STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATIONARY ENGINEERS LOCAL 39, INTERNATIONAL UNION OF OPERATING ENGINEERS, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Respondent.	Case No. SA-CE-1777-S PERB Decision No. 2085-S December 22, 2009

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Stationary Engineers Local 39, International Union of Operating Engineers; Jennifer M. Garten, 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 (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) enacting and implementing Government Code section 19844.1, subdivision (a), which changed the method of calculating overtime compensation for State employees; and (2) failing to offer the bargaining unit represented by Local 39 an "exemption" from the new law while offering such an exemption to another bargaining unit. The charge also alleged that the enactment of

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

Government Code section 19844.1, subdivision (a) impaired the parties' contract in violation of the California Constitution. The Board agent dismissed the charge for failure to state a prima facie case of unlawful unilateral change or 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 memorandum of understanding (MOU) covering Unit 13 that expired on June 30, 2008. Article 7, section 7.1(H) of the expired MOU stated:

> For the purposes of computing overtime, all compensable time (i.e., sick leave, vacation, annual leave, holiday credit, CTO and personal leave) shall be considered as time worked.

On November 6, 2008, the Governor called a special session of the Legislature to address the State's ongoing fiscal crisis. According to the charge, the Governor stated at this time that he intended to propose to the Legislature that leave time no longer be considered time worked for purposes of calculating overtime for State employees.

During a bargaining session with Local 39 on December 3, 2008, DPA proposed the following language be included in the parties' successor MOU:

> Notwithstanding any other provision of this [MOU], effective with the December 2008 pay period, leave time shall not count as hours worked for purpose of calculating overtime.

On February 19, 2009, the Legislature passed SB X3 8 as part of a comprehensive plan to close an unprecedented State budget deficit. Among other changes, SB X3 8 added section 19844.1 to the Government Code. Subdivision (a) of that section states in full:

> Notwithstanding any other provision of law, personal leave, sick leave, annual leave, vacation, bereavement leave, holiday leave,

> and any other paid or unpaid leave, shall not be considered as time worked by the employee for the purpose of computing cash compensation for overtime or compensating time off for overtime.

On February 20, 2009, the Governor signed SB X3 8 as part of the comprehensive budget plan. By its terms, SB X3 8 became effective that same day.

Sometime after the enactment of SB X3 8, DPA and the California Department of Forestry Firefighters (CDFF), the exclusive representative of firefighters in State Bargaining Unit 8, negotiated a renewable "sixty day exemption" from the operation of the new overtime calculation method in Government Code section 19844.1, subdivision (a). Local 39 alleged that DPA did not offer the same "exemption" to Bargaining Unit 13 and thus failed to bargain in good faith "by treating bargaining units differently." Local 39 also asserted that DPA could not have acted pursuant to a legislative mandate in implementing SB X3 8 if it was able to make exemptions from the law for certain bargaining units.

DISCUSSION[2]

1. Unilateral Change

A unilateral change in terms and conditions of employment constitutes a "per se" violation of Dills Act section 3519, subdivision (c)[3] if: (1) the State breached or altered the

[2] DPA contends that Local 39's appeal fails to comply with PERB Regulation 32635(a)* because it does not state "the specific issues of procedure, fact, law or rationale" appealed, the "page or part of the dismissal" appealed, or "the grounds for each issue stated." To satisfy the requirements of PERB Regulation 32635(a), the appeal must sufficiently put the Board and the respondent "on notice of the issues raised on appeal." (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H.) We find the appeal complies with PERB Regulation 32635(a) because it sufficiently puts the Board and DPA on notice that Local 39 is appealing the Board agent's dismissal of the unilateral change and bad faith bargaining allegations. (*PERB regs are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

[3] Dills Act section 3519, subdivision (c) makes it unlawful for the State to "[r]efuse or fail to meet and confer in good faith with a recognized employee organization."

parties' written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1296-S; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

Local 39 contends the State violated the Dills Act by enacting and implementing Government Code section 19844.1, subdivision (a) without providing Local 39 an opportunity to bargain over the statute's change in the method of overtime calculation for Bargaining Unit 13 members. PERB addressed this same argument on similar facts in *State of California (Department of Personnel Administration)* (2008) PERB Decision No. 1978-S. In that case, AFSCME Local 2620 (AFSCME) alleged that the State violated the Dills Act by enacting and implementing SB 1105, which created the Alternative Retirement Program (ARP) for State miscellaneous employees hired on or after August 11, 2004. Regarding the allegation that the enactment of the statute violated the Dills Act, the Board stated:

> The California Constitution provides that the Legislature 'may exercise any and all legislative powers which are not expressly, or by necessary implication denied to it by the Constitution.' (Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168, 180 [172 Cal.Rptr. 487] citing Methodist Hosp. of Sacramento v. Saylor (1971) 5 Cal.3d 685, 691 [97 Cal.Rptr. 1].) The Dills Act is a limited delegation of authority by the Legislature to the Governor, allowing DPA, as the State employer's representative, the authority to bargain with the State's unions to determine terms and conditions of employment. (Department of Personnel Administration v. Superior Court (1992) 5 Cal.App.4th 155, 177 [6 Cal.Rptr.2d 714].) The Dills Act, however, does not preclude the Legislature itself from unilaterally adopting, enacting or implementing terms and conditions of employment which, if implemented by DPA without legislative direction, would have been an unfair practice if not negotiated. Notwithstanding

> AFSCME's arguments to the contrary, DPA's implementation of the ARP amounted to the State's compliance with law as prescribed by the legislative process and not unilateral implementation of a change in policy on the part of the State as an employer.

Unlike *State of California (Department of Personnel Administration)*, *supra*, PERB Decision No. 1978-S, where the legislative action occurred during the term of the parties' MOU, the Legislature enacted Government Code section 19844.1, subdivision (a) after the parties' MOU expired but before they reached agreement or impasse on a successor MOU. As a result, the parties' conduct in this case was governed by Dills Act section 3517.8, subdivision (a), which states in full:

> 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 (29 U.S.C. Sec. 201 et seq.), and any provisions covering fair share fee deduction consistent with Section 3515.7.

Local 39 argues that this provision of the Dills Act required the State to maintain the method of overtime calculation set forth in the parties' expired MOU until the parties agreed to a new MOU or reached impasse. We find nothing in the language or legislative history of this provision to indicate the Legislature intended to limit its authority to legislate changes in terms and conditions of employment during the period when DPA is bargaining with a recognized employee organization following the expiration of an MOU. Thus, the timing of the legislative action in this case does not compel a different conclusion than in *State of California (Department of Personnel Administration)*, *supra*, PERB Decision No. 1978-S.

Also, in *State of California (Department of Personnel Administration)*, *supra*, PERB Decision No. 1978-S, the Board rejected AFSCME's argument that the Dills Act required the Governor to negotiate the implementation of SB 1105 before signing it into law. "PERB has acknowledged that when the Governor is acting as a participant in the legislative process and is fulfilling his/her constitutional responsibilities thereby, those acts are to be viewed separate and apart from his/her responsibilities as a chief executive and employer of State employees. (*State of California, Department of Personnel Administration* (1988) PERB Decision No. 706-S.)" The Board thus held that, because the Governor was acting pursuant to his responsibilities under article IV, section 10(a) of the Constitution when he signed SB 1105 into law, his action did not constitute an unlawful unilateral change in violation of the Dills Act.

Here, Local 39 alleged that the Governor violated the Dills Act by initially proposing the language of SB X3 8 and subsequently signing the bill without providing Local 39 an opportunity to bargain over the proposal or its implementation. The allegation regarding the Governor's signing of SB X3 8 clearly must be dismissed based on the Board's holding in *State of California (Department of Personnel Administration)*, *supra*, PERB Decision No. 1978-S. PERB case law also supports dismissal of the allegation regarding the Governor's initial proposal of the overtime language in SB X3 8 to the Legislature. In *State of California, Department of Personnel Administration*, *supra*, PERB Decision No. 706-S, the Board stated:

> [T]he Governor's proposed budget is not a matter for negotiation, but is instead the performance of a constitutionally imposed duty. The Governor acts as an essential participant in the legislative process, whereby the state remains solvent and operating. The Governor has the constitutional responsibility to assess the financial needs of state government and estimate potential income and expenditures and provide a fiscal plan to the Legislature which will culminate in the adoption of a fiscal budget.

