statute of limitations is an affirmative defense which has been raised by the State in this case."

On appeal, CCPOA asserts that the statute of limitations should be equitably tolled while the parties participated in mediation pursuant to Dills Act section 3518. The Board recently addressed this argument in a case involving the same parties. For the reasons discussed in *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2013-S, the statute of limitations was not equitably tolled while the parties engaged in mandatory mediation. Therefore, the Board agent correctly determined that certain allegations were untimely filed.

Also on appeal, CCPOA presents new allegations in support of its claim that the State retaliated against CCPOA's officers and members. CCPOA alleges on appeal that the State did not offer justification for its refusal to implement union leave provisions and that the elimination of these provisions deviated from established procedures and standards. These allegations were not presented to the Board agent for consideration.

PERB Regulation 32635(b)[5] states, "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." CCPOA makes no attempt to demonstrate why good cause exists to consider these allegations on appeal. Thus, these allegations were not considered.

ORDER

The partial dismissal of the unfair practice charge in Case No. SA-CE-1621-S is hereby AFFIRMED.

Members McKeag and Neuwald joined in this Decision.

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

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
Fax: (916) 327-6377

December 7, 2007

Gregg McLean Adam, Attorney
Carroll, Burdick & McDonough
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-1621-S (Second Amended Charge)
PARTIAL DISMISSAL

Dear Mr. Adam:

The above-referenced unfair practice charge was filed on September 25, 2007, and amended on October 2, 2007. The California Correctional Peace Officers Association (CCPOA) alleges that the State of California (Department of Personnel Administration) (State or DPA) violated the Ralph C. Dills Act (Dills Act) at: (1) section 3517 by failing to provide necessary and relevant information requested by CCPOA in the course of the parties' negotiations, and by engaging in bad faith, or surface, bargaining; (2) sections 3516, 3516.5, and 3517 by implementing a last, best, and final offer (LBFO) that "supercedes and cancels" prior bargaining history, past practices, and "articulations, understandings, interpretations and/or applications" of the parties' entire agreement article (Section 27.01 of the expired memorandum of understanding (MOU)), and by placing artificial barriers on future negotiations; (3) section 3517.8 by implementing the State's LBFO with a three-year duration;[1] (4) sections 3517 and 3517.8 by implementing changes to Chapter President Release Day, the Release Time Bank, and State Vice-Presidents Leave that are not reasonably comprehended in the State's LBFO; (5) sections 3515, 3515.5, and 3519 by interfering with CCPOA's protected activity and discriminating against CCPOA in retaliation for prior protected activity; and (6) section 3517.8 by implementing the LBFO without a determination of impasse being made by PERB.

I informed you in the attached Partial Warning Letter dated October 22, 2007, that certain allegations contained in the 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 these allegations to state a prima facie case or withdrew them prior to October 31, 2007, the allegations would be dismissed.

[1] The alleged violation based on implementation of a three-year duration was not addressed by the Partial Warning Letter. This allegation also is not addressed by this Partial Dismissal Letter, and neither is the allegation that the State violated the Dills Act by failing to include State Vice-Presidents Leave in its implementation plan.

Your subsequent requests for additional time in which to amend the charge were granted, and a Second Amended Charge was filed on November 20, 2007.[2] Except for those allegations described in footnote one of this letter, each of the charge allegations will be addressed in the order listed above.

Requests for Information

In the Partial Warning Letter, I concluded that the allegations with respect to pre-impasse requests for information were time-barred, and that the allegations with respect to requests for information made after a mediator was appointed failed to state a prima facie case. In the Second Amended Charge, CCPOA argues the pre-impasse requests for information should be considered timely under the continuing violations doctrine. However, as the Board held in *State of California (Department of Corrections)* (2003) PERB Decision No. 1559-S (*Corrections*), one of the cases relied upon by CCPOA, to find a continuing violation, "new conduct independent of the original conduct must occur during the limitations period." (See, also, *State of California (Department of Consumer Affairs)* (1994) PERB Decision No. 1066-S; *El Dorado Union High School District* (1984) PERB Decision No. 382.) Here, as in *Corrections*, the charge fails to establish that the State unlawfully refused to provide requested information during the six-month period preceding the filing of the charge.

