

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA CORRECTIONAL PEACE
OFFICERS ASSOCIATION,

Charging Party,

v.

STATE OF CALIFORNIA (DEPARTMENT OF
PERSONNEL ADMINISTRATION),

Respondent.

Case No. SA-CE-1621-S

COMPLAINT

It having been charged by Charging Party that Respondent engaged in unfair practices in violation of California Government Code section 3519, the General Counsel of the Public Employment Relations Board (PERB), pursuant to California Government Code sections 3513(h), 3514.5 and 3541.3(i) and California Code of Regulations, title 8, section 32640, issues this COMPLAINT on behalf of PERB and alleges:

1. Charging Party is a recognized employee organization within the meaning of Government Code section 3513(b) of an appropriate unit of employees.
2. Respondent is the State employer within the meaning of Government Code section 3513(j).
3. During the period from April 13, 2006 through May 17, 2007, the Charging Party and Respondent were meeting and conferring with regard to a successor memorandum of understanding (MOU) pursuant to Government Code section 3517. During the period including May 17, 2007 through September 17, 2007, the parties were engaged in mediation pursuant to Government Code section 3518.

4. On or about September 18, 2007, Respondent informed Charging Party that Respondent was "exercising its right to implement all three years of its last, best and final offer," subject only to "Legislative funding of expenditures."

5. By implementing terms and conditions for a three-year duration, Respondent acted contrary to the provisions of Government Code sections 3517 and 3517.8, and thus violated Government Code section 3519(c).

6. This conduct also interfered with the rights of bargaining unit employees to be represented by Charging Party in violation of Government Code section 3519(a).

7. This conduct also denied Charging Party its right to represent bargaining unit employees in violation of Government Code section 3519(b).

8. On or about September 18, 2007, Respondent informed Charging Party that its unilateral imposition of terms and conditions of employment did not include the continuation of State Vice-Presidents leave, as set forth at Article 2, Section 2.11, of the parties' expired MOU. The omission of this provision was not reasonably comprehended within the meaning of the last, best, and final offer presented by the Respondent prior to the implementation.

9. By the acts and conduct described in paragraph 8, Respondent failed and refused to meet and confer in good faith with Charging Party in violation of Government Code section 3519(c).

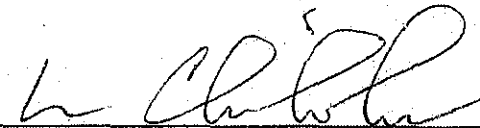
10. This conduct also interfered with the rights of bargaining unit employees to be represented by Charging Party in violation of Government Code section 3519(a).

11. This conduct also denied Charging Party its right to represent bargaining unit employees in violation of Government Code section 3519(b).

Any amendment to the complaint shall be processed pursuant to California Code of Regulations, title 8, sections 32647 and 32648.

DATED: December 7, 2007

TAMI R. BOGERT
General Counsel

By 
Les Chisholm
Division Chief

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



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STATE OF CALIFORNIA (DEPARTMENT OF
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Respondent.

Case No. SA-CE-1621-S

**NOTICE OF INFORMAL
CONFERENCE**

~~PLEASE TAKE NOTICE~~ that on January 7, 2008, at the Public Employment Relations Board, 1031 18th Street, Room 103, Sacramento, California, beginning at 10:00 a.m., an informal conference will be held pursuant to California Code of Regulations, title 8, section 32650 on an unfair practice complaint issued by the Public Employment Relations Board (PERB) against the above-named respondent. The conference will be held before the undersigned representative of PERB, at which time the parties should appear in person or by representative.

PLEASE TAKE FURTHER NOTICE that requests to change the date of the informal conference will not be entertained unless a written request meeting the following conditions is filed in the Sacramento Regional Office not less than five (5) working days before the date set for the conference.