The Board held the Dills Act did not require the Governor to sunshine or negotiate over his economic proposals for State employees before submitting his proposed budget to the Legislature pursuant to article IV, section 12 of the California Constitution.

Here, SB X3 8, as enacted, contained language proposed by the Governor as part of his plan to close an unprecedented State budget deficit. In proposing this language, the Governor acted pursuant to his constitutional obligation to keep the State "solvent and operating." Accordingly, because the Governor acted "as an essential participant in the legislative process," the Governor was not obligated to negotiate his proposal with recognized employee organizations prior to submitting it to the Legislature.

For the above reasons, we hold the State did not make an unlawful unilateral change in violation of Dills Act section 3519, subdivision (c) when it enacted Government Code section 19844.1, subdivision (a) and implemented the new method of overtime calculation for State employees contained therein.

2. Bad Faith Bargaining

Local 39 also alleged that DPA bargained in bad faith in violation of Dills Act section 3519, subdivision (c) by failing to offer Local 39 the same renewable "sixty day exemption" from the operation of Government Code section 19844.1, subdivision (a) that it negotiated with CDFF. In determining whether the State has violated Dills Act section 3519, subdivision (c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.) An absolute refusal to bargain a matter within the scope of representation is a per se violation of the duty to bargain in good faith. (*State of California (Board of Prison Terms)* (2005) PERB Decision No. 1758-S; *Sierra Joint Community College District* (1981) PERB Decision No. 179.) Local 39 did not allege that it

requested to bargain over an exemption to the immediate operation of Government Code section 19844.1, subdivision (a) for Bargaining Unit 13 members. Thus, we analyze this allegation under the "totality of the conduct" test.

Under the "totality of the conduct" test, PERB 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.) There are many indicia of bad faith bargaining, including: (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*, *supra*); (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).

Local 39 cites no authority, nor have we found any, in which an employer's failure to offer a benefit negotiated with one bargaining unit to another of its bargaining units was found to constitute or indicate bad faith bargaining. Such a finding would require an employer to offer every benefit agreed to with one of its bargaining units to each of its other bargaining units to avoid committing an unfair practice. We find no such requirement in the Dills Act.

Additionally, Local 39 argues that DPA's agreement with CDFF to exempt Bargaining Unit 8 members from the immediate operation of Government Code section 19844.1, subdivision (a) indicates DPA was not complying with a legislative mandate in implementing the statute. This argument is belied by the plain text of the statute. Subdivision (b) of Government Code section 19844.1 states in full:

> If subdivision (a) is in conflict with the provisions of a memorandum of understanding reached or amended pursuant to Section 3517.5 on or after February 1, 2009, or the date that the act adding this section takes effect, whichever is later, that memorandum of understanding shall be controlling without further legislative action, except that if those provisions of the memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

This provision allows DPA and a recognized employee organization to negotiate a different method of calculating overtime than that set forth in subdivision (a). Thus, DPA acted under authority granted by the Legislature when it negotiated with CDFF the renewable "sixty day exemption" from the operation of subdivision (a). DPA's action therefore was not contrary to the legislative mandate that DPA implement subdivision (a) for all State employees, subject to subsequent agreement between DPA and a recognized employee organization on an alternate method of overtime calculation.

3. Constitutional Violation

Finally, Local 39 alleged in its charge that the State's enactment and implementation of Government Code section 19844.1, subdivision (a) impaired the parties' contract in violation of the California Constitution. The Board agent did not address this allegation in the warning or dismissal letters. Nonetheless, Local 39 has raised the issue again on appeal. It is well-settled that PERB lacks jurisdiction to adjudicate alleged violations of the California Constitution. (*State of California (Department of Transportation)* (2005) PERB Decision

No. 1735-S; *Los Angeles Unified School District* (1990) PERB Decision No. 835.) Accordingly, the Board agent's failure to address this allegation does not mandate reversal of the dismissal of Local 39's charge. (See *Chula Vista Elementary School District* (2003) PERB Decision No. 1557 [Board agent's failure to address some of the allegations in charge did not support reversal because the charge failed to state a prima facie case even when the omitted allegations were treated as true].)

ORDER

The unfair practice charge in Case No. SA-CE-1777-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Neuwald and Wesley joined in this Decision.