STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA UNION OF SAFETY EMPLOYEES, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF PARKS AND RECREATION), Respondent.	Case No. S-CE-443-S Request for Reconsideration PERB Decision No. 810-S PERB Decision No. 810a-S August 1, 1990

Appearances: Sam A. McCall, Jr., Attorney, for California Union of Safety Employees; Department of Personnel Administration by M. Jeffrey Fine, Deputy Chief Counsel, for State of California (Department of Parks and Recreation).

Before Hesse, Chairperson; Craib, Shank and Camilli, Members.

DECISION

CRAIB, Member: The Department of Parks and Recreation (Department) requests reconsideration of PERB Decision No. 810-S, issued by the Public Employment Relations Board (PERB or Board) on June 4, 1990. In that decision, the Board affirmed a Board agent's dismissal of the allegation that the Department violated section 3519, subdivision (a) of the Ralph C. Dills Act[1] by

[1]The Ralph C. Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3519, subdivisions (a) and (b) provides:

> It shall be unlawful for the state to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce

denying representation at an investigatory interview. However, the Board reversed the dismissal of the allegation that the denial of representation violated section 3519, subdivision (b), finding that, unlike the allegation of interference with employee rights, the allegation that the denial of representation interfered with organizational rights was not subject to deferral to arbitration.

DISCUSSION

PERB Regulation 32410, subdivision (a)[2] states, in pertinent part:

> Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision . . . . The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

In its request for reconsideration, the Department puts forth four arguments: (1) the California Union of Safety Employees did not specifically raise the issue of deferral of the subdivision (b) allegation, therefore, the Department had no opportunity to address that issue prior to the Board's decision;

> employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

[2]PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq.

(2) the Board's decision is inconsistent with the language of section 3514.5, subdivision (a)(2), which states that the Board shall not "issue a complaint against conduct also prohibited by the provisions of the agreement . . . ." Since the same conduct alleged to have constituted the section 3519, subdivision (b) violation also was the basis for the subdivision (a) allegation that was deferred to arbitration, the Department claims that the Board has improperly issued a complaint against conduct also prohibited by the contract; (3) the present case is distinguishable from State of California (California Department of Forestry and Fire Protection) (1989) PERB Decision No. 734-S because, in that case, the alleged unlawful conduct was principally directed at the employee organization, while, in the present case, the conduct was principally directed at an employee; and (4) the Board erred in ordering that a complaint issue because there was no determination that the allegations were sufficient to state a prima facie violation.

The Department's request for reconsideration does not claim that the Board's decision contains prejudicial errors of fact, nor does it offer newly discovered evidence or law. Rather, it asserts that the decision contains various errors of law. Therefore, the request is denied for failure to meet the requirements of Regulation 32410.[3]

[3]With regard to the Department's argument that the Board failed to determine if a prima facie violation was stated, we note that such determination, though not express, was implicit in the Board's adoption of the Board agent's rendition of the facts and its order that a complaint issue. Nevertheless, to avoid any

ORDER

The request for reconsideration of PERB Decision No. 810-S is hereby DENIED.

Members Shank and Camilli joined in this Decision.

Chairperson Hesse's dissent begins on p. 5.

---

potential for confusion, we now expressly hold that, assuming the facts alleged are true, Ranger Robert Murphy could reasonably have believed that discipline might occur, so as to trigger representational rights at the investigatory interview on or about October 12, 1989. (See, e.g., Redwoods Community College District (1983) PERB Decision No. 293, affd. in part in Redwoods Community College District v. Public Employment Relations Board (1984) 159 Cal.App.3d 617.)

conduct is alleged to violate section 3519(a) and (b) of the Dills Act. As this conduct is arguably prohibited by the parties' collective bargaining agreement, which has a grievance procedure culminating in binding arbitration, the Board does not have jurisdiction to issue a complaint. The fact that the same conduct may constitute a violation of section 3519(b) of the Dills Act, in addition to section 3519(a), cannot be used to defeat the jurisdictional bar of section 3514.5(a)(2). (See Lake Elsinore School District, supra, PERB Decision No. 646.) By issuing a complaint alleging a violation of section 3519(b), the Board is issuing a complaint against conduct prohibited by the collective bargaining agreement.[1] Such a result is contrary to the mandatory language of section 3514.5(a)(2) of the Dills Act

---

[1] Article VI, section 6.2(a) of the parties' collective bargaining agreement defines grievance as:

> [A] dispute of one or more employees, or a dispute between the State and CAUSE [California Union of Safety Employees] involving the interpretation, application, or enforcement of the express terms of this Contract.

Under this provision, the Association can be a grievant. Even if the collective bargaining agreement were silent on this issue, the Board has held that the exclusive representative has the right to file a grievance in its own name. (South Bay Union School District (1990) PERB Decision No. 791.) This right appears to be based on EERA section 3543.1(a). As section 3515.5 of the Dills Act contains identical language, this holding is applicable to the present case. Accordingly, the allegation that the Department's denial of representation to an employee at an investigatory interview interfered with the employee organization's rights is also prohibited by the parties' collective agreement.

Hesse, Chairperson, dissenting: I would grant the Department of Parks and Recreation's (Department) request for reconsideration. Further, I would find the Public Employment Relations Board (Board) agent properly dismissed and deferred to arbitration the allegations that the Department violated section 3519(a) and (b) of the Ralph C. Dills Act (Dills Act) by denying representation at an investigatory interview.

Section 3514.5(a)(2) of the Dills Act states, in pertinent part:

> Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not . . . issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. . . .

In Lake Elsinore School District (1987) PERB Decision No. 646, the Board held that section 3541.5(a) of the Educational Employment Relations Act (EERA), which contains language identical to section 3514.5(a) of the Dills Act, established a jurisdictional rule requiring an unfair practice charge be dismissed and deferred if: (1) the grievance procedure of the parties' collective bargaining agreement culminates in binding arbitration; and (2) the conduct alleged in the unfair practice charge is prohibited by the parties' collective bargaining agreement.

In the present case, the alleged conduct is the Department's denial of representation at an investigatory interview. This

and contrary to the Board's holding in Lake Elsinore School District, supra, PERB Decision No. 646.

Finally, the majority has failed to distinguish the present case from the Board's decision in State of California (California Department of Forestry and Fire Protection) (1989) PERB Decision No. 734-S. In State of California, the Board was confronted with two alleged employer statements which allegedly interfered with the employees' rights and employee organization's rights. The Board found one of the alleged statements was directed toward the employee organization and, therefore, stated a prima facie case of interference with the employee organization's rights in violation of section 3519(b) of the Dills Act. The Board did not find that this alleged statement also interfered with the employees' rights. Rather, the alleged threat was directed against the employee organization. Thus, unlike the present case, the Board did not find the same conduct was prohibited by the parties' collective bargaining agreement and also constituted a prima facie violation of the Dills Act.

For these reasons, I would grant the Department's request for reconsideration and reverse the majority's decision in State of California (Department of Parks and Recreation) (1990) PERB Decision No. 810-S.