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-1649-S PERB Decision No. 2081-S November 24, 2009

Appearances: Suzanne L. Branine, Staff Counsel, for California Correctional Peace Officers Association; Anthony V. Pane, Legal Counsel, for State of California (Department of Personnel Administration).

Before McKeag, Neuwald and Wesley, Members.

DECISION

NEUWALD, Member: 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 an 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 engaging in conditional bargaining. CCPOA alleged that this conduct constituted a violation of the Dills Act section 3519(c) and (e). Specifically, CCPOA alleged that, in its August 22, 2007 Last, Best, Final Offer (LBFO), the State insisted to impasse on the following non-mandatory subjects of bargaining that would

[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.

require a waiver of employees' statutory rights: (1) LBFO section 10.02D (use of sick leave)[2]; (2) LBFO section 11.11F2 (Fair Labor Standards Act (FLSA) exemption)[3]; and (3) LBFO section 27.01 (entire agreement)[4].[5]

The Board has reviewed the entire record including, but not limited to, the unfair practice charge, the State's position, the amended unfair practice charge, the warning and dismissal letters, CCPOA's appeal, and the State's response. Based on this review, the Board adopts the warning and dismissal letters as its own subject to the following discussion.

BACKGROUND

The Board adopts the Board agent's summary of the alleged facts as set forth in the warning and dismissal letters.

CCPOA'S APPEAL

CCPOA argues that, while the Board agent was essentially correct in the formulation of the test to be applied, he incorrectly applied the test to the facts. CCPOA argues that the Board agent incorrectly relied on language contained in *San Mateo Community College District* (1993) PERB Decision No. 1030 (*San Mateo*) in concluding that CCPOA failed to make known its objections to DPA's proposals that CCPOA contended contained non-mandatory

[2] CCPOA argues that LBFO section 10.02D waived employees' statutory rights under California Labor Code sections 233 and 234.

[3] CCPOA argues that LBFO section 11.11F2 violated FLSA.

[4] CCPOA argues that LBFO section 27.01 waived the statutory right to meet and confer pursuant to Dills Act section 3519(c).

[5] The amended unfair practice charge listed four sections of the LBFO that the State improperly insisted to impasse. CCPOA did not appeal the dismissal of the charge with respect to LBFO section 12.02 and, as such, we do not address LBFO section 12.02 in this decision.

subjects of bargaining requiring a waiver of a statutory right. Instead, CCPOA asserts, the Board agent should have relied on *Travis Unified School District* (1992) PERB Decision No. 917 (*Travis)* and *Chula Vista School District* (1990) PERB Decision No. 834 *(Chula Vista)*. CCPOA asserts that, pursuant to that authority, it effectively put the State on notice that it was unwilling to waive its statutory rights and thereby objected to the consideration of non-mandatory subjects of bargaining.

DPA'S RESPONSE

DPA argues that the Board agent correctly dismissed the unfair practice charge. DPA first argues that two of the three proposals (§§ 10.02 and 27.01) at issue did not require a waiver of state law. Second, the State argues the Board agent correctly determined that CCPOA failed to communicate that it objected to the inclusion of non-mandatory subjects of bargaining.

DISCUSSION

It is well established that parties are free to negotiate over the inclusion of non-mandatory subjects of bargaining. (*Lake Elsinore School District* (1986) PERB Decision No. 603 (*Lake Elsinore*); *San Mateo; Chula Vista.*) A party may not, however, legally insist upon the acceptance of such proposals "in the face of a clear and express refusal by the union to bargain" over them. (*Lake Elsinore.*) Thus, the insistence to impasse on non-mandatory subjects of bargaining is a per se unfair practice. (*Travis*; *Chula Vista*; *Lake Elsinore*; *Modesto City Schools* (1983) PERB Decision No. 291; *Ross School District Board of Trustees* (1978) PERB Decision No. 48.) Applying this rule, PERB has held that an employer may not insist to impasse that a union waive statutory rights, such as the right to file grievances in its own name. (*Travis; Chula Vista.*)

In *San Mateo*, the Board articulated the *Lake Elsinore* rule as follows:

> Under *Lake Elsinore*, the Board held that parties may engage in negotiations dealing with permissive, nonmandatory subjects of bargaining, but once a party subsequently decides to take a position that the nonmandatory subject not be included in the collective bargaining agreement, that party must express its opposition to further negotiation on the proposal as a prerequisite to charging the other party with bargaining to impasse on a nonmandatory subject of bargaining.