1. The request must be served on the opposing party;
2. The reasons for the request must be specified;
3. The request must include the opposing party's position on the request;
4. Alternate dates proposed by the requesting party and submitted by the opposing

party must be stated. (Reasonable attempts should have been previously made to coordinate those dates with the calendar of the undersigned; and

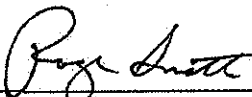
5. The alternate dates must fall within 20 calendar days of the date the conference was originally scheduled.

If all of the above-listed conditions are not met, the written request must set forth good cause for the failure to comply with this directive.

At the conference, the parties should be prepared to reach a settlement agreement or reduce the number of outstanding issues. If no settlement is reached, a formal hearing will be scheduled by the PERB. Parties should be prepared at the conference to submit at least three sets of proposed dates for formal hearing.

All communications concerning the further processing of this case should be addressed to the undersigned at PERB, 1031 18th Street, Sacramento, CA 95811-4124; (916) 327-8387.

DATED: December 7, 2007

By 

Roger Smith
Labor Relations Specialist

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, 1031 18th Street, Sacramento, CA 95811-4124.

On December 7, 2007, I served the LETTER, COMPLAINT and NOTICE OF INFORMAL CONFERENCE regarding Case No. SA-CE-1621-S on the parties listed below by

placing a true copy thereof enclosed in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid.

personal delivery.

facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).

Gregg McLean Adam, Attorney
Carroll, Burdick & McDonough
44 Montgomery Street, Suite 400
San Francisco, CA 94104

Paul M. Starkey, Labor Relations Counsel
Department of Personnel Administration
1515 "S" Street North Building, Suite 400
Sacramento, CA 95811-7258

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 7, 2007, at Sacramento, California.

Anna Quintero
(Type or print name)



(Signature)



"Adam, Gregg"
<GAdam@cbmlaw.com>
12/11/2007 09:56 PM

"Charles L. Alexander Jr. \ (E-mail)"
To <chuck.alexander@ccpoa.org>, "David A. Sanders
\ (E-mail)" <david.sanders@ccpoa.org>
"Lance Corcoran \ (E-mail)" <lance.corcoran@ccpoa.org>,
cc "Michael L. Jimenez \ (E-mail)" <elpresidente@ccpoa.org>,
"Steve Weiss \ (E-mail)" <steve.weiss@ccpoa.org>, "Ryan
bcc
Subject PERB Complaint and Partial Dismissal in LBFO

Chuck and David:

My apologies for only getting word of this to you so late. We had an internal communications breakdown at CBM today and I only learned about this after getting home tonight. Bottom line: Complaint issued on 3 year LBFO and (citing the discrimination clause of the Dills Act--you can have some fun with that, politically) unilateral ending of State Vice President Leave.

A better result than I anticipated, given PERB's demeanor towards us. We will appeal the claims dismissed, although I have little expectation that *this board* will reconsider. (The denial of our claim re RTB makes no sense as it is the mirror-image of the SVPL claim.)

I copy in Lance and Ryan as I think they can have some fun with the press on the news that we have at least an initial determination by PERB that the LBFO was illegal in at least two regards.

Gregg

-----Original Message-----

From: Oliker, Janine
Sent: Tuesday, December 11, 2007 10:13 AM
To: Adam, Gregg; Stoughton, Jennifer; Leonard, Natalie
Subject: Monday's Mail: PERB Complaint and Partial Dismissal in LBFO

Two attached docs rec'd in yesterday's mail:

Partial Dismissal - note must appeal within 20 days if review of dismissal desired. Calendared 12/27 deadline.

Also, Complaint issued, with 20 days to Answer - also calendared for 12/27.

Note, Informal Conference set for January 7, 2008, 10:00 at PERB. Also calendared.

