

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



STATIONARY ENGINEERS LOCAL 39,
INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL-CIO,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENT OF
PERSONNEL ADMINISTRATION),

Respondent.

Case No. SA-CE-1747-S

PERB Decision No. 2078-S

November 24, 2009

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO; Jake M. Hurley, Labor Relations Counsel, for State of California (Department of Personnel Administration).

Before Dowdin Calvillo, Acting Chair; Neuwald and Wesley, Members.

DECISION

DOWDIN CALVILLO, Acting Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Stationary Engineers Local 39, International Union of Operating Engineers, AFL-CIO (Local 39), of a Board agent's dismissal of its unfair practice charge. The charge alleged that the State of California (Department of Personnel Administration) (DPA or State) violated the Ralph C. Dills Act (Dills Act)¹ by: (1) failing to make or respond to economic proposals during bargaining; (2) failing to respond to information requests;² (3) making bargaining proposals directly to employees; and (4) claiming it had no authority to bargain over economic items after stating at the outset of negotiations

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

² Local 39 does not appeal the dismissal of this allegation and therefore we do not address it further.

that it had such authority. The Board agent dismissed the charge for failure to state a prima facie case of bad faith bargaining.

The Board has reviewed the dismissal and the record in light of Local 39's appeal, DPA's response and the relevant law. Based on this review, the Board affirms the dismissal of the charge for the reasons discussed below.

BACKGROUND

Local 39 is the exclusive representative of employees in State Bargaining Unit 13. Local 39 and the State were parties to a collective bargaining agreement covering Unit 13 that expired on June 30, 2008.

On April 13, 2008, Local 39 sunshined proposals for a successor agreement. On May 8, Local 39 and DPA agreed on ground rules for negotiations. The parties held 11 negotiation sessions from June 4 through November 5, 2008. The parties reached tentative agreement on a number of non-economic items during these sessions. However, as of the eleventh session, DPA had not made an economic proposal nor had it responded to Local 39's economic proposals.

DPA negotiators asserted during the May 8, 2008 meeting over ground rules that they had authority to negotiate with Local 39 over all issues. Sometime later, DPA negotiators told Local 39 they had no authority to address economic proposals until after the State budget was passed. After the budget passed, DPA negotiators continued to claim they had no authority to negotiate over economic items.³

³ In its position statement, DPA contended its negotiators had full authority to negotiate all proposals with Local 39. When there is a material factual dispute at the investigation stage, PERB must accept the charging party's allegations as true. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489; *San Juan Unified School District* (1977) EERB* Decision No. 12.) Accordingly, we assume as true the statements attributed to DPA's negotiators by Local 39. (*Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.)

On November 4, 2008, Local 39 representatives attended an informational briefing where DPA representatives informed them the Governor would be holding a press conference soon to discuss the State budget crisis. The DPA representatives said the Governor was considering several proposals that would impact State employees, including one furlough day per month, a reduction in holiday premium pay, changes in overtime calculation methods, and the elimination of Columbus Day and Lincoln's Birthday as State holidays. DPA told Local 39 "not to discuss this and to allow the Governor to hold his press conference and/or make his statement."

On November 6, 2008, the Governor issued a letter to all State employees informing them of "a projected \$11 billion revenue shortfall this fiscal year." The letter detailed four measures affecting State employees that would be proposed to the Legislature as part of the Governor's plan to close the budget gap: (1) one furlough day per month for 18 months; (2) elimination of Columbus Day and Lincoln's Birthday as State holidays; (3) increased ability to work four ten-hour days per week (4/10 workweek); and (4) elimination of leave time from overtime calculation. The letter assured State workers:

we are working closely with union leadership to achieve results in the least painful way possible. All the actions we're proposing must first be approved by the Legislature.

Unfair Practice Charge, Dismissal and Appeal

Local 39 filed the instant unfair practice charge on November 14, 2008. The charge alleged, in relevant part, that DPA violated Dills Act section 3519, subdivisions (a), (b) and (c), and sections 3516 and 3516.5, by engaging in surface bargaining, delaying negotiations through its negotiators' lack of authority, and bypassing Local 39 and dealing directly with employees.

The Board agent dismissed the first two allegations on the ground that the charge failed to allege other indicia of bad faith. He dismissed the bypass allegation because the Governor's letter did not ask employees to bargain about or agree to the proposals it announced.