CCPOA asserts that the administrative law judge's reliance on this language in *San Mateo* is misplaced because it is actually dicta in that, under the facts of that case, the Board determined that the proposal (concerning released time) was a mandatory subject of bargaining; thus, there was no per se violation under a conditional bargaining theory. According to CCPOA, the language in *San Mateo* imposes a more difficult burden on an employee organization by requiring it to refuse to bargain over the statutory right. Instead, CCPOA argues, *Travis* and *Chula Vista* set forth a less stringent burden on CCPOA to establish that it "merely needs to put the employer on notice that it was unwilling to agree to language that it believes deprives it or its members of statutory rights," even though it has not refused to bargain over the proposal. Thus, CCPOA asserts that in *Travis*, the Board found it sufficient that the union "did make it clear its contention that it was improper for the District to insist on language which it believed deprived it of statutory rights." CCPOA further points out that in *Chula Vista* the Board found that " . . . the Association's statements [were] sufficient to put the District on notice that the Association was unwilling to waive its right to represent its members."

We do not find CCPOA's arguments persuasive. *Lake Elsinore*, *Travis* and *Chula Vista* all make it clear that the party opposing the non-mandatory subject must communicate its

opposition to further negotiation about the non-mandatory proposal. Thus, in *Chula Vista*, the Board stated:

> ...while the parties may engage in negotiations over proposals dealing with permissive, nonmandatory subjects of bargaining, when one party subsequently decides to take the position that the nonmandatory proposal not be included in the contract, that party must express its opposition to further negotiation on the proposal as a prerequisite to charging the other party with bargaining to impasse on a nonmandatory subject of bargaining. (Citations omitted.)

In *Travis*, the school district insisted to impasse on maintaining a contract provision that limited the union's right to file grievances on its own behalf, a subject that had been determined to be non-mandatory in *Chula Vista* and *South Bay Union School District* (1990) PERB Decision No. 791. The union rejected the employer's proposal to maintain the status quo and continued to insist on its own proposal to modify the contract provision so as not to waive its statutory rights. Finding the facts of this case to be very similar to those of *Chula Vista*, the Board found that the union's continued refusal to waive its statutory rights, while at the same time continuing to press for inclusion of its proposal, "ma[d]e clear its contention that it was improper for the district to insist on language which it believed deprived it of its statutory rights."

The Board's statements in *San Mateo* are consistent with the standards set forth in *Lake Elsinore*, *Chula Vista* and *Travis*. In all of these cases, the Board required a showing that the party objecting to the inclusion of the non-mandatory subject clearly communicate its opposition to further consideration of the proposal. As discussed below, CCPOA has failed to meet this burden.

The issue here is whether CCPOA communicated its opposition to further negotiation about what it believed to be non-mandatory proposals that would require a waiver of statutory rights. CCPOA contends that it effectively put the State on notice by the following conduct:

1. The letter dated August 31, 2007, which contained the following statement: "YOUR CURRENT PROPOSAL HAS SEVERAL SECTIONS THAT REQUIRE US TO AGREE TO WAIVE STATE LAW FOR OUR MEMBERS. THAT IS NOT A LEGITIMATE EFFORT TOWARDS AN AGREEMENT";

2. In its August 31, 2007 letter, CCPOA also sought further clarification from the State on the intent of LBFO sections 10.02 and 11.11, to which the State never responded; and

3. CCPOA excluded the disputed sections from its September 5, 2007, letter listing the 133 proposals CCPOA found acceptable from the State's August 22, 2007 package.

The State argues that CCPOA did not place it on notice because: (1) the purpose of the questions was to clarify their meaning as opposed to an expression of opposition to further negotiation, and (2) the August 31, 2007 letter made clear that CCPOA accepted some parts of DPA's proposal and requested further information on the rest, without objecting to the packaged offer.