Janine Oliker

Assistant to Ronald Yank, Gregg McLean Adam and Erick V. Munoz
Carroll, Burdick & McDonough LLP
44 Montgomery Street, Suite 400
San Francisco, CA 94104
415.743.2462 (Direct)
415.989.0932 (Fax)

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PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
Fax: (916) 327-6377



October 22, 2007

Gregg McLean Adam, Attorney
Carroll, Burdick & McDonough
44 Montgomery Street, Suite 400
San Francisco, CA 94104

Re: California Correctional Peace Officers Association v. State of California (Department of Personnel Administration)
Unfair Practice Charge No. SA-CE-1621-S
PARTIAL WARNING LETTER

Dear Mr. Adam:

The above-referenced unfair practice charge was filed on September 25, 2007, and amended on October 2, 2007. 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) at: (1) section 3517 by failing to provide necessary and relevant information requested by CCPOA in the course of the parties' negotiations, and by engaging in bad faith, or surface, bargaining; (2) sections 3516, 3516.5, and 3517 by implementing a last, best, and final offer (LBFO) that "supercedes and cancels" prior bargaining history, past practices, and "articulations, understandings, interpretations and/or applications" of the parties' entire agreement article (Section 27.01 of the expired memorandum of understanding (MOU)), and by placing artificial barriers on future negotiations; (3) section 3517.8 by implementing the State's LBFO with a three-year duration;¹ (4) sections 3517 and 3517.8 by implementing changes to Chapter President Release Day, the Release Time Bank, and Vice President Leave that are not reasonably comprehended in the State's LBFO; (5) sections 3515, 3515.5, and 3519 by interfering with CCPOA's protected activity and discriminating against CCPOA in retaliation for prior protected activity; and (6) section 3517.8 by implementing the LBFO without a determination of impasse being made by PERB.

Facts²

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. Attached to that letter was a four-page statement of the State's

¹ The alleged violation based on implementation of a three-year duration is not addressed by this Partial Warning Letter.

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

initial bargaining proposals. On July 30, 2006, DPA presented a more detailed and voluminous set of contract proposals. The proposed term of the new MOU at that point was from the date of ratification to June 30, 2008.

DPA Director Dave Gilb appeared at the negotiations session of March 29, 2007 to explain the concepts of a new package that the State had prepared on March 22. At that meeting CCPOA President Mike Jimenez repeatedly interrupted Gilb and ultimately advised him to stop "wasting his time." Following the break up of that meeting, CCPOA's President wrote to DPA and advised that "as long as DPA chooses to engage in the obvious gamesmanship the current offer exudes, we can do nothing but sit back and watch as valuable time slips away." This April 2 response concluded with "please consider this (letter) a counterproposal." The letter contained no specific contract language.

On April 3, 2007, DPA attempted to schedule further meetings but received no response. On April 6, 2007, DPA sent the March 22 proposal, including a three-year duration but with an option for a fourth year.

On April 6, 2007, CCPOA sent two letters to DPA, one an opinion letter from Jimenez in which he concludes with a purported quote from Woodrow Wilson: "Nothing chills pretense like exposure." The second letter from CCPOA Chief of Labor Steve Weiss was an information request seeking background on reasons for DPA's attempt to reduce the entire agreement clause of the contract and expand the management rights provisions.

The State again attempted to get dates for further meetings. On April 11, 2007, DPA wrote to CCPOA and accused CCPOA of stalling and asking for information it must already have, e.g., the total number of grievances outstanding and copies of grievances in which the State's response was untimely.

On April 13, 2007, Jimenez wrote to DPA and stated:

...it seems that each time we get together we grow further apart. Accordingly, since you feel so strongly about the generosity of your offer and your perceived legitimate management needs, the CCPOA Executive Council has decided to eliminate any further unhealthy interactions and permit you to send out your proposal for a vote of the CCPOA membership. We have no intention of delaying, frustrating or aggravating the negotiations process.

On April 20, 2007, CCPOA's attorney, Gregg Adam, wrote to DPA and stated "we have no confidence that an agreement can be reached with the State's present proposal as the framework for negotiations." He continued by indicating that CCPOA had multiple proposals that had not yet been given to DPA.

On May 10, 2007, the State filed with PERB a Request for Impasse Determination/ Appointment of Mediator (PERB Case No. SA-IM-3041-S). CCPOA opposed the request but the request was approved and a mediator appointed on May 17, 2007.

