STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION, CSU DIVISION, SEIU LOCAL 1000, AFL-CIO,	)	Case No. LA-CE-328-H
Charging Party,	)	Request for Reconsideration PERB Decision No. 1093-H
v.	)	PERB Decision No. 1093a-H
CALIFORNIA STATE UNIVERSITY,	)	July 21, 1995
Respondent.	)	

Appearances: California State Employees Association by Claire Iandoli, Attorney, for California State Employees' Association, CSU Division, SEIU Local 1000, AFL-CIO; William G. Knight, Attorney, for California State University.

Before Carlyle, Garcia and Caffrey, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on a request for reconsideration[1] filed by the California State Employees' Association, CSU Division, SEIU Local 1000, AFL-CIO (CSEA) of the Board's decision in California State University (1995) PERB Decision No. 1093-H. In that decision, the Board dismissed CSEA's unfair practice charge which alleged that the California State University (CSU)

[1]**PERB** regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32410(a) states, in pertinent part:

> 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.

violated section 3571(a) and (c) of the Higher Education Employer-Employee Relations Act (HEERA)[2] when it unilaterally suspended merit salary adjustments (MSA).

CSEA'S EXCEPTIONS

CSEA listed eight exceptions to the Board's decision in its request for reconsideration; those exceptions are summarized below.

Exception 1: Since an arbitrator ruled that CSU's 1988 action was in accordance with the 1985-88 collective bargaining agreement (CBA), the record includes no evidence of a practice of suspending MSAs by CSU. Furthermore, a provision of a prior CBA is "insufficient" to constitute a past practice constraining parties who have altered the provision in a later agreement.

Exception 2: The majority opinion was erroneous because it applied a narrow holding from Marine & Shipbuilding Workers v. NLRB (1963) 320 F.2d. 615 [53 LRRM 2878]; cert. den. (1964) 375 U.S. 984 [55 LRRM 2134], but the court's broader holding was that the employer cannot unilaterally change fundamental conditions of employment. Wages are such a condition.

Exception 3: The durational language does not address CSU's statutory obligation under HEERA after expiration of the contract. The durational language should not be given effect because it is not a clear and unmistakable waiver of CSEA's right under HEERA to bargain over terms and conditions of employment.

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[2]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

Exception 4: Contrary to the majority finding, HEERA section 3572 precludes unilateral suspension of mandatory subjects of bargaining until impasse or agreement occurs.[3]

Exception 5: Principles of labor law govern here, not contract law. Under labor law, it is a fundamental rule that the employer must maintain certain terms and conditions of employment following expiration of a CBA during the parties' negotiations over a successor agreement.

Exception 6: Under Berkeley Unified School District (1994) PERB Decision No. HO-U-564, the Board misinterpreted what constitutes past practice.

Exception 7: HEERA and labor law obligate CSU to negotiate matters within the scope of representation following the expiration of a CBA during the parties' negotiations over a successor agreement; thus the majority opinion's reference to a contractual and management right not to pay the MSAs is erroneous.

Exception 8: The continued payment of MSAs over a seven-year period establishes the past practice. Furthermore, Government Code section 19832 shows the Legislature's recognition of the importance of MSAs, which are to be paid if the employee meets certain standards of efficiency.

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[3]The precedent CSEA cites in support of this interpretation is California State University (1993) PERB Decision No. H0-U-527-H. We note that unappealed proposed decisions do not have a precedential effect in other cases, and accordingly we do not consider them.

CSEA concludes that the majority decision ignores the concept of "past practice" and based its decision solely on interpretation of existing contract language. This approach misapplies PERB and National Labor Relations Board precedent and threatens a fundamental rule of collective bargaining (maintenance of the status quo during successor negotiations). Finally, there was no evidence in the record that funds were unavailable to pay MSAs in this case. CSEA requests that the Board reconsider its decision and adopt the dissenting opinion of Member Caffrey as its decision, awarding back pay plus interest from June 1, 1992, until a new successor agreement was reached.