We find the Board agent correctly determined that CCPOA's actions failed to put the State on notice that it opposed negotiations on the non-mandatory subject. The August 31, 2007 letter does not communicate a clear opposition to negotiate about what CCPOA believed to be non-mandatory subjects of bargaining. Instead, it merely sets forth CCPOA's belief that the State's proposals sought a waiver of state law, but does not communicate whether or not CCPOA would be willing to consider such proposals. CCPOA's request for clarification as to

whether Sections 10.02 and 11.11 were intended to waive statutory rights too, does not communicate a clear opposition to their inclusion. Finally, the fact that CCPOA accepted some, but not all, of DPA's proposal and requested clarification does not communicate opposition to further negotiations. To the contrary, CCPOA's requests for clarification could reasonably be construed as demonstrating a willingness to continue negotiations over these subjects; indeed, CCPOA did continue to negotiate over the disputed sections. Thus, unlike in *Travis* and *Chula Vista*, CCPOA in this case did not clearly communicate to DPA that it would not consider any proposals that required it to waive its members' statutory rights.[6]

ORDER

The unfair practice charge in Case No. SA-CE-1649-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.

[6] Because we conclude that CCPOA did not meet its burden of communicating a clear opposition to further negotiations over the disputed sections, we need not and do not reach the issue of whether, in fact, the proposals required a waiver of statutory rights and therefore were non-mandatory subjects of bargaining.

PUBLIC EMPLOYMENT RELATIONS BOARD

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April 11, 2008

Suzanne L. Branine, Staff Legal Counsel
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755 Riverpoint Drive, Suite 200
West Sacramento, CA 95605-1634

Re: California Correctional Peace Officers Association v. State of California (Department of Personnel Administration)
Unfair Practice Charge No. SA-CE-1649-S
DISMISSAL LETTER

Dear Ms. Branine:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 8, 2008. The California Correctional Peace Officers Association (CCPOA) alleged that the State of California (Department of Personnel Administration) (State or DPA) violated the Ralph C. Dills Act (Dills Act)[1] by engaging in conditional bargaining.

In the attached Warning Letter dated February 21, 2008, CCPOA was informed that the above-referenced charge did not state a prima facie case. CCPOA was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. CCPOA was further advised that, unless the charge was amended to state a prima facie case or withdrawn prior to February 29, 2008, the charge would be dismissed.

CCPOA sought and was granted additional time in which to amend its charge, and a First Amended Charge was filed with PERB on March 4, 2008. In its amended charge, CCPOA alleges the State violated the Dills Act by insisting to impasse on non-mandatory subjects of bargaining and by presenting package offers that conditioned agreement on mandatory subjects upon agreement to proposals affecting non-mandatory subjects of bargaining.

More specifically, CCPOA alleges four sections in package proposals presented by DPA on August 22 and September 12, 2007 involve non-mandatory subjects of bargaining, and thus impermissibly condition agreement on other, mandatory subjects. The four alleged non-mandatory subjects identified in the amended charge concern the following sections of the proposed Memorandum of Understanding (MOU):

1. MOU section 10.02.D: The issue here concerns the State's proposal to delete language stating that employees will not be "subject to any type of corrective or disciplinary action . . . based solely on the amount or frequency of [sick leave] use." CCPOA argues that agreement to

[1] The Dills Act is codified at Government Code section 3512 et seq.

the proposed change in language in this section waives statutory rights of employees under Labor Code section 233. Labor Code section 233, subdivision (c), which is applicable to the State employer, provides that, "No employer shall deny an employee the right to use sick leave or discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using, or attempting to exercise the right to use, sick leave to attend to an illness of a child, parent, spouse, or domestic partner of the employee."

2. MOU section 11.11.F.2: Section 11.11 begins with the statement that "CCPOA and the State agree that the employees listed below are working under the provisions of Section 207k of the Fair Labor Standards Act (FLSA) and the parties acknowledge that the employer is declaring a specific exemption for these employees." The State's proposal included continuation of language in paragraph F.2 whereby "CCPOA agrees that neither it nor any of its employees acting on their own behalf or in conjunction with other law firms shall bring any suit in court challenging the validity of this provision under the FLSA." Here, CCPOA objects to inclusion of this waiver language in the proposed agreement.

3. MOU section 12.02: Section 12.02 concerns "permanent involuntary transfer by inverse seniority." CCPOA notes that the language does not reference the right of an employee to a minimum notice period as to an involuntary transfer made under this MOU provision. CCPOA notes further that Government Code section 19994.1 requires the State, under specified circumstances, to provide an employee "a written notice of transfer 60 days in advance of the effective date of the transfer," unless a MOU contains a conflicting provision.