On appeal, Local 39 argues it need not allege other indicia of bad faith because a negotiator's lack of authority "is fatal to the negotiation process." Local 39 also contends that the Governor's letter was coercive because it was intended to turn bargaining unit members against Local 39.

DISCUSSION

1. Bad Faith Bargaining

Local 39's charge alleged that DPA violated Dills Act section 3519, subdivision (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.)

Factors that indicate surface bargaining include: (1) entering negotiations with a "take-it-or-leave-it" attitude (*General Electric Co.* (1964) 150 NLRB 192, 194, enf. 418 F.2d 736); (2) recalcitrance in the scheduling of meetings (*Oakland Unified School District* (1983) PERB Decision No. 326); (3) dilatory and evasive tactics including canceling meetings or failing to prepare for meetings (*ibid.*); (4) conditioning agreement on economic matters upon prior agreement on non-economic subjects (*State of California (Department of Personnel*

Administration) (1998) PERB Decision No. 1249-S); (5) negotiator's lack of authority which delays and thwarts the bargaining process (*Stockton Unified School District* (1980) PERB Decision No. 143); (6) insistence on ground rules before negotiating substantive issues (*San Ysidro School District* (1980) PERB Decision No. 134); and (7) reneging on tentative agreements the parties already have made (*Charter Oak Unified School District* (1991) PERB Decision No. 873; *Stockton Unified School District, supra*; *Placerville Union School District* (1978) PERB Decision No. 69).

a. *Failure to Make or Respond to Economic Proposals*

The charge alleged that DPA engaged in surface bargaining by failing both to make economic proposals of its own and to respond to Local 39's economic proposals. On appeal, Local 39 states that DPA took "non-substantive positions" during bargaining but does not directly address DPA's alleged failure to negotiate over economic items. DPA argues that this portion of the appeal fails to comply with PERB Regulation 32635(a).⁴ The regulation, however, requires only that the appeal provide the respondent and the Board with sufficient notice of the issues raised on appeal. (*United Teachers – Los Angeles* (1989) PERB Decision No. 738.) The appeal states that Local 39 is appealing the dismissal of the surface bargaining allegation, which includes DPA's failure to make and respond to economic proposals. PERB Regulation 32635(a) is therefore satisfied.

DPA does not dispute the allegation that it did not make any economic proposals or respond to economic proposals made by Local 39. However, this conduct in itself is insufficient to establish bad faith bargaining. The facts alleged in the charge are similar to those before the Board in *State of California (Department of Personnel Administration)* (1986)

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

PERB Decision No. 569-S.) In that case, the Governor and Legislature were negotiating over the total amount to be allocated for employee compensation in the budget for the upcoming fiscal year. At the same time, DPA was negotiating with the State attorneys' union on re-opener items. DPA deferred bargaining over economic items pending resolution of the budget negotiations but negotiated and reached tentative agreement on a number of non-economic items.

After examining the totality of DPA's bargaining conduct, the Board concluded that DPA's deferral of bargaining over economic items did not constitute bad faith bargaining. The Board stated that it is permissible for an employer to defer bargaining over economic items when its financial situation is uncertain, citing *San Mateo County Community College District* (1979) PERB Decision No. 94 and *National Labor Relations Board v. Minute Maid Corp.* (5th Cir. 1960) 283 F.2d 705. The Board found the fiscal uncertainty caused by the disagreement between the Governor and the Legislature over the amount of funds available for State employee compensation sufficient to justify DPA's deferral of bargaining over economic items. The Board also found that DPA had reached tentative agreement with the attorney's union on several non-economic items. Based on these findings, the Board held that DPA's bargaining conduct did not establish that "DPA lacked the requisite intent to reach an agreement with [the union]."

In a later case, PERB held that it does not constitute bad faith bargaining for DPA to defer making a firm proposal on economic items until it "has had an opportunity to review the final budget in good faith in order to determine the funds potentially available for salary increases." (*State of California, Department of Personnel Administration* (1990) PERB Decision No. 823-S.) Accordingly, DPA's failure in this case to present or respond to

economic proposals prior to the passage of the final budget for the 2008-2009 fiscal year did not constitute bad faith bargaining.