On August 22, 2007, just prior to a scheduled mediation session, CCPOA informed the mediator that it was withdrawing from mediation and would not participate further.³ Later that day, DPA submitted to CCPOA a 300-plus page package proposal, stating the offer would remain "on the table" for two weeks. The proposal was for a MOU of three years duration, expiring on June 30, 2010. CCPOA responded to the August 22 proposal by letter dated August 31, 2007. The response stated that the proposal had been reviewed with delegates to a CCPOA training conference, and that the delegates had approved a motion to submit 30 questions about the August 22 package proposal (with a request that the correspondence, the questions, and any response to the questions be posted on the DPA website).

By letter dated September 4, 2007, DPA Director Gilb responded to CCPOA Executive Vice President Chuck Alexander. Responding specifically to CCPOA claims that it could not enter into agreements that it did not understand, and thus needed to ask and receive responses to questions about the proposals, Gilb's letter, in part, stated:

Any lack of understanding on the part of the CCPOA negotiating team is calculated ignorance. The State has been attempting to bargain/mediate a successor MOU for well over a year with CCPOA. CCPOA, however, has made it abundantly clear that it is not interested in a new contract. CCPOA has not supplied even one substantive proposal or counterproposal during this entire process. All CCPOA has done is reject each of the State's offers and has proposed only that the language of the expired MOU remain.

Regardless of the number of times that the State provides responses to CCPOA's endless supply of questions, the volume of documents provided in response to CCPOA's requests for information, the compromises the State has made in its proposals, CCPOA's refrain is the same: "We don't trust the State and we don't understand the State's proposals." CCPOA may well distrust the State, but with respect to the State's proposals, CCPOA simply does not like or agree with them. I think you certainly understand them.

Addressing the 30 questions, Gilb's letters refers to them as "simply rhetorical or inconsequential," or as already responded to, or that a "simple reading of the proposed

³ The assigned mediator notified PERB of CCPOA's action by letter dated September 6, 2007, and PERB records show Case No. SA-IM-3041-S as closed effective September 10, 2007 (the date of receipt of the mediator's letter).

language would answer," or as ones that CCPOA already knows the answer to, or as "simply baffling." That said, Gilb's letter provides a response to 15 of the questions.

On September 12, 2007, the State presented its formal Last, Best and Final Offer to CCPOA, with a proposed duration until June 30, 2010. CCPOA rejected the offer on September 17, 2007. On September 18, 2007, DPA notified CCPOA that, pursuant to Dills Act section 3517.8, the State was "exercising its right to implement all three years of its last, best and final offer as indicated [in an attached table] and subject to Legislative funding of expenditures." The implementation letter also concluded with the following paragraph:

In the absence of a contract, union paid leave, among other things, no longer exists as the parties have previously understood it. To the extent that the union executive leadership desires to remain off work (outside of an institution/facility), please contact [DPA] no later than close of business on September 25, 2007, to discuss how this could be accomplished extra-contractually. Release Time Bank, however, will continue consistent with the terms and conditions of the July 1, 2008, [sic] Stipulated Settlement (Case # 05AS05470).

By letter dated September 20, 2007, Margie McCune, Chief, Office of Labor Relations, of the California Department of Corrections & Rehabilitation (CDCR), informed CDCR administrators that Chapter President Release Day⁴ would end as of October 1, 2007, and that any [CCPOA] Chapter President designated to utilize a release day should be required to report for duty per their normal work schedule.

Statutory Provisions

The statutory provisions applicable to this case are as follows:

3517. Meet and confer in good faith

The Governor, or his representative as may be properly designated by law, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

⁴ The Chapter President Release Day, which permits each CCPOA chapter president one day per week to conduct union business (e.g., filing grievances) was first agreed to in 2004 as a part of the Addendum to the 2001-2006 MOU.

“Meet and confer in good faith” means that the Governor or such representatives as the Governor may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses.

**3517.61. State employees in State
Bargaining Unit 6; application of
memorandum of understanding**

Notwithstanding Section 3517.6, for state employees in State Bargaining Unit 6, in any case where the provisions of [certain statutes] are in conflict with the provisions of a memorandum of understanding, the memorandum of understanding shall be controlling without further legislative action. In any case where the provisions of [certain statutes] are in conflict with the provisions of a memorandum of understanding, the terms of the memorandum of understanding shall be controlling unless the State Personnel Board finds those terms to be inconsistent with merit employment principles as provided for by Article VII of the California Constitution. Where this finding is made, the provisions of the Government Code shall prevail until those affected sections of the memorandum of understanding are renegotiated to resolve the inconsistency. If any provision of the memorandum of understanding requires the expenditure of funds, those provisions of the memorandum of understanding may not become effective unless approved by the Legislature in the annual Budget Act. If any provision of the memorandum of understanding requires legislative action to permit its implementation by amendment of any section not cited above, those provisions of the memorandum of understanding may not become effective unless approved by the Legislature.

**3517.8. Expiration of memoranda of
understanding; continued effect.**

(a) 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 (Chapter 8 (commencing with Section 201) of Title 29 of the United States Code)), and any provisions covering fair share fee deduction consistent with Section 3515.7.

(b) If the Governor and the recognized employee organization reach an impasse in negotiations for a new memorandum of understanding, the state employer may implement any or all of its last, best, and final offer. Any proposal in the state employer's last, best, and final offer that, if implemented, would conflict with existing statutes or require the expenditure of funds shall be presented to the Legislature for approval and, if approved, shall be controlling without further legislative action, notwithstanding Sections 3517.5, 3517.6, and 3517.7. Implementation of the last, best, and final offer does not relieve the parties of the obligation to bargain in good faith and reach an agreement on a memorandum of understanding if any circumstances change, and does not waive any rights that the recognized employee organization has under this chapter.

In considering the enactment of section 3517.8, the Third Reading analysis of the bill prepared for the Assembly Committee on Public Employees, Retirement and Social Security noted that:

In the case of *DPA v. Greene* (1992) [5 Cal.App.4th 155], the court considered whether the state could unilaterally implement its last, best, and final offer after declaring "impasse" at the bargaining table. The court held that, where the terms are the subject of Government Code provisions which were superseded by the MOU, once the MOU expired, the Government Code provisions spring back into existence, and DPA must implement those provisions. Therefore, DPA can implement its last, best, and final offer only as to those terms not covered by government codes.

Aside from the discussion of the implications of the *Greene* decision, the legislative history regarding the enactment of this new provision focused on the policy reasons for providing for the continuation of binding grievance arbitration and fair share fees following the expiration of a negotiated agreement. In this respect, the bill analyses prepared for the legislative committees considering the legislation noted the Board's decision in *State of California, Department of Youth Authority* (1992) PERB Decision No. 962-S. In that case, the Board adopted the holding of *Litton Financial Printing v. NLRB* (1991) 501 U.S. 190, that negotiated grievance arbitration provisions do not survive the expiration of the agreement.

Requests for Information

The exclusive representative is entitled to all information that is “necessary and relevant” to the discharge of its duty of representation. (*Stockton Unified School District* (1980) PERB Decision No. 143.) PERB uses a liberal standard, similar to a discovery-type standard, to determine relevance of the requested information. (*California State University* (1986) PERB Decision No. 613-H.) Failure to provide such information is a per se violation of the duty to bargain in good faith.

The duty to bargain in good faith includes the obligation of each party to explain the reasons for a bargaining position sufficient to “permit the negotiating process to proceed on the basis of mutual understanding.” (*Jefferson School District* (1980) PERB Decision No. 133.) However, the Board’s discussions of this obligation are distinguished from that found in “request for information” cases, first because the failure to provide relevant and necessary information is held to per se violate the duty to bargain (*Stockton Unified School District, supra*, PERB Decision No. 143), while the failure to adequately explain a bargaining proposal or position is considered within the totality of circumstances. (*Compton Community College District* (1989) PERB Decision No. 728.) In addition, “request for information” cases deal with just that, requests for information; alleged violations based on requests for a party’s thought process are outside the scope of such cases. (See, for example, *Ventura County Community College District, supra*, PERB Decision No. 1340.)

Here, the alleged violations based on the June 6 and 7, August 4, September 6, and November 6, 2006 information requests are time-barred by Dills Act section 3514.5(a)(1), which prohibits PERB from issuing a complaint with respect to “any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.” The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) The statute of limitations is an affirmative defense which has been raised by the State in this case. (*Long Beach Community College District* (2003) PERB Decision No. 1564.) Therefore, charging party now bears the burden of demonstrating that the charge is timely filed. (cf. *Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

The facts surrounding the June 25 and August 31, 2007 requests, which were made after the parties were in mediation, also fail to establish prima facie evidence that an unfair practice has been committed. This conclusion is reached based on the questions themselves that were submitted by CCPOA (most of which were of the “why are you proposing a change” variety), the absence of evidence that the June 25 questions were even presented to the State as a “request for information,” and the fact that the State did respond in writing to the August 31 questions without any subsequent renewal of the request by CCPOA. (See, for example, *King City Joint Union High School District* (2005) PERB Decision No. 1777 [no violation found where the exclusive representative did not express dissatisfaction with the employer’s responses to its information requests, nor did the union clearly communicate its disagreement with the employer sufficiently to require a more detailed response].)

Surface Bargaining

The charge alleges that the employer violated Dills Act sections 3517 and 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.)

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 [45 LRRM 2829, 2830].)

Here, the allegation of bad faith bargaining in violation of Government Code section 3519(c) is based entirely on conduct outside the six months statute of limitations, as it relies on the alleged failure of the State to respond to information requests submitted between June 6 and November 6, 2006, and the alleged unresponsiveness of State representatives at bargaining sessions held in September 2006.

Additionally, while not time-barred, the alleged failure of the State to participate in good faith in statutory impasse procedures in violation of Government Code section 3519(e), under a surface bargaining theory, is also unpersuasive, as the only conduct in question concerns the June 25 and August 31, 2007 "requests for information" discussed above.⁵

Entire Agreement

CCPOA's amended charge includes an allegation that the State's implementation violates the Dills Act based on DPA's statement that the LBFO "supercedes and cancels" prior bargaining history, past practices, and other interpretations of the parties under Section 27.01 (the Entire Agreement article) of the expired MOU. The charge then cites language of changes to Section 27.01 proposed by DPA in the course of bargaining.

⁵ CCPOA does not expressly allege a violation of Dills Act section 3519(e), but it is necessary under applicable precedent to analyze conduct before and after the initiation of statutory impasse procedures as separate unfair practice allegations. (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.)

This allegation, however, appears to overlook a statement made in documents accompanying the State's notice to CCPOA of the implementation of terms and conditions. The statement is that, "Any provision of the expired MOU that has terminated by virtue of implementation, referenced in an implemented term, such as any variation of the entire agreement requirements or arbitration, is no longer operable or applicable."

The theory of CCPOA's allegation in this regard is not clear. An employer may not unilaterally impose a waiver or limitation on a union's right to bargain. (*Rowland Unified School District* (1994) PERB Decision No. 1053.) An entire agreement article, whatever its particular terms, has as an essential characteristic a limitation on both parties' right and/or duty to bargain during the term of an agreement. DPA's omission of the entire agreement article, and of any changes to it, from its implementation appears consistent with the relevant case law, and thus does not support finding a violation.

Implementation of Changes Not Comprehended within LBFO (Union Leave)

As observed by the Board in *Laguna Salada Union School District* (1995) PERB Decision No. 1103 (*Laguna Salada*), citing *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416, it is well established that public-sector employers in California may lawfully make unilateral changes in terms and conditions of employment only after completing statutory impasse procedures. As stated by the Board in *Modesto City Schools* (1983) PERB Decision No. 291, "impasse under EERA is identical to impasse under the NLRA; either party may decline further requests to bargain, and the employer may implement policies reasonably comprehended within previous offers made and negotiated between the parties."

