STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

REGENTS OF THE UNIVERSITY OF CALIFORNIA, Charging Party, v. STATEWIDE UNIVERSITY POLICE ASSOCIATION, Respondent.	)	Case No. SF-CO-1-H PERB Decision No. 520-H September 17, 1985

Appearance: Marcia J. Canning, Attorney for Regents of the University of California.

Before Hesse, chairperson; jaeger, Morgenstern, Burt and Porter, Members.

DECISION

BURT, Member: This case is before the public Employment Relations Board (PERB or Board) on exceptions filed by the Regents of the University of California (University) to a proposed decision of an administrative law judge (ALJ) dismissing charges that the Statewide University Police Association (SUPA) violated section 3571.1(c) of the Higher Education Employer-Employee Relations Act (HEERA)[1]

[1]The HEERA is codified at Government Code section 3560 et seq. All references are to the Government Code unless otherwise indicated.

Section 3571.1(c) provides:

It shall be unlawful for an employee

by engaging in a course of conduct that amounted to bad-faith bargaining.

We have reviewed the ALJ's decision in light of the University's exceptions and the record as a whole and we affirm his conclusions of law consistent with the discussion below.

FACTUAL SUMMARY

The relevant facts may be summarized as follows: Negotiations between the University and SUPA began in June 1981 when SUPA sent its initial written proposal covering 24 subject areas. The parties were represented by Thomas Mannix for the University and Robert Jones for SUPA. Between August 17, 1981, when ground rules were established, and January 27, 1982, the parties met 15 times, usually for one to three hours.

At the August 17, 1981 meeting, the university proposed 10 ground rules for the negotiations. SUPA agreed to all but one, which involved initialling proposals when tentative agreements were reached. SUPA rejected that proposal and suggested an alternative procedure. The University rejected SUPA's suggestion and no agreement was reached on how the parties would confirm tentative agreements on given articles.

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organization to:

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(c) Refuse or fail to engage in meeting and conferring with the higher education employer.

By November 13, 1981, the parties had met nine times without agreement on any article. At that time, there were 40 articles on the table, some placed there by SUPA, some by the University. During that period, each party had submitted initial proposals and also revised proposals on certain articles. There were articles on which the parties had not moved from their initial position, and others on which one party or the other had not indicated its position in writing.

At the November 18, 1981 meeting, various changes in articles were proposed and discussed. It was agreed that the duration of the contract would be one year and, consequently, SUPA agreed to the University's waiver clause proposal. At the end of this meeting, the university and SUPA were in agreement on three articles: rules and regulations, duration, and waiver.

On December 16, 1981, the university gave SUPA proposals on 32 subjects, some of which were revisions of previous proposals. At this time, the University also made its first salary proposal: a 6-percent raise to take effect January 1, 1982, plus a $300 one-time "adjustment" to each employee.[2] Mannix told Jones that he believed he would not receive authority to agree to more than 6 percent and, if that were not enough to allow the parties to reach agreement, that he would like to work with Jones to reach a "controlled" impasse rather

[2]This "adjustment" was understood by both parties to be a euphemism for retroactive pay.

than an "uncontrolled" impasse. Jones told Mannix that 6 percent would not be enough and Mannix replied that, if so, SUPA was free to strike if it chose to do so. No agreements were reached at that meeting. Mannix testified that he did not believe Jones because, despite his words, SUPA was willing to continue to meet.

On January 6, 1982, Mannix received a complete contract proposal from SUPA which incorporated a number of changes from SUPA's previous positions. On January 20, the University sent SUPA a new set of proposals. Among other things, the University proposed a change in the duration clause that had already been agreed to: instead of a one-year contract, the University now proposed a three-year contract. The University's salary proposal was changed as well: it now offered a 6-percent raise beginning February 1, 1982, and a $350 one-time "adjustment."

By the January 27, 1982 meeting, the parties were in agreement on 11 articles. SUPA stated at this meeting that it no longer agreed to the waiver clause because their prior agreement had been conditioned on the one-year contract duration which the university had changed. The parties also discussed the 15 articles they disagreed on. Jones indicated that the University was not offering enough money in its salary proposal to avoid going to impasse. After a caucus, Mannix indicated the university was willing to move on certain of the

proposals, but that it would stand firm on certain others. He also stated that if the salary increase were to begin on March 1, 1982 instead of February 1, the University would have additional money to add to either the one-time salary "adjustment" or the uniform allowance. Mannix also distributed copies of the statutory impasse procedures.