CCPOA also argues, with respect to the requests for information made during mediation, and my observation in the Partial Warning Letter that it was not clear the questions submitted to the mediator on June 25, 2007 were ever presented to the State, that CCPOA should have an opportunity at hearing to present evidence demonstrating the questions were presented to and not answered by the State. However, PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*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.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

For these reasons, as well as those set forth in the Partial Warning Letter, these allegations shall be dismissed.

Surface Bargaining

In the Partial Warning Letter, I further concluded that the allegation of surface bargaining was also time-barred. CCPOA argues this allegation is also timely based on the continuing

[2] The statement of the charge attached to the Second Amended Charge is labeled "Addendum to Second Amended Unfair Practice Charge." The analysis herein is based on an assumption that the reference to "Addendum" is intended to denote that the Second Amended Charge supplements, and does not supplant, the charge as originally filed and earlier amended.

violations doctrine. However, the Second Amended Charge does not allege any additional facts with respect to conduct by the State that occurred pre-impasse and during the six-month period preceding the filing of the instant charge. Thus, pursuant to *Corrections*, the surface bargaining allegation must be dismissed as untimely.

The Second Amended Charge does not address the analysis found at page 8 of the Partial Warning Letter with respect to a possible violation of Government Code section 3519(e). Thus, this allegation is dismissed for the reasons set forth in the Partial Warning Letter.

Entire Agreement

The Second Amended Charge does not appear to address the analysis of this allegation found at pages 8 and 9 of the Partial Warning Letter. Thus, this allegation is dismissed for the reasons set forth in the Partial Warning Letter.

Implementation of Changes Not Comprehended within LBFO (Union Leave)[3]

Release Time Bank

In the Second Amended Charge, CCPOA correctly notes that the discussion in the Partial Warning Letter erred factually by stating that changes to the Release Time Bank provision of the expired MOU were not included in the State's LBFO. However, the Partial Warning Letter did correctly quote the State's letter with respect to the implementation on this point. In its letter, the State stated that Release Time Bank would continue "consistent with the terms and conditions" of a stipulated settlement.

According to CCPOA, the reference to the stipulated settlement with regard to the Release Time Bank provided for lesser benefits than were proposed earlier by the State, including in the LBFO.[4] However, as discussed in the Partial Warning Letter, the applicable test is whether the State implemented changes the parties did not discuss during negotiations "which are less than the status quo." (*Laguna Salada Union School District* (1995) PERB Decision No. 1103; emphasis added.) The charge does not establish that the State's continuation of the Release Time Bank "consistent with the terms and conditions" of a stipulated settlement constituted a changes that was less than the status quo. This allegation must therefore be dismissed.

[3] As noted earlier, this Partial Dismissal Letter does not address allegations with respect to State Vice-Presidents Leave.

[4] The State, including in its LBFO, made proposals regarding various changes to the Release Time Bank provision. The proposed changes included an increase in the bankable hours from 10,000 to 35,000.

Chapter Presidents' Release Day

In its Second Amended Charge, CCPOA's representative alleges that the status of this benefit is "not clear," but that "counsel preparing this charge is aware of no official correspondence received by CCPOA that ends the benefit." Absent factual allegations establishing that this benefit was terminated by the State, no violation may be found, and allegations concerning this benefit are dismissed.

Discrimination/Retaliation

In the Partial Warning Letter, I concluded that this allegation lacked "factual foundation to support an inference that the State's actions were caused by any protected activity on the part of CCPOA or its members." The Second Amended Charge, while it elaborates on actions of CCPOA, its officers, and members, does not cure the defect identified by the Partial Warning Letter. For this reason, and based on the facts and reasons contained in the Partial Warning Letter, this allegation is dismissed.

Implementation without Determination of Impasse

The discussion of this allegation in the Partial Warning Letter consisted of the following:

> CCPOA also alleges in the amended charge that Dills Act section 3517.8 requires a determination of impasse by PERB in order for the State to implement its LBFO, and that the State unilaterally implemented in this case without a determination of impasse. However, as previously discussed, PERB did make an impasse determination leading to the appointment of a mediator in this dispute in May 2007, and neither the statute nor PERB regulations provides for a subsequent administrative determination regarding impasse by PERB. PERB's regulations reference Government Code section 3518 with regard to a determination of impasse and appointment of a mediator under the Dills Act, but there is no reference in the applicable regulations to Dills Act section 3517.8. For these reasons, this allegation also fails to state a prima facie violation.