4. MOU section 27.01: Section 27.01 of the expired MOU was entitled "Entire Agreement." The language quoted by CCPOA in its charge from this article was proposed by DPA as a new paragraph D in Section 27.01, but DPA also noted that the proposed language incorporated existing language, with modifications, from the parties' Side Letter #8. In brief, the objected-to proposal would allow the Department of Corrections & Rehabilitation (CDCR) and the Department of Mental Health (DMH) to request a waiver of the otherwise-applicable 30-day notice requirement and/or necessity to meet and confer with CCPOA.[2] The language would authorize the departments to make the request where the department believed its business necessity to make changes in areas within the scope of representation must be expedited or where the change would have a de minimus effect on Unit 6 employees.

Background

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.

[2] The 30-day notice period and description of when the duty to meet and confer would be applicable were described elsewhere in Section 27.01. The proposed contract language at issue here would not apply to matters otherwise covered by the MOU.

On May 10, 2007, the State filed with PERB a Request for Impasse Determination/ Appointment of Mediator. CCPOA opposed the request, but the request was approved and a mediator was appointed on May 17, 2007.

On August 22, 2007, DPA presented a "complete Package Offer of August 22, 2007 and governing language proposals" to CCPOA. The cover letter accompanying the proposal referenced the State's understanding that CCPOA had, earlier that day, "informed the mediator that it was withdrawing from mediation and would no longer participate." The cover letter also stated that CCPOA's reply was expected by September 5, 2007.

The charge states that "CCPOA could not accept the entire offer as presented. However, a significant portion of the State's offer was acceptable to CCPOA and consistent with preliminary negotiation discussions."

By letter dated August 31, 2007, CCPOA responded to the August 22 package offer.[3] CCPOA's letter, in part, referenced prior invitations to State representatives to attend a CCPOA training conference held on August 28 and 29, 2007, at which time CCPOA hoped the State could "explain content and answer questions about this voluminous proposal."

The August 31 letter also stated that CCPOA conference delegates had reviewed and discussed the State's offer, "asked many more questions than [CCPOA's] negotiating team had answers," and passed a motion to submit questions to the State's negotiating team.

CCPOA's letter also included the following:

> YOUR CURRENT PROPOSAL HAS SEVERAL SECTIONS THAT REQUIRE US TO AGREE TO WAIVE STATE LAW FOR OUR MEMBERS. THAT IS NOT A LEGITIMATE EFFORT TOWARDS AGREEMENT.
>
> It will be extremely difficult, perhaps impossible, to engage in any manner meaningful enough to understand and subsequently sign a 358 page long-term contract without some face-to-face discussions. Your team doesn't seem to have any sense of urgency.
>
> We are still willing to work very hard for long hours to get the job done. However, we are at a loss as to how we can meaningfully respond to the deadline that you set, without first receiving responses to the questions that [are] attached. Please understand that this is not an exhaustive list of all the questions your proposal generates. However, the answers to these few may provide us the information necessary to decide our course of action. We eagerly await your timely response.

(Emphasis in original.)

[3] The letter was addressed to DPA Director David Gilb.

Attached to the August 31 correspondence were 30 numbered items/questions. Included were the following items/questions:

> **24. Section 10.02:** Does the State's proposal go below State Law? If so, explain the State's legal authority to do so. Would the State be prepared to arbitrate any claim that adverse actions based on sick leave violated the labor code? With all remedies available under the labor code? [Sic]
>
> **27. Section 11.11:** Can the State impose an exemption to the labor code absent bargaining unit agreement?
>
> **30. Section 27.01:** How is CCPOA expected to be able to identify impact on to [sic] the bargaining unit's members prior to discussing management's proposed change?

(Emphasis in original.)

Director Gilb responded to CCPOA's letter by correspondence dated September 4, 2007. DPA's letter consisted of three pages plus a one-page attachment that included items identified as responses to approximately 15 of CCPOA's 30-item list of questions. The charge alleges that DPA's response was "curt, evasive and argumentative," and "yielded answers deliberately calculated to be of no assistance in understanding or evaluating" the State's offer.

On September 5, 2007, CCPOA again wrote to Director Gilb. This three-page letter commented critically on various aspects of the September 4 response from DPA, including an assertion that it left each question posed on August 31 "substantially unanswered." CCPOA, however, also stated the following:

> We remain willing to meet in negotiations, fairly conducted to obtain a successor [MOU] and we await more comprehensive answers to the questions posed in the August 31 letter. In the interim and in an effort to demonstrate our genuine desire to stimulate bargaining and reach an equitable agreement, CCPOA agrees to accept DPA's August 22, 2007 offer to rollover, or rollover with changes related to SB 737, the [133] sections listed below.

Included in the list of sections regarding which CCPOA was willing to accept DPA's offer was Section 12.02. CCPOA asserts in the charge that it "neither accepted nor declined the remaining provisions" of DPA's package offer from August 22, 2007.

Discussion

The Board has long held that it is unlawful to insist "to impasse and during impasse on contractual language outside the scope of representation." (Travis Unified School District (1992) PERB Decision No. 917; Mt. Diablo Unified School District (1990) PERB Decision No. 844;

Chula Vista City School District (1990) PERB Decision No. 834; South Bay Union School District (1990) PERB Decision No. 791; Lake Elsinore School District (1986) PERB Decision No. 603 (Lake Elsinore); see also South Bay Union School District v. Public Employment Relations Board (1991) 228 Cal.App.3d 502.)

In San Mateo County Community College District (1993) PERB Decision No. 1030 (San Mateo), the Board in relevant part stated:

> Under Lake Elsinore, the Board held that parties may engage in negotiations dealing with permissive, nonmandatory subjects of bargaining, but once a party subsequently decides to take a position that the nonmandatory subject not be included in the collective bargaining agreement, that party must express its opposition to further negotiation on the proposal as a prerequisite to charging the other party with bargaining to impasse on a nonmandatory subject of bargaining.

The party objecting to the inclusion of a non-mandatory subject of bargaining is not required to register its objection by any particular phrase or by highly specific language; instead, what is required is that the other party be put on notice of the objection. (Travis Unified School District, supra, PERB Decision No. 917; Chula Vista City School District, supra, PERB Decision No. 834.)

While parties are free to negotiate over the permissive subject of a waiver of statutory rights, a waiver may not be unilaterally implemented. (Rowland Unified School District (1994) PERB Decision No. 1053.) Insistence to impasse and during impasse on the waiver of a statutory right is per se an unfair practice, provided the party opposing negotiations on the non-mandatory subject makes its objection known, as discussed above. (San Mateo, supra, PERB Decision No. 1030.)

Thus, there are two elements to consider in determining whether a violation under this theory has been stated: (1) whether the subject is a permissive or non-mandatory subject of bargaining; and (2) whether the charging party made known its objection to inclusion of the subject in the negotiations. The allegations concerning each of the proposed MOU sections listed above shall be considered in turn.

MOU Section 10.02.D

As discussed above, Labor Code section 233, subdivision (c) provides that, "No employer shall deny an employee the right to use sick leave or discharge, threaten to discharge, demote, suspend, or in any manner discriminate against an employee for using, or attempting to exercise the right to use, sick leave to attend to an illness of a child, parent, spouse, or domestic partner of the employee." Thus, the provisions of this statute are specific to the use of sick leave "to attend to an illness of a child, parent, spouse, or domestic partner." The language at issue in the MOU, on the other hand, is broader and pertains to potential "corrective or disciplinary action . . . based solely on the amount or frequency of [sick leave] use."

The subjects of sick leave and sick leave use policies, as well as rules that concern subjecting employees to disciplinary action, are subject to negotiation. (San Bernardino City Unified School District (1998) PERB Decision No. 1270.) CCPOA, in effect, argues that the State's proposal in this area falls outside the scope of representation because the State sought CCPOA's waiver of employee rights under a provision of the Labor Code. Yet, the State's proposals are silent as to the application of the Labor Code provision at issue. Thus, CCPOA's unfair practice charge relies on legal conclusions rather than the allegation of specific facts to support its allegation, but legal conclusions are not sufficient to state a prima facie case. (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; Charter Oak Unified School District (1991) PERB Decision No. 873.)

In addition, the questions posed by CCPOA regarding this MOU section[4] in its August 31 correspondence fall far short of notice to DPA that CCPOA objected to further negotiations on the subject. Thus, the allegation concerning proposed MOU Section 10.02.D fails to satisfy either element of the applicable test under San Mateo and other cases discussed above. Therefore, the allegation that the State unlawfully insisted to impasse with respect to proposed MOU Section 10.02.D is dismissed based on the facts and reasons set forth above.

MOU Section 11.11.F.2

The proposal in MOU Section 11.11.F.2 clearly concerns a proposed waiver of the right to sue with regard to proposed exemptions to the FLSA, assuming the parties had otherwise memorialized such agreement on such exemptions in MOU Section 11.11. However, the charge fails to demonstrate that CCPOA made known its objection to bargaining over exemptions to the FLSA, a federal statute, or to bargaining over possible waiver of the right to challenge such exemptions in the event of an agreement. While CCPOA, in its August 31 correspondence, generally objected to proposals that would require [CCPOA] to agree to "waive state law" for its members, no similar objection was lodged with regard to federal law. Nor did the August 31 correspondence otherwise raise an objection to continued negotiations with regard to this section, as the list of questions attached merely asked whether "the State [could] impose an exemption to the labor code absent bargaining unit agreement."

Thus, the allegation concerning proposed MOU Section 11.11.F.2 fails to satisfy both elements of the applicable test, and is dismissed. (San Mateo, supra, PERB Decision No. 1030.)

MOU Section 12.02

While CCPOA correctly observes that Government Code section 19994.1 requires the State, under specified circumstances, to provide an employee "a written notice of transfer 60 days in advance of the effective date of [an involuntary] transfer," and that DPA's proposed language in Section 12.02 did not reference this minimum notice requirement, these facts are not sufficient to

[4] As quoted above, the relevant portion of the correspondence read, "Does the State's proposal go below State Law? If so, explain the State's legal authority to do so. Would the State be prepared to arbitrate any claim that adverse actions based on sick leave violated the labor code? With all remedies available under the labor code? [Sic]"

demonstrate that the State's proposal sought a waiver of statutory rights or otherwise addressed a non-mandatory subject of bargaining. First, Section 12.02 concerns matters pertaining to the transfer of employees, and the Board has long held that the transfer of employees is within the scope of representation under the Dills Act. (State of California (Department of Transportation) (1983) PERB Decision No. 333-S.) Further, while it is true that the State's proposal did not reference the minimum notice requirements of Government Code section 19994.1, it is the absence of any reference to minimum notice that undercuts CCPOA's case. While Government Code section 19994.1, at subdivision (c), provides that its provisions may be superseded by the terms of a MOU, this circumstance is triggered only where the provisions of the statute are in conflict with the terms of a MOU. Here, the silence of the proposed MOU provision with respect to minimum notice precludes finding that its language would conflict with, and thus supersede, the provisions of Government Code section 19994.1.

Moreover, even if the proposed language involved a non-mandatory subject of bargaining, the charge fails to demonstrate that CCPOA made known an objection to negotiations on this subject. Instead, by letter dated September 5, 2007, CCPOA stated its willingness to agree to certain proposals contained in the August 22, 2007 package proposal by DPA, including specifically the proposal regarding Section 12.02.

Thus, the allegation concerning proposed MOU Section 12.02 fails to satisfy either element of the applicable test under San Mateo and other cases discussed above.

Therefore, the allegation that the State unlawfully insisted to impasse with respect to its proposed MOU Section 12.02 is dismissed based on the facts and reasons set forth above.

MOU Section 27.01.D

As discussed more fully above, the instant charge only addresses the language in Section 27.01.D that would have allowed the CDCR and DMH to request a future waiver by CCPOA of its opportunity to receive notice and an opportunity to meet and confer over proposed changes under specified conditions. Nothing in the language required CCPOA to agree to such waivers.

Thus, the charge fails to demonstrate that the State's proposal amounted to a proposed waiver. In addition, the charge does not establish that CCPOA ever clearly objected to this proposal being included in the negotiations on the grounds that it involved a non-mandatory subject of bargaining. As discussed above, the general statement of objection by CCPOA to State proposals that concerned possible waivers of state law was not specific enough to inform the State as to which proposals were found objectionable. Nor did the list of questions attached to the August 31 correspondence convey an objection to Section 27.01.D being included in the negotiations.[5]

Thus, the allegation concerning proposed MOU Section 27.01.D fails to satisfy either element of the applicable test and is dismissed. (San Mateo, supra, PERB Decision No. 1030.)

[5] The relevant question attached to the August 31 correspondence read as follows: "How is CCPOA expected to be able to identify impact on to [sic] the bargaining unit's members prior to discussing management's proposed change?"