Although the university contends that both parties agreed that whoever wished to declare impasse would present a final pre-impasse proposal to the other party prior to invoking HEERA's impasse procedures, we cannot conclude that SUPA in fact agreed to this procedure. The university's witness, Sarah Jo Gilpin-Bishop, testified that no explicit agreement to that effect was reached, and the minutes support this conclusion. Nor can we conclude that SUPA agreed to bring a new citizen complaint proposal to the next meeting.

The parties next met on February 8, 1982 for about 20 minutes. Mannix was annoyed that SUPA had not brought two proposals to the table that he had expected, and made a comment to Jones about SUPA "wasting the university's time." He also gave SUPA the University's new salary proposal for a 6-percent pay increase beginning March 1, 1982, plus a one-time $400 "adjustment." The members of SUPA's negotiating team caucused and then told Mannix that they would review the university's position and either arrange for another meeting or send the University its final offer. The record also indicates that the

SUPA negotiating team, although ready to leave, stayed on at the University's request and left only after a University negotiator told them there was no reason to wait longer.

On Friday, February 19, 1982, Jones sent to Mannix a complete set of proposals, which he described as SUPA's "last, best and final offer concerning all areas of this year's negotiations." The cover letter indicated that SUPA had, on the same date, informed PERB that the parties were at impasse, in fact, however, SUPA filed its "Declaration of impasse" with PERB the following Monday, February 22. At this time, the parties were in substantial disagreement on a number of articles, including salary and related monetary issues. While the University proposed a 6-percent raise with a $400 "adjustment," SUPA asked for a 12-percent raise with a $1,000 "adjustment," and also proposed shift differentials, special assignment premiums, educational incentive pay and merit pay increases. In the six to ten areas in which there were significant differences, there had been little or no movement to narrow the gap by either party during the six months of negotiations. These areas included layoff, transfer/promotion, performance evaluation, merit pay, citizens' complaints, parking, salary and other economic benefits.

On February 23, 1982, Mannix wrote Jones that he disagreed that they were at impasse and suggested a further meeting in March, on February 24, he repeated the invitation to meet.

On February 25, Jones responded to Mannix's February 23 letter. He gave four reasons why SUPA believed impasse had occurred:

1. The university's actions, indicating that "the major areas of our final offer were totally unacceptable to the University."

2. Mannix had provided the members of the SUPA bargaining team with copies of the statutory impasse procedures, and suggested that if a total wage package amounting to 6 percent was unacceptable, then SUPA should declare impasse.

3. The facts that, at the last bargaining session, Mannix had said to SUPA "I don't know why you continue to waste our time with these meetings"; had made no further proposals on behalf of the University; and, according to Jones, had terminated the meeting.

4. The University's salary offer at each of the last three bargaining sessions had decreased.[3]

Jones also indicated that SUPA had no reason to believe that any additional meetings would do anything but waste the parties' time, but that they would meet with the University if the latter indicated in writing that it was prepared to make "significant" movement toward meeting SUPA's demands. Jones

[3]Given the existing salary range for police officers, a 6-percent increase would amount to between $95 to $114 each month. Thus, the university's successive salary proposals, which postponed the effective date of the 6-percent raise one month more than the prior salary proposal, would give the employees less money than the previous offer even after a $50 increase in the one-time "adjustment" was factored in.

also asked the University to provide SUPA with a list of the specific areas the University proposed to discuss.

On March 2, 1982, Mannix wrote SUPA refusing to give any written assurance of "significant" movement. He said that the University wished to meet to clarify certain aspects of SUPA's offer and was prepared to discuss areas in which the parties were in disagreement. On March 3, Jones submitted a "Request to Appoint Mediator" to PERB. On March 9, Jones told PERB that the parties were scheduled to meet on March 11, that he understood the impasse petition would be held in abeyance until after that meeting, and that he would advise PERB shortly thereafter if SUPA wