STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF CORRECTIONS & REHABILITATION), Respondent.	Case No. SA-CE-1705-S PERB Decision No. 2108-S May 10, 2010

Appearances: Suzanne L. Branine, Staff Counsel, for California Correctional Peace Officers Association; Todd M. Ratshin, Labor Relations Counsel, for State of California (Department of Corrections & Rehabilitation).

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

DECISION

McKEAG, 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 dismissal (attached) of its unfair practice charge. The charge alleged that the State of California (Department of Corrections & Rehabilitation) (CDCR) violated the Ralph C. Dills Act (Dills Act)[1] by failing to bargain changes to a protective vest policy. CCPOA alleged that this conduct constituted a violation of Dills Act section 3519.

The unfair practice charge alleges CDCR engaged in surface bargaining in connection with bargaining over changes to a protective vest policy. The Board agent found that the record failed to support a finding that CDCR's conduct constituted bad faith bargaining. In

[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.

addition, the Board agent found that CCPOA failed to plead sufficient facts to support its claims. Accordingly, the Board agent dismissed the charge.

We have reviewed the entire record in this matter and find the warning and dismissal letters well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, we hereby adopt the warning and dismissal letters[2] as a decision of the Board itself, subject to the following brief discussion regarding CCPOA's alleged pleading defect.

DISCUSSION

The Department of Personnel Administration (DPA) notes that although it was the named party in the charge, the charge was based solely on conduct committed by CDCR. Accordingly, DPA contends the charge was filed against the wrong party and should be dismissed on that basis alone.

The State of California is the respondent in charges filed against the State, and DPA is the agency that receives service of Dills Act charges. The caption identifying specific departments assists the parties in identifying the area of the State where the alleged unfair practice occurred. Here, DPA, who was properly served with a copy of the charge, has failed to show any prejudice resulting from the failure to identify CDCR on the face of the charge.

[2] The Board notes an apparent typographical error on page 1 of the Warning letter. The last sentence of the quoted language on that page erroneously refers to non-uniformed peace officers at the beginning of the sentence. The sentence should read:

> Whereas ~~non~~-uniformed peace officers had been required to wear their vests in a concealed fashion under their uniforms, non-uniformed peace officers, such as correctional counselors, were permitted to wear their vests over their clothing.

PERB Regulation 32620(b)(1) authorizes a Board agent to, "[a]ssist the charging party to state in proper form the information required by section 32615." (PERB regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.) Based on this regulation, we find the Board agent has since properly identified CDCR as the actual respondent in the case. (See *San Marcos Educators Association, CTA/NEA (Duran-Chugon)* (1988) PERB Decision No. 711.) We, therefore, conclude that CCPOA's failure to name CDCR as the respondent in this case is not sufficient, standing alone, to warrant dismissal.

ORDER

The unfair practice charge in Case No. SA-CE-1705-S is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Dowdin Calvillo and Member Wesley joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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

December 4, 2008

Suzanne L. Branine, Staff Legal Counsel
California Correctional Peace Officers Association
755 Riverpoint Drive, Suite 200
West Sacramento, CA 95605-1634

Re: California Correctional Peace Officers Association v. State of California, (Department of Corrections & Rehabilitation)
Unfair Practice Charge No. SA-CE-1705-S
DISMISSAL LETTER

Dear Ms. Branine:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 31, 2008. The California Correctional Peace Officers Association (CCPOA, Union, or Charging Party) alleges that the State of California (Department of Corrections & Rehabilitation) (State, CDCR, or Respondent) violated section 3519 of the Ralph C. Dills Act (Dills Act)[1] by engaging in surface bargaining.

You were informed in the attached letter dated November 4, 2008 (Warning Letter), that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to November 14, 2008, the charge would be dismissed. On November 10, 2008, you verified to me during our telephone conversation that you had in fact received the Warning Letter. At your request, I extended at that time the deadline to file an amended charge to December 3, 2008.

No amended charge was filed with PERB by or on the December 3, 2008 deadline. Therefore, this charge is being dismissed based on the facts and reasons set forth in the Warning Letter.

Right to Appeal

Pursuant to PERB Regulations,[2] Charging Party 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. (Cal. Code Regs, tit. 8, sec. 32635(a).) Any document filed with the Board

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

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. (Cal. Code Regs, tit. 8, secs. 32135(a) and 32130; see also Gov. Code, sec. 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 PERB 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. (Cal. Code Regs, tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 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. (Cal. Code Regs, tit. 8, sec. 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 Cal. Code Regs., tit. 8, sec. 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. (Cal. Code Regs, tit. 8, sec. 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, sec. 32132.)

Final Date

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

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Yaron Partovi
Regional Attorney

Attachment

cc: Todd M. Ratshin

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
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November 4, 2008

Suzanne L. Branine, Staff Legal Counsel
California Correctional Peace Officers Association
755 Riverpoint Drive, Suite 200
West Sacramento, CA 95605-1634

Re: California Correctional Peace Officers Association v. State of California (Department of Corrections & Rehabilitation)
Unfair Practice Charge No. SA-CE-1705-S
WARNING LETTER

Dear Ms. Branine:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 31, 2008. The California Correctional Peace Officers Association (CCPOA, Union, or Charging Party) alleges that the State of California (Department of Corrections & Rehabilitation) (State, CDCR, or Respondent) violated section 3519 of the Ralph C. Dills Act (Dills Act)[1] by engaging in surface bargaining.

Investigation of the charge revealed the following relevant information. CCPOA is the exclusive representative of State Bargaining Unit 6 (BU 6) employees of the State. CCPOA and CDCR were parties to a Memorandum of Understanding (MOU) that expired by its terms on June 30, 2006. On September 12, 2007, the State presented its last, best, and final offer (LBFO) to CCPOA. CCPOA did not accept the State's LBFO. On September 18, 2007, the State notified CCPOA that, "[p]ursuant to the Ralph C. Dills Act, Government Code Section 3517.8, the State is exercising its right to implement. . . its last, best, and final offer. . . ."

On November 27, 2007, CDCR provided notice to CCPOA that it intended to revise its protective vest policy. On November 30, 2007, CCPOA requested to meet and confer over the impact of these proposed changes.

It is alleged by Respondent that the revisions to the protective vest policy involved the following:

> One substantive revision to the policy involved the wearing of vests by non-uniformed peace officers. Whereas non-uniformed peace officers had been required to wear their vests in a concealed fashion under their uniforms, non-uniformed peace officers, such as correctional counselors, were permitted to wear

[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.

> their vests over their clothing, Under the revisions to the protective vest policy, non-uniformed peace officers would be required to wear their vests in a concealed fashion under their clothing consistent with manufacturer recommendations and instructions.

On January 30 and 31, 2008, the parties met and conferred over the impact of the changes to the protective vest policy. In attendance for the Union was, among others, CCPOA Field Representative Cory Davis.

During negotiations CCPOA team members passed 14 proposals. It is alleged that CDCR responded to each proposal with either a "no," with no counter offer, or with a claim that the proposal was a matter outside the scope of representation.

The charge also alleges that on January 31, 2008, during discussion of the new vest policy,

> A CCPOA team member was trying to express his concerns on several issues raised by the new policies. CDCR team members refused to acknowledge that he was speaking, would not look at him while he spoke, and even though he had not finished expressing his concerns on the policy, CDCR team members got up and walked out of negotiations. CDCR team members walked out of negotiations even though CCPOA team members clearly stated that they were not finished passing proposals and that they thought there was room for movement. They stated that the table was not at impasse.

On March 7, 2008, CDCR issued a letter to CCPOA summarizing the discussion held at the January 30-31 sessions. The letter stated in pertinent part:

> During these meetings, CCPOA passed 14 proposals . . . . None of the proposals related to an impact of CDCR's change in its vest policy. The proposals ranged from a request for more money for all [BU 6] staff, to changing of the calendar for inspections of the vests.
>
> At the end of the first day at 5:00 p.m., Mr. Davis gave me an information request totaling seven items; however, none of the items related to issues within scope of this table. Nevertheless, management responded to each item the following day. Our meeting ended on January 31st when CCPOA was unable to identify any issues within scope resulting from the changes in the vest policy.