Right to Appeal

Pursuant to PERB Regulations,[6] 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:

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

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

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

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February 21, 2008

Suzanne L. Branine, Staff Legal Counsel
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Re: California Correctional Peace Officers Association v. State of California (Department of Personnel Administration)
Unfair Practice Charge No. SA-CE-1649-S
WARNING LETTER

Dear Ms. Branine:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 8, 2008. 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)[1] by engaging in conditional bargaining.

CCPOA is the exclusive representative of State Bargaining Unit 6 – Corrections. The most recent memorandum of understanding (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.

On May 10, 2007, the State filed with PERB a Request for Impasse Determination/ Appointment of Mediator. CCPOA opposed the request, but the request was approved and a mediator was appointed on May 17, 2007.[2]

On August 22, 2007, DPA presented a "complete Package Offer of August 22, 2007 and governing language proposals" to CCPOA. The cover letter accompanying the proposal referenced the State's understanding that CCPOA had, earlier that day, "informed the mediator that it was withdrawing from mediation and would no longer participate." The cover letter also stated that CCPOA's reply was expected by September 5, 2007.

[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.

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

The charge states that "CCPOA could not accept the entire offer as presented. However, a significant portion of the State's offer was acceptable to CCPOA and consistent with preliminary negotiation discussions."

By letter dated August 31, 2007, CCPOA responded to the August 22 package offer.[3] CCPOA's letter, in part, referenced prior invitations to State representatives to attend a CCPOA training conference held on August 28 and 29, 2007, at which time CCPOA hoped the State could "explain content and answer questions about this voluminous proposal." CCPOA further noted that the State did not respond to the offer to attend.

The August 31 letter also stated that CCPOA conference delegates had reviewed and discussed the State's offer, "asked many more questions than [CCPOA's] negotiating team had answers," and passed a motion to submit questions to the State's negotiating team.

CCPOA's letter also included the following:

> There was an overwhelming concern from our delegates that we might accept or reject a contract proposal without fully understanding the intent or consequences of such enormous contract changes. The CCPOA negotiating team was reminded that "trust" would not replace written design or intent in any future MOUs. It seems none of our members have forgotten how their "trust" was abused in the 2004 amendment to our 2001-2006 MOU.
>
> It seems reasonable for us to ask some questions about a contract with so many changes and/or outright deletions of language, particularly one of such duration as this one proposes. CCPOA negotiators, some members of past teams were present, spent the last 25 years working on getting some of the language your proposal eliminates. Your attendance at our conference may have stimulated a different outcome.
>
> Engaging one another in this fashion seems ridiculous in light of the acknowledged dangers from the severe overcrowding and understaffing in our institutions. The Governor, the Legislature and the Secretary have all spoken publicly about the impending threat to inmates, staff and the public which is only exaserbated [sic] by such overcrowding. Yet you refuse to meet with us as individuals or as a team. Despite your assurances to the contrary to the Legislature, the media and the people of California, the mediation process had no positive effect whatsoever. You said

[3] The letter was addressed to DPA Director David Gilb.

> you never wanted to go to impasse, yet your team consistently failed to offer anything that we could agree to.
>
> YOUR CURRENT PROPOSAL HAS SEVERAL SECTIONS THAT REQUIRE US TO AGREE TO WAIVE STATE LAW FOR OUR MEMBERS. THAT IS NOT A LEGITIMATE EFFORT TOWARDS AGREEMENT.
>
> It will be extremely difficult, perhaps impossible, to engage in any manner meaningful enough to understand and subsequently sign a 358 page long-term contract without some face-to-face discussions. Your team doesn't seem to have any sense of urgency.
>
> We are still willing to work very hard for long hours to get the job done. However, we are at a loss as to how we can meaningfully respond to the deadline that you set, without first receiving responses to the questions that [are] attached. Please understand that this is not an exhaustive list of all the questions your proposal generates. However, the answers to these few may provide us the information necessary to decide our course of action. We eagerly await your timely response.

(Emphasis in original.)

Attached to the August 31 correspondence were 30 numbered items/questions, many of which included more than one question.