CSU'S RESPONSE TO EXCEPTIONS

CSU did not respond directly to each of CSEA's exceptions, but it noted that no new law is cited. Also, CSU responds that employers do not waive their right to exercise a power simply because it has not previously exercised it. CSU's response to exception 8 was that Government Code section 19832 does not apply to CSU; it applies to Ralph C. Dills Act (Dills Act) employees.[4] In conclusion, CSU supports the decision reached by the Board and

[4]The Dills Act is codified at Government Code section 3512 et seq. Since this issue does not affect our decision on the request for reconsideration, the Board makes no ruling on that question.

encourages the Board to deny the request for reconsideration, which fails to meet the requirements of PERB Regulation 32410(a).

DISCUSSION

The sole issue before the Board in this request for reconsideration is whether CSEA's exceptions cite newly-discovered evidence or law or identify prejudicial errors of fact in the Board's decision. Member Caffrey writes separately to restate his dissent in the decided case, which is irrelevant to the issue before the Board. Los Angeles Unified School District (1993) PERB Decision No. 964a is instructive on the best way to deny a request for reconsideration and still be consistent with one's prior separate opinion on the case in chief.

Reconsideration is not appropriate when a party merely restates arguments and issues previously considered and rejected by the Board in the underlying decision. (California State Employees Association, Local 1000 (Janowicz) (1994) PERB Decision No. 1043a-S; California Faculty Association (Wang) (1988) PERB Decision No. 692a-H; Tustin Unified School District (1987) PERB Decision No. 626a; Riverside Unified School District (1987) PERB Decision No. 622a.) Since CSEA's exceptions simply disagree with the legal conclusions reached by the Board, the request does not meet the criteria in PERB Regulation 32410(a).

ORDER

The request for reconsideration of the Board's decision in California State University (1995) PERB Decision No. 1093-H is hereby DENIED.

Member Carlyle joined in this Decision.

Member Caffrey's concurrence begins on page 7.

CAFFREY, Member, concurring: I continue to support the position stated in my dissent in California State University (1995) PERB Decision No. 1093-H (CSU). The majority opinion in that case misapplies Public Employment Relations Board (PERB or Board) and National Labor Relations Board precedent, and misinterprets section 3572 of the Higher Education Employer-Employee Relations Act (HEERA) so severely, that it threatens the fundamental rule of collective bargaining that an employer must maintain certain terms and conditions of employment, including wages and benefits, following expiration of a collective bargaining agreement during the parties' negotiations over a successor agreement.

The California State University (CSU) violated HEERA section 3571(a) and (c) when it unilaterally suspended merit salary adjustments (MSAs) for employees represented by the California State Employees' Association, CSU Division, SEIU Local 1000, AFL-CIO (CSEA) on June 1, 1992, prior to the completion of bargaining with CSEA. Accordingly, as I indicated in my dissent in CSU. I would have affirmed the proposed decision of the PERB administrative law judge (ALJ). However, I would have modified the remedy proposed by the ALJ to include a make whole provision, ordering backpay plus interest to be paid to the employees affected by CSU's unlawful MSA suspension.

The matter currently before the Board, however, is the request by CSEA that the Board reconsider its decision in CSU. PERB Regulation 32410 enables any party to a decision of the

Board itself to request the Board to reconsider that decision. However, Section 32410(a) states, in pertinent part:

> 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.

The Board has adopted this strict, narrow standard for reconsideration requests specifically to avoid the use of the reconsideration process to reargue and/or relitigate issues which have already been decided. In numerous reconsideration cases the Board has reiterated this policy, declining to reconsider arguments previously offered by parties and rejected in the underlying decision. In short, PERB's reconsideration process cannot be used to allow parties a second bite of the apple.

In the instant request, CSEA expressly adopts my dissenting opinion in CSU as the basis of its request for reconsideration. While I obviously agree with this viewpoint on the merits of the underlying case, CSEA must point to prejudicial errors of fact within the majority opinion in CSU, or cite newly discovered, previously unavailable evidence or law, in order to support its request for reconsideration of that decision. As noted by the majority above, CSEA's request for reconsideration simply does not comply with this requirement.

Therefore, since CSEA's request for reconsideration of the Board's decision in CSU does not meet the standard described in PERB Regulation 32410, I concur in the denial of that request.