> On January 31st, during out meeting, I asked you several times: "*What items are within scope that we can reach agreement on, or what do you feel has not been addressed?*" [Italics in original]. You were unable to identify any subject within scope for use to discuss. Shortly thereafter, the meeting concluded.

DISCUSSION

The charge alleges that the employer violated Dills Act section 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.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a failure of the duty to bargain because it amounts to merely going through the motions of negotiations. (General Electric Co. (1964) 150 NLRB 192, 194, enf. 418 F.2d 736.) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (Oakland Unified School District (1983) PERB Decision No. 326.) Dilatory and evasive tactics including canceling meetings or failing to prepare for meetings is evidence of bad faith. (Ibid.) Conditioning agreement on economic matters upon prior agreement on non-economic subjects is evidence of an unwillingness to engage in a give-and-take. (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S.)

Other factors that have been held to be indicia of surface bargaining include: negotiator's lack of authority which delays and thwarts the bargaining process (Stockton Unified School District (1980) PERB Decision No. 143); insistence on ground rules before negotiating substantive issues (San Ysidro School District (1980) PERB Decision No. 134); and reneging on tentative agreements the parties already have made (Charter Oak Unified School District (1991) PERB Decision No. 873; Stockton Unified School District, supra, PERB Decision No. 143; Placerville Union School District (1978) PERB Decision No. 69).

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.)

The charge alleges that the following indicia demonstrate CDCR engaged in surface bargaining: (1) refusing to pass counterproposals; (2) refusing to acknowledge a CCPOA team member's concerns; and (3) walking out on negotiations prior to either impasse or agreement.

I. State's Refusal To Make Counterproposals

A party's willingness to exchange reasonable proposals and its attempts to reconcile differences during the bargaining process indicate its intent to bargain in good faith. (See Gonzales Union High School District (1985) PERB Dec. No. 480; Oakland Unified School District (1981) PERB Dec. No. 178.) PERB has held that "[a] flat refusal to reconcile differences by failing to offer counterproposals could be construed to be in bad faith if no explanation or rationale supports the employer's position." (Ibid.) Total inflexibility in bargaining positions, especially when coupled with other indicia, may be the basis for a finding of bad faith. (Fremont Unified School District (1980) PERB Decision No. 136.)

However, the duty to bargain does not compel either party to make concessions. Insistence on a firm position is not necessarily evidence of bad faith because the law merely requires the parties to maintain a sincere interest in reaching an agreement, and even if the reasons for insisting on a particular position or contract term are questionable, if the belief is sincerely held, it may be maintained even if it produces a stalemate. (See Public Employees Assn. v. Board of Supervisors (1985) 167 Cal.App.3d 797, 805-806; Placentia Fire Fighters v. City of Placentia (1976) 57 Cal.App.3d 9, 22-23; Los Angeles County Employees Assn., Local 660 v. County of Los Angeles (1973) 33 Cal.App.3d 1, 4, n.3; Trustees of the California State University (2006) PERB Decision No. 1842-H; City of Fresno (2006) PERB Decision No. 1841-M; County of Riverside (2004) PERB Dec. No. 1715-M; Oakland Unified School District, supra, PERB Dec. No. 275.) The obligation to bargain in good faith merely requires the parties to explain the reasons for a particular bargaining position with sufficient detail to "permit the negotiating process to proceed on the basis of mutual understanding." (Jefferson School District (1980) PERB Decision No. 133.)

In the context of this record, it cannot be concluded that the State's conduct regarding the protective vest policy constituted any indicia of bad faith bargaining. It appears that during negotiations, with respect to the protective vest policy, the State drove a hard bargain. During negotiations, the State refused to accept any of the 14 proposals passed by CCPOA because these proposals—as alleged by CDCR in their March 7, 2008 letter—either failed to relate to matters that impact bargaining unit employees or were not matters within the scope of representation. (See, e.g., Kern Community College District (1983) PERB Decision No. 372 [exclusive representative's failure to make proposals within scope regarding the effects of a nonnegotiable decision relieved the employer of any violation].) Thus, even if CCPOA believes CDCR's position on the protective vest policy was questionable, the facts in the record demonstrate that CDCR met its obligations under the Dills Act by providing reasons for its particular bargaining positions.