However, the "term 'reasonably comprehended' excludes those changes better than the last offer and also any changes which the parties did not discuss during negotiations which are less than the status quo." (*Laguna Salada*, citing *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

This issue would, under certain facts, ultimately require reconciling the "any or all" language of section 3517.8, the term "reasonably comprehended" as discussed in *Laguna Salada* and other cases, and the holdings of *Litton* with respect to provisions of a MOU that do not survive expiration of the agreement. While CCPOA is correct that *Litton* does not address union leave, there remains the question whether the Legislature intended, in adopting section 3517.8, to leave in place existing provisions of a MOU, when the State unilaterally imposes terms and conditions and has not previously proposed deletion of the disputed items.

In the instant case, though, it is not necessary to answer the question. Although CCPOA alleges that changes to Chapter President Release Day, Release Time Bank, and Vice President Leave were not "contemplated" by the State's LBFO, the documents submitted with its charge do not support such a conclusion. The package offer presented by DPA on September 12, 2007, and identified as the State's Last, Best and Final Offer, included the following relevant

provisions, and did not include specific reference to changes in either Chapter President Release Day⁶ or Vice President Leave:

The State continues to propose to update the MOU to recognize the parties' settlement of the annual donation and use cap of 35,000 hours of release time bank. In addition, permit rank and file Chapter Presidents to utilize this Release Time Bank instead of the former weekly official business/State release time.

All sections of the MOU and addenda not identified in any of the above proposals are deleted.

In its notice of implementation, the State's letter, in relevant part, stated that:

In the absence of a contract, union paid leave, among other things, no longer exists as the parties have previously understood it. To the extent that the union executive leadership desires to remain off work (outside of an institution/facility), please contact [DPA] to discuss how this could be accomplished extra-contractually. Release Time Bank, however, will continue consistent with the terms and conditions of the July 1, 2008 [sic] Stipulated Settlement (Case # 05AS05470).

A comparison of the relevant provisions of the LBFO and the notice of implementation does not factually support a conclusion that the State implemented changes in this respect that were not contemplated by the LBFO.⁷

Discrimination/Retaliation

To demonstrate a violation of Dills Act section 3519(a), the charging party must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained, or coerced the employees because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *Carlsbad Unified School District* (1979) PERB Decision No. 89.)

⁶ At least one earlier package offer included a proposal to delete Chapter President Release Day but to allow such time to be charged to the Release Time Bank.

⁷ I note, but do not rely upon for purposes of this letter, the State's subsequent written notification to CCPOA that "any communications concerning the cancellation of Chapter Presidents Release Time," as well as any communications received by union officials directing a return to work, were rescinded.

However, 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." Thus, 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.)

This aspect of CCPOA's charge lacks factual foundation to support an inference that the State's actions were caused by any protected activity on the part of CCPOA or its members.

Implementation without Determination of Impasse

CCPOA also alleges in the amended charge that Dills Act section 3517.8 requires a determination of impasse by PERB in order for the State to implement its LBFO, and that the State unilaterally implemented in this case without a determination of impasse. However, as previously discussed, PERB did make an impasse determination leading to the appointment of a mediator in this dispute in May 2007, and neither the statute nor PERB regulations provides for a subsequent administrative determination regarding impasse by PERB. PERB's regulations reference Government Code section 3518 with regard to a determination of impasse and appointment of a mediator under the Dills Act, but there is no reference in the applicable regulations to Dills Act section 3517.8. For these reasons, this allegation also fails to state a prima facie violation.