Director Gilb responded to CCPOA's letter by correspondence dated September 4, 2007. DPA's letter consisted of three pages plus a one-page attachment that included items identified as responses to approximately 15 of CCPOA's 30-item list of questions. The charge alleges that DPA's response was "curt, evasive and argumentative," and "yielded answers deliberately calculated to be of no assistance in understanding or evaluating" the State's offer.

On September 5, 2007, CCPOA again wrote to Director Gilb. This three-page letter commented critically on various aspects of the September 4 response from DPA, including an assertion that it left each question posed on August 31 "substantially unanswered." CCPOA, however, also stated the following:

> We remain willing to meet in negotiations, fairly conducted to obtain a successor [MOU] and we await more comprehensive answers to the questions posed in the August 31 letter. In the interim and in an effort to demonstrate our genuine desire to stimulate bargaining and reach an equitable agreement, CCPOA agrees to accept DPA's August 22, 2007 offer to rollover, or

> rollover with changes related to SB 737, the [133] sections listed below.

CCPOA asserts in the charge that it "neither accepted nor declined the remaining provisions" of DPA's package offer from August 22, 2007.

The statement of the charge concludes as follows:

> On September 12, 2007, DPA presented CCPOA with a Last, Best and Final [LBF or LBFO], modestly modified from the offer of August 22, 2007. DPA's letter announcing the LBF assumed CCPOA's rejection in contradiction to the specific intent stated in the response. The DPA's letter reaffirmed "rejection of any part of a package proposal constitutes a rejection of the entire package proposal." On September 18, 2007, DPA announced implementation of a modified form of the LBFO.
>
> The State's refusal to accept and sign agreements on sections of their own proposals that CCPOA also agreed with, unless CCPOA accepted without modification the undefined, untested and potentially bitter aspects of the entire package is unfair and constitutes conditional bargaining. This conduct by DPA violated Government Code § 3519.

(Citation to attachment omitted.)

Discussion

CCPOA alleges that the State violated Government Code section 3519 by engaging in conditional bargaining. CCPOA does not expressly allege a violation of Dills Act section 3519(e), but it is necessary under applicable precedent to analyze conduct after the initiation of statutory impasse procedures as an alleged violation of section 3519(e) rather than 3519(c). (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.)

Under long-standing Board precedent, a party may not negotiate to impasse a proposal that conditions agreement to a non-mandatory subject on acceptance of mandatory subjects of bargaining, i.e., conditioning agreement, and insisting to impasse, on such non-mandatory subjects, is a per se unfair practice. (Lake Elsinore School District (1986) PERB Decision No. 603; Travis Unified School District (1992) PERB Decision No. 917; Berkeley Unified School District (2005) PERB Decision No. 1744.) In this respect, PERB follows National Labor Relations Board (NLRB) precedent. (See NLRB v. Wooster Division, of the Borg-Warner Corp. (1958) 356 U.S. 342.)

It is also an indicia of bad faith to impose unlawful conditions during negotiations. (See, e.g., Fremont Unified School District (1980) PERB Decision No. 136 [conditioning agreement of economic matters on agreement with non-economic matters]; Gilroy Unified School District (1984) PERB Decision No. 471 [insisting on specifying who may be on the opposing negotiating committee].)

However, the Board has also held that insistence upon negotiations on a mandatory subject of bargaining, such as released time, is not a per se violation of the duty to bargain. (San Mateo County Community College District (1993) PERB Decision No. 1030; State of California (Department of Personnel Administration) (1991) PERB Decision No. 900.) In assessing conditional bargaining allegations, PERB has found no violation where, in exchange for acceptance of the union's economic demands, the employer seeks the union's commitment to support legislation targeting civil service reforms. (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S.) Nor did the Board find a violation where the employer's wage offer was conditioned on the union's acceptance of the offer within a specified time limit. (Trustees of the California State University (2006) PERB Decision No. 1871-H, affirming board agent's decision.)

Therefore, there is no violation based on the theory of conditional bargaining of a mandatory subject of bargaining.

Here, the charge alleges only that DPA conditioned acceptance of tentative agreement to portions of the State's package offer on CCPOA's acceptance of "the undefined, untested and potentially bitter aspects of the entire package." This statement falls well short of a demonstration that the State conditioned agreement on mandatory subjects of bargaining on CCPOA's agreement to non-mandatory subjects of bargaining. 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.)

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, you may 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 I do not receive an

amended charge or withdrawal from you before February 29, 2008, I shall dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Les Chisholm
Division Chief