The Second Amended Charge concludes that the above-quoted analysis "makes no sense," but offers no authority in statute, regulation, or case law to support finding a violation on the grounds alleged. Thus, this allegation must also be dismissed.

Conclusion

Based on the facts and reasons set forth in this letter and the attached Partial Warning Letter, each and all of these allegations are dismissed for failure to state a prima facie case.

Right to Appeal

Pursuant to PERB Regulations,[5] you may obtain a review of this dismissal by filing an appeal with 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. (Regulation 32135(b), (c) and (d); see also Regulations 32090 and 32130.)

The Board's address is:

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

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

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 _____
Les Chisholm
Division Chief

Attachment

cc: Paul M. Starkey

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
Fax: (916) 327-6377

October 22, 2007

Gregg McLean Adam, Attorney
Carroll, Burdick & McDonough
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-1621-S
PARTIAL WARNING LETTER

Dear Mr. Adam:

The above-referenced unfair practice charge was filed on September 25, 2007, and amended on October 2, 2007. The California Correctional Peace Officers Association (CCPOA) alleges that the State of California (Department of Personnel Administration) (State or DPA) violated the Ralph C. Dills Act (Dills Act) at: (1) section 3517 by failing to provide necessary and relevant information requested by CCPOA in the course of the parties' negotiations, and by engaging in bad faith, or surface, bargaining; (2) sections 3516, 3516.5, and 3517 by implementing a last, best, and final offer (LBFO) that "supercedes and cancels" prior bargaining history, past practices, and "articulations, understandings, interpretations and/or applications" of the parties' entire agreement article (Section 27.01 of the expired memorandum of understanding (MOU)), and by placing artificial barriers on future negotiations; (3) section 3517.8 by implementing the State's LBFO with a three-year duration;[1] (4) sections 3517 and 3517.8 by implementing changes to Chapter President Release Day, the Release Time Bank, and Vice President Leave that are not reasonably comprehended in the State's LBFO; (5) sections 3515, 3515.5, and 3519 by interfering with CCPOA's protected activity and discriminating against CCPOA in retaliation for prior protected activity; and (6) section 3517.8 by implementing the LBFO without a determination of impasse being made by PERB.

Facts[2]

CCPOA is the exclusive representative of State Bargaining Unit 6 – Corrections. The most recent MOU between CCPOA and the State expired by its own terms as of June 30, 2006. By letter dated April 13, 2006, DPA notified CCPOA of its readiness to commence bargaining toward a successor MOU. Attached to that letter was a four-page statement of the State's

[1] The alleged violation based on implementation of a three-year duration is not addressed by this Partial Warning Letter.

[2] Notice has been taken of the contents of PERB's files concerning a related impasse case, PERB Case No. SA-IM-3041-S.

initial bargaining proposals. On July 30, 2006, DPA presented a more detailed and voluminous set of contract proposals. The proposed term of the new MOU at that point was from the date of ratification to June 30, 2008.

DPA Director Dave Gilb appeared at the negotiations session of March 29, 2007 to explain the concepts of a new package that the State had prepared on March 22. At that meeting CCPOA President Mike Jimenez repeatedly interrupted Gilb and ultimately advised him to stop "wasting his time." Following the break up of that meeting, CCPOA's President wrote to DPA and advised that "as long as DPA chooses to engage in the obvious gamesmanship the current offer exudes, we can do nothing but sit back and watch as valuable time slips away." This April 2 response concluded with "please consider this (letter) a counterproposal." The letter contained no specific contract language.

On April 3, 2007, DPA attempted to schedule further meetings but received no response. On April 6, 2007, DPA sent the March 22 proposal, including a three-year duration but with an option for a fourth year.

On April 6, 2007, CCPOA sent two letters to DPA, one an opinion letter from Jimenez in which he concludes with a purported quote from Woodrow Wilson: "Nothing chills pretense like exposure." The second letter from CCPOA Chief of Labor Steve Weiss was an information request seeking background on reasons for DPA's attempt to reduce the entire agreement clause of the contract and expand the management rights provisions.

The State again attempted to get dates for further meetings. On April 11, 2007, DPA wrote to CCPOA and accused CCPOA of stalling and asking for information it must already have, e.g., the total number of grievances outstanding and copies of grievances in which the State's response was untimely.

On April 13, 2007, Jimenez wrote to DPA and stated:

> ...it seems that each time we get together we grow further apart. Accordingly, since you feel so strongly about the generosity of your offer and your perceived legitimate management needs, the CCPOA Executive Council has decided to eliminate any further unhealthy interactions and permit you to send out your proposal for a vote of the CCPOA membership. We have no intention of delaying, frustrating or aggravating the negotiations process.

On April 20, 2007, CCPOA's attorney, Gregg Adam, wrote to DPA and stated "we have no confidence that an agreement can be reached with the State's present proposal as the framework for negotiations." He continued by indicating that CCPOA had multiple proposals that had not yet been given to DPA.

On May 10, 2007, the State filed with PERB a Request for Impasse Determination/ Appointment of Mediator (PERB Case No. SA-IM-3041-S). CCPOA opposed the request but the request was approved and a mediator appointed on May 17, 2007.

On August 22, 2007, just prior to a scheduled mediation session, CCPOA informed the mediator that it was withdrawing from mediation and would not participate further.[3] Later that day, DPA submitted to CCPOA a 300-plus page package proposal, stating the offer would remain "on the table" for two weeks. The proposal was for a MOU of three years duration, expiring on June 30, 2010. CCPOA responded to the August 22 proposal by letter dated August 31, 2007. The response stated that the proposal had been reviewed with delegates to a CCPOA training conference, and that the delegates had approved a motion to submit 30 questions about the August 22 package proposal (with a request that the correspondence, the questions, and any response to the questions be posted on the DPA website).

By letter dated September 4, 2007, DPA Director Gilb responded to CCPOA Executive Vice President Chuck Alexander. Responding specifically to CCPOA claims that it could not enter into agreements that it did not understand, and thus needed to ask and receive responses to questions about the proposals, Gilb's letter, in part, stated:

> Any lack of understanding on the part of the CCPOA negotiating team is calculated ignorance. The State has been attempting to bargain/mediate a successor MOU for well over a year with CCPOA. CCPOA, however, has made it abundantly clear that it is not interested in a new contract. CCPOA has not supplied even one substantive proposal or counterproposal during this entire process. All CCPOA has done is reject each of the State's offers and has proposed only that the language of the expired MOU remain.
>
> Regardless of the number of times that the State provides responses to CCPOA's endless supply of questions, the volume of documents provided in response to CCPOA's requests for information, the compromises the State has made in its proposals, CCPOA's refrain is the same: "We don't trust the State and we don't understand the State's proposals." CCPOA may well distrust the State, but with respect to the State's proposals, CCPOA simply does not like or agree with them. I think you certainly understand them.

Addressing the 30 questions, Gilb's letters refers to them as "simply rhetorical or inconsequential," or as already responded to, or that a "simple reading of the proposed

[3] The assigned mediator notified PERB of CCPOA's action by letter dated September 6, 2007, and PERB records show Case No. SA-IM-3041-S as closed effective September 10, 2007 (the date of receipt of the mediator's letter).

language would answer," or as ones that CCPOA already knows the answer to, or as "simply baffling." That said, Gilb's letter provides a response to 15 of the questions.

On September 12, 2007, the State presented its formal Last, Best and Final Offer to CCPOA, with a proposed duration until June 30, 2010. CCPOA rejected the offer on September 17, 2007. On September 18, 2007, DPA notified CCPOA that, pursuant to Dills Act section 3517.8, the State was "exercising its right to implement all three years of its last, best and final offer as indicated [in an attached table] and subject to Legislative funding of expenditures." The implementation letter also concluded with the following paragraph:

> In the absence of a contract, union paid leave, among other things, no longer exists as the parties have previously understood it. To the extent that the union executive leadership desires to remain off work (outside of an institution/facility), please contact [DPA] no later than close of business on September 25, 2007, to discuss how this could be accomplished extra-contractually. Release Time Bank, however, will continue consistent with the terms and conditions of the July 1, 2008, [sic] Stipulated Settlement (Case # 05AS05470).