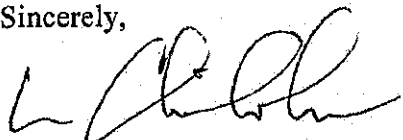
Conclusion

For these reasons the allegations that the State violated the Dills Act at: section 3517 by failing to provide necessary and relevant information requested by CCPOA in the course of the parties' negotiations, and by engaging in bad faith, or surface, bargaining; sections 3516, 3516.5, and 3517 by implementing a last, best, and final offer (LBFO) that "supercedes and cancels" prior bargaining history, past practices, and "articulations, understandings, interpretations and/or applications" of the parties' entire agreement article (Section 27.01 of the expired memorandum of understanding (MOU)), and by placing artificial barriers on future negotiations; sections 3517 and 3517.8 by implementing changes to Chapter President Release Day, the Release Time Bank, and Vice President Leave that are not reasonably comprehended in the State's LBFO; sections 3515, 3515.5, and 3519 by interfering with CCPOA's protected activity and discriminating against CCPOA in retaliation for prior protected activity; and section 3517.8 by implementing the LBFO without a determination of impasse being made by PERB, as presently written, do 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 Second 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

SA-CE-1621-S
October 22, 2007
Page 12

original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before October 31, 2007, I shall dismiss the above-described allegations from your charge. If you have any questions, please call me at the telephone number listed above.

Sincerely,

A handwritten signature in black ink, appearing to read 'Les Chisholm', written in a cursive style.

Les Chisholm
Division Chief

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, 1031 18th Street, Sacramento, CA 95811-4124.

On October 22, 2007, I served the Letter regarding Case No. SA-CE-1621-S on the parties listed below by

placing a true copy thereof enclosed in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid.

personal delivery.

facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).

Gregg McLean Adam, Attorney
Carroll, Burdick & McDonough
44 Montgomery Street, Suite 400
San Francisco, CA 94104
Fax: (415) 989-0932

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on October 22, 2007, at Sacramento, California.

Anna Quintero
(Type or print name)


(Signature)



**PUBLIC EMPLOYMENT RELATIONS BOARD
FACSIMILE TRANSMITTAL SHEET**

TO:

Fax: (415) 989-0932
Gregg McLean Adam
Attorney
Carroll, Burdick & McDonough

FROM:

Les Chisholm
Division Chief
Office of the General Counsel
1031 18th Street
Sacramento, CA 95811-4124
Phone: (916) 327-8383
Fax: (916) 327-6377

DATE:

October 22, 2007

TOTAL NO. OF PAGES INCLUDING COVER:

14

RE:

SA-CE-1621-S

NOTES/COMMENTS:

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PUBLIC EMPLOYMENT RELATIONS BOARD



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



December 7, 2007

Gregg McLean Adam, Attorney
Carroll, Burdick & McDonough
44 Montgomery Street, Suite 400
San Francisco, CA 94104

Paul M. Starkey, Labor Relations Counsel
Department of Personnel Administration
1515 "S" Street North Building, Suite 400
Sacramento, CA 95811-7258

Re: California Correctional Peace Officers Association v. State of California (Department of Personnel Administration)
Unfair Practice Charge No. SA-CE-1621-S

Dear Parties:

The Office of the General Counsel has issued the enclosed COMPLAINT in the above-entitled matter. The Respondent is required to file an ANSWER within 20 calendar days from the date of service of the COMPLAINT, pursuant to PERB Regulation 32644.¹ The required contents of the ANSWER are described in Regulation 32644(b). If you have not filed a Notice of Appearance form, one should be completed and returned with your ANSWER.

Also enclosed is a Notice of Informal Conference informing you that an informal settlement conference has been scheduled. If you are unable to meet on the date specified, please follow the instructions in the second paragraph of the notice. All inquiries, filings, and correspondence in this matter should be directed to me.

Sincerely yours,

Roger Smith
Labor Relations Specialist

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CARROLL, BURDICK & MCDONOUGH

Enclosures

¹ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Copies may be purchased from PERB's Publications Coordinator, 1031 18th Street, Sacramento, CA 95814-4174, and the text is available at www.perb.ca.gov.