If CDCR's negotiators had persisted in flatly refusing to negotiate about the protective vest policy, this may well have been a different case. (See e.g., Regents of the University of

California (1983) PERB Decision No. 356-H, pp 21-22 [when a party preemptively announces it will not deviate from a position under any circumstances, bad faith may be inferred].) However, this is not what happened here. Again, while CDCR espoused a hard line, it appears that such a position was not etched in stone. During negotiations CDCR informed CCPOA several times: "What items are within scope that we can reach agreement on, or what do you feel has not been addressed?" These facts demonstrate that CDCR had a flexible position. Further, there are no facts in the record to show that CCPOA clarified this request or responded to CDCR's position. Based on the current record, the State's conduct with respect to its refusal to provide counterproposals, considered in its totality, was not unlawful.

The charge alleges CDCR's response to CCPOA's proposals "was inappropriate . . . because there were many possible counterproposals which CDCR could have offered."

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.)

In addition to the deficiencies discussed above, the charge presently fails to meet its burden under United Teachers-Los Angeles (Ragsdale), supra, PERB Decision No. 944 because it fails to describe, for example, what proposals CCPOA offered the State and what counterproposals CCPOA believes CDCR could have offered to those proposals.

II. State's Refusal to Acknowledge a CCPOA Team Member's Concerns

The charge alleges that CDCR's conduct (i.e., CDCR managers "refused to acknowledge" a CCPOA negotiator and refused to look at him) during negotiations demonstrates an indicia of bad faith bargaining.

The charge presently fails to meet its burden under United Teachers-Los Angeles (Ragsdale), supra, PERB Decision No. 944 because it fails to, for example: (1) identify who among CCPOA's team members was allegedly ignored by CDCR when he sought to "express his concerns" over the policy changes; (2) identify whether the "concerns" were over management's decision to implement the policy, and if not, describe the "concerns" and how such concerns relate to the effects on bargaining unit employees; (3) identify which CDCR negotiators refused to look at the CCPOA negotiator while he sought to "express his concerns"; and (4) describe how CDCR "refused to acknowledge" the CCPOA team member, and generally how one acknowledges an opposing negotiator during bargaining.

Secondly, assuming the above deficiencies have been cured by the Charging Party, the charge presently fails to demonstrate any indicia of bad faith bargaining. Specifically, the Dills Act does not require the parties to negotiation to look at each other or to make eye contact. In

addition, there are no applicable standards under other PERB-administered collective bargaining statutes that might obligate Respondent to follow such etiquette during bargaining. Further, Charging Party's view that such conduct at the negotiation table is unlawful is not supported by any PERB or National Labor Relations Board (NLRB) authorities.

III. Walking Out During Negotiations

The charge alleges that another factor of bad faith or surface bargaining came about when CDCR team members walk out of negotiations before the parties were at impasse.

The charge presently fails to meet its burden under United Teachers-Los Angeles (Ragsdale), supra, PERB Decision No. 944 because it fails to describe, for example: (1) "who" from CDCR's bargaining team walked out of negotiations; (2) whether the CDCR team members returned to the table on January 31, 2008; and (3) whether CDCR offered to schedule another negotiation meeting before walking out.

Walking out of a bargaining session can constitute indicia of surface bargaining. (San Ysidro School District, supra, PERB Decision No. 134; Arkansas Grain Co. (1968) 172 NLRB 1742 [walking out of bargaining sessions for irrelevant reasons].) However, the presence of one indicia alone will not establish bad faith bargaining. (Oakland Unified School District (1996) PERB Decision No. 1156.)

CONCLUSION

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not received in this matter before November 14, 2008, your charge shall be dismissed. If you have any questions, please call me at the above telephone number.

Sincerely,

Yaron Partovi
Regional Attorney

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