By letter dated September 20, 2007, Margie McCune, Chief, Office of Labor Relations, of the California Department of Corrections & Rehabilitation (CDCR), informed CDCR administrators that Chapter President Release Day[4] would end as of October 1, 2007, and that any [CCPOA] Chapter President designated to utilize a release day should be required to report for duty per their normal work schedule.

Statutory Provisions

The statutory provisions applicable to this case are as follows:

> 3517. **Meet and confer in good faith**
>
> 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.

[4] The Chapter President Release Day, which permits each CCPOA chapter president one day per week to conduct union business (e.g., filing grievances) was first agreed to in 2004 as a part of the Addendum to the 2001-2006 MOU.

"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.

3517.61. **State employees in State Bargaining Unit 6; application of memorandum of understanding**

Notwithstanding Section 3517.6, for state employees in State Bargaining Unit 6, in any case where the provisions of [certain statutes] are in conflict with the provisions of a memorandum of understanding, the memorandum of understanding shall be controlling without further legislative action. In any case where the provisions of [certain statutes] are in conflict with the provisions of a memorandum of understanding, the terms of the memorandum of understanding shall be controlling unless the State Personnel Board finds those terms to be inconsistent with merit employment principles as provided for by Article VII of the California Constitution. Where this finding is made, the provisions of the Government Code shall prevail until those affected sections of the memorandum of understanding are renegotiated to resolve the inconsistency. If any provision of the memorandum of understanding requires the expenditure of funds, those provisions of the memorandum of understanding may not become effective unless approved by the Legislature in the annual Budget Act. If any provision of the memorandum of understanding requires legislative action to permit its implementation by amendment of any section not cited above, those provisions of the memorandum of understanding may not become effective unless approved by the Legislature.

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.

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 155], 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 considering the legislation 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* (1991) 501 U.S. 190, that negotiated grievance arbitration provisions do not survive the expiration of the agreement.

Requests for Information

The exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation. (*Stockton Unified School District* (1980) PERB Decision No. 143.) PERB uses a liberal standard, similar to a discovery-type standard, to determine relevance of the requested information. (*California State University* (1986) PERB Decision No. 613-H.) Failure to provide such information is a per se violation of the duty to bargain in good faith.

The duty to bargain in good faith includes the obligation of each party to explain the reasons for a bargaining position sufficient to "permit the negotiating process to proceed on the basis of mutual understanding." (*Jefferson School District* (1980) PERB Decision No. 133.) However, the Board's discussions of this obligation are distinguished from that found in "request for information" cases, first because the failure to provide relevant and necessary information is held to per se violate the duty to bargain (*Stockton Unified School District, supra,* PERB Decision No. 143), while the failure to adequately explain a bargaining proposal or position is considered within the totality of circumstances. (*Compton Community College District* (1989) PERB Decision No. 728.) In addition, "request for information" cases deal with just that, requests for information; alleged violations based on requests for a party's thought process are outside the scope of such cases. (See, for example, *Ventura County Community College District, supra,* PERB Decision No. 1340.)

Here, the alleged violations based on the June 6 and 7, August 4, September 6, and November 6, 2006 information requests are time-barred by Dills Act section 3514.5(a)(1), which prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The statute of limitations is an affirmative defense which has been raised by the State in this case. (Long Beach Community College District (2003) PERB Decision No. 1564.) Therefore, charging party now bears the burden of demonstrating that the charge is timely filed. (cf. Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

The facts surrounding the June 25 and August 31, 2007 requests, which were made after the parties were in mediation, also fail to establish prima facie evidence that an unfair practice has been committed. This conclusion is reached based on the questions themselves that were submitted by CCPOA (most of which were of the "why are you proposing a change" variety), the absence of evidence that the June 25 questions were even presented to the State as a "request for information," and the fact that the State did respond in writing to the August 31 questions without any subsequent renewal of the request by CCPOA. (See, for example, *King City Joint Union High School District* (2005) PERB Decision No. 1777 [no violation found where the exclusive representative did not express dissatisfaction with the employer's responses to its information requests, nor did the union clearly communicate its disagreement with the employer sufficiently to require a more detailed response].)

Surface Bargaining

The charge alleges that the employer violated Dills Act sections 3517 and 3519(c) by engaging in bad faith or "surface" bargaining. It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (*Muroc Unified School District* (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (*Oakland Unified School District* (1982) PERB Decision No. 275.)

It is clear, however, that while a party may not merely go through the motions, it may lawfully maintain an adamant position on any issue. Adamant insistence on a bargaining position is not necessarily refusal to bargain in good faith. (*Oakland Unified School District, supra,* PERB Decision No. 275.) "The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (*NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229 [45 LRRM 2829, 2830].)

Here, the allegation of bad faith bargaining in violation of Government Code section 3519(c) is based entirely on conduct outside the six months statute of limitations, as it relies on the alleged failure of the State to respond to information requests submitted between June 6 and November 6, 2006, and the alleged unresponsiveness of State representatives at bargaining sessions held in September 2006.

Additionally, while not time-barred, the alleged failure of the State to participate in good faith in statutory impasse procedures in violation of Government Code section 3519(e), under a surface bargaining theory, is also unpersuasive, as the only conduct in question concerns the June 25 and August 31, 2007 "requests for information" discussed above.[5]

Entire Agreement

CCPOA's amended charge includes an allegation that the State's implementation violates the Dills Act based on DPA's statement that the LBFO "supercedes and cancels" prior bargaining history, past practices, and other interpretations of the parties under Section 27.01 (the Entire Agreement article) of the expired MOU. The charge then cites language of changes to Section 27.01 proposed by DPA in the course of bargaining.

[5] CCPOA does not expressly allege a violation of Dills Act section 3519(e), but it is necessary under applicable precedent to analyze conduct before and after the initiation of statutory impasse procedures as separate unfair practice allegations. (See *Moreno Valley Unified School District v. Public Employment Relations Board* (1983) 142 Cal.App.3d 191 and, for example, *Temple City Unified School District* (1990) PERB Decision No. 841.)

This allegation, however, appears to overlook a statement made in documents accompanying the State's notice to CCPOA of the implementation of terms and conditions. The statement is that, "Any provision of the expired MOU that has terminated by virtue of implementation, referenced in an implemented term, such as any variation of the entire agreement requirements or arbitration, is no longer operable or applicable."

The theory of CCPOA's allegation in this regard is not clear. An employer may not unilaterally impose a waiver or limitation on a union's right to bargain. (*Rowland Unified School District* (1994) PERB Decision No. 1053.) An entire agreement article, whatever its particular terms, has as an essential characteristic a limitation on both parties' right and/or duty to bargain during the term of an agreement. DPA's omission of the entire agreement article, and of any changes to it, from its implementation appears consistent with the relevant case law, and thus does not support finding a violation.

Implementation of Changes Not Comprehended within LBFO (Union Leave)

As observed by the Board in *Laguna Salada Union School District* (1995) PERB Decision No. 1103 (*Laguna Salada*), citing *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416, it is well established that public-sector employers in California may lawfully make unilateral changes in terms and conditions of employment only after completing statutory impasse procedures. As stated by the Board in *Modesto City Schools* (1983) PERB Decision No. 291, "impasse under EERA is identical to impasse under the NLRA; either party may decline further requests to bargain, and the employer may implement policies reasonably comprehended within previous offers made and negotiated between the parties."

However, the "term 'reasonably comprehended' excludes those changes better than the last offer and also any changes which the parties did not discuss during negotiations which are less than the status quo." (*Laguna Salada*, citing *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

This issue would, under certain facts, ultimately require reconciling the "any or all" language of section 3517.8, the term "reasonably comprehended" as discussed in *Laguna Salada* and other cases, and the holdings of *Litton* with respect to provisions of a MOU that do not survive expiration of the agreement. While CCPOA is correct that *Litton* does not address union leave, there remains the question whether the Legislature intended, in adopting section 3517.8, to leave in place existing provisions of a MOU, when the State unilaterally imposes terms and conditions and has not previously proposed deletion of the disputed items.