After the FY 2008-2009 budget passed, DPA negotiators continued to state they could not bargain over economic items. Typically, passage of the budget resolves any uncertainty over the amount of funds available for State employee compensation for that budget year. However, as the Governor's November 6, 2008 letter indicated, the State faced a projected \$11 billion revenue shortfall almost immediately after the FY 2008-2009 budget passed. In light of this continuing uncertainty over the State's fiscal condition due to economic circumstances that were far more severe than during the period at issue in *State of California (Department of Personnel Administration)*, *supra*, PERB Decision No. 569-S, DPA's deferral of bargaining over economic items was justified. Moreover, just as in that prior case, DPA and Local 39 had reached tentative agreement on a number of non-economic items. Thus, we conclude that DPA's failure to present or respond to economic proposals between June and November 2008 did not constitute or indicate bad faith bargaining.

b. *Negotiators' Lack of Authority to Bargain Over Economic Items*

The main focus of Local 39's appeal of the dismissal of the surface bargaining allegation is that DPA's negotiators lacked authority to bargain over economic items. Local 39 disagrees with the Board agent's conclusion that such lack of authority, standing alone, was insufficient to state a *prima facie* case of bad faith bargaining:

It is inconceivable that this can be the rationale for refusing to issue a complaint. Nothing can be more fundamental to a charge of failure to bargain in good faith than the negotiators for one party refusing to negotiate on the basis that they had no authority to do so. It is fatal to the negotiation process.^[5]

⁵ We disagree with DPA's contention that this language constitutes new allegations raised for the first time on appeal in violation of PERB Regulation 32635(b).^{*} While the appeal does not state, as the charge did, that DPA's negotiators lacked authority to negotiate economic items, given that the parties did reach agreement on several non-economic items,

PERB has long held that a negotiator's lack of authority to bind the employer to a final agreement is insufficient in itself to establish bad faith bargaining. In *San Ramon Valley Unified School District* (1979) PERB Decision No. 111, the Board quoted with approval the following passage from *National Labor Relations Board v. Fitzgerald Mills Corp.* (2d Cir. 1963) 313 F.2d 260, cert. den. (1963) 375 U.S. 834:

If in other respects good faith is found it is not enough to establish an unfair labor practice solely that the representative of the Company was not empowered to enter into a binding agreement.

(*Id.* at p. 267.)

PERB has since held that it is not an unfair practice for a negotiator to discuss issues and make proposals that are subject to ratification by the employer.⁶ (*Oakland Unified School District, supra*, PERB Decision No. 326.) Such conduct constitutes an unfair practice only when the negotiator's limited authority "was intended to or was used to foreclose the achievement of any agreement." (*State of California (Department of Personnel Administration), supra*, PERB Decision No. 569-S.)

Here, assuming as we must that DPA's negotiators lacked authority to bargain over economic items, this limitation did not delay or thwart the negotiation process. Just as in *State of California (Department of Personnel Administration), supra*, PERB Decision No. 569-S, the

Local 39's appeal cannot be read to allege that DPA's negotiators had no authority to bargain over *any* subject. (*PERB Reg. 32635(b) provides in full: "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence.")

⁶ Indeed, the Dills Act establishes just such a system. Dills Act section 3517.5 provides that any agreement between the Governor and an employee organization "shall be presented, when appropriate, to the Legislature for determination." Section 3517.6, subdivision (b) provides that any collective bargaining agreement that requires an expenditure of funds or legislative action for implementation does not become binding on the parties until approved by the Legislature.

limitation on DPA negotiators was due to continuing uncertainty over the amount of funds that would be available for State employee compensation. Because this uncertainty justified DPA's deferral of bargaining over economic items, the fact that DPA negotiators lacked authority to bargain over such items while the uncertainty continued did not delay or thwart negotiations. Thus, the limitation on DPA negotiators' authority did not constitute or indicate bad faith bargaining.

Nor does the allegation in the charge that DPA negotiators initially represented they had authority to bargain over economic items, only to later claim they had no such authority, indicate that DPA bargained in bad faith. In *Chino Valley Unified School District* (1999) PERB Decision No. 1326, the district twice endorsed its lead negotiator's authority to reach agreement. After a tentative agreement was reached, the district reneged on the agreement, claiming its lead negotiator lacked authority to reach agreement. The Board found this change in position constituted an indicator of bad faith bargaining.

Here, DPA negotiators' statements midway through bargaining that they lacked authority to negotiate over economic items did not hinder the bargaining process. Unlike the school district in *Chino Valley Unified School District, supra*, DPA did not attempt to renege on tentative agreements made by its negotiators. Instead, it appears from the charge that DPA took the position from the outset of bargaining that negotiations on economic items should be deferred until the amount of funds available for State employee compensation had been determined. Accordingly, the alleged change in DPA negotiators' authority had no negative impact on negotiations. Moreover, even if the alleged change in negotiators' authority constituted an indicator of bad faith bargaining, this single indicator is insufficient to establish that DPA bargained in bad faith. (*State of California (Department of Education)* (1996) PERB Decision No. 1160-S.)

For the reasons above, we conclude the charge failed to state a prima facie case of bad faith bargaining by DPA.

2. Bypass/Direct Dealing

In its charge, Local 39 alleged that the Governor's November 6, 2008 letter unlawfully bypassed Local 39 by presenting proposals to modify terms and conditions of employment directly to Unit 13 members. An employer violates the duty to bargain in good faith when it bypasses the exclusive representative to negotiate directly with employees over matters within the scope of representation. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160.) To establish that an employer has unlawfully bypassed the union, the charging party must demonstrate that the employer dealt directly with its employees: (1) to create a new policy of general application, or (2) to obtain a waiver or modification of existing policies applicable to those employees. (*Ibid.*)

The four proposals listed in the Governor's letter addressed subjects within the scope of representation under the Dills Act: furloughs, holidays, 4/10 workweek and overtime. However, the letter did not ask State employees to bargain over or agree to the proposals. Rather, it stated that the Governor intended to propose these changes to the Legislature as part of his legislative package to close the budget gap.

Furthermore, employers may communicate with their employees about labor relations matters as long as the communication does not contain a threat of reprisal or force, or promise of benefit. (*Rio Hondo Community College District* (1980) PERB Decision No. 128.) In the bargaining context, an employer is free to communicate with employees in a noncoercive manner by accurately reporting the status of negotiations or the nature of proposals exchanged. (*City of Fresno* (2006) PERB Decision No. 1841-M; *Muroc Unified School District* (1978) PERB Decision No. 80.) However, an employer may not engage in a campaign of

communications designed “to undermine the exclusive representative in the eyes of bargaining unit employees.” (*California State University* (1989) PERB Decision No. 777-H; *Muroc Unified School District, supra.*)

Local 39 admits in its appeal that the Governor’s November 6, 2008 letter did not threaten Unit 13 members with force or reprisal, or promise them a benefit. Nevertheless, Local 39 claims the letter was an attempt by the Governor “to turn the bargaining unit against the Union.” While the appeal is not clear about how the letter might do so, it appears Local 39 is asserting that the letter undermined Local 39’s authority in the eyes of Unit 13 members.

The Board has found a violation under such a theory in only one case, *California State University, supra.* In that case, the parties were negotiating economic issues, including salary increases, pursuant to a re-opener provision in their memorandum of understanding. During bargaining, the employer published a newsletter stating that the Trustees had approved a four percent salary increase to take effect the following January 1. The newsletter contained no language indicating the amount or effective date of the increase could change based on the outcome of the ongoing negotiations. The Board held the newsletter interfered with employee rights because, by implying the employer could unilaterally determine a salary increase, it “tend[ed] to diminish the authority of the exclusive representative at the table, as well as in the eyes of bargaining unit employees.”

Here, the Governor’s November 6, 2008 letter did not announce a fait accompli. Instead, after announcing the proposals, it stated that the Governor was “working closely with union leadership to achieve results in the least painful way possible.” Thus, unlike the communication in *California State University, supra*, the Governor’s letter acknowledged that the proposed cost-cutting measures could change based on the outcome of negotiations with

State employee unions. Accordingly, we find that the letter did not tend to undermine Local 39's authority in the eyes of Unit 13 members.

For the above reasons, we conclude the charge failed to establish a prima facie case that the Governor bypassed Local 39 and dealt directly with Unit 13 members regarding subjects within the scope of representation.

ORDER

The unfair practice charge in Case No. SA-CE-1747-S is hereby DISMISSED
WITHOUT LEAVE TO AMEND.

Members Neuwald and Wesley joined in this Decision.