In the instant case, though, it is not necessary to answer the question. Although CCPOA alleges that changes to Chapter President Release Day, Release Time Bank, and Vice President Leave were not "contemplated" by the State's LBFO, the documents submitted with its charge do not support such a conclusion. The package offer presented by DPA on September 12, 2007, and identified as the State's Last, Best and Final Offer, included the following relevant

provisions, and did not include specific reference to changes in either Chapter President Release Day[6] or Vice President Leave:

> The State continues to propose to update the MOU to recognize the parties' settlement of the annual donation and use cap of 35,000 hours of release time bank. In addition, permit rank and file Chapter Presidents to utilize this Release Time Bank instead of the former weekly official business/State release time.
>
> **********
>
> All sections of the MOU and addenda not identified in any of the above proposals are deleted.

In its notice of implementation, the State's letter, in relevant part, stated that:

> In the absence of a contract, union paid leave, among other things, no longer exists as the parties have previously understood it. To the extent that the union executive leadership desires to remain off work (outside of an institution/facility), please contact [DPA] to discuss how this could be accomplished extra-contractually. Release Time Bank, however, will continue consistent with the terms and conditions of the July 1, 2008 [sic] Stipulated Settlement (Case # 05AS05470).

A comparison of the relevant provisions of the LBFO and the notice of implementation does not factually support a conclusion that the State implemented changes in this respect that were not contemplated by the LBFO.[7]

Discrimination/Retaliation

To demonstrate a violation of Dills Act section 3519(a), the charging party must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained, or coerced the employees because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *Carlsbad Unified School District* (1979) PERB Decision No. 89.)

---

[6] At least one earlier package offer included a proposal to delete Chapter President Release Day but to allow such time to be charged to the Release Time Bank.

[7] I note, but do not rely upon for purposes of this letter, the State's subsequent written notification to CCPOA that "any communications concerning the cancellation of Chapter Presidents Release Time," as well as any communications received by union officials directing a return to work, were rescinded.

However, PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Thus, the charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*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.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

This aspect of CCPOA's charge lacks factual foundation to support an inference that the State's actions were caused by any protected activity on the part of CCPOA or its members.

Implementation without Determination of Impasse

CCPOA also alleges in the amended charge that Dills Act section 3517.8 requires a determination of impasse by PERB in order for the State to implement its LBFO, and that the State unilaterally implemented in this case without a determination of impasse. However, as previously discussed, PERB did make an impasse determination leading to the appointment of a mediator in this dispute in May 2007, and neither the statute nor PERB regulations provides for a subsequent administrative determination regarding impasse by PERB. PERB's regulations reference Government Code section 3518 with regard to a determination of impasse and appointment of a mediator under the Dills Act, but there is no reference in the applicable regulations to Dills Act section 3517.8. For these reasons, this allegation also fails to state a prima facie violation.

Conclusion

For these reasons the allegations that the State violated the Dills Act at: section 3517 by failing to provide necessary and relevant information requested by CCPOA in the course of the parties' negotiations, and by engaging in bad faith, or surface, bargaining; sections 3516, 3516.5, and 3517 by implementing a last, best, and final offer (LBFO) that "supercedes and cancels" prior bargaining history, past practices, and "articulations, understandings, interpretations and/or applications" of the parties' entire agreement article (Section 27.01 of the expired memorandum of understanding (MOU)), and by placing artificial barriers on future negotiations; sections 3517 and 3517.8 by implementing changes to Chapter President Release Day, the Release Time Bank, and Vice President Leave that are not reasonably comprehended in the State's LBFO; sections 3515, 3515.5, and 3519 by interfering with CCPOA's protected activity and discriminating against CCPOA in retaliation for prior protected activity; and section 3517.8 by implementing the LBFO without a determination of impasse being made by PERB, as presently written, do 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 Second 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 I do not receive an amended charge or withdrawal from you before October 31, 2007, I shall dismiss the above-described allegations from your charge. If you have any questions, please call me at the telephone number listed above.

Sincerely,

Les Chisholm
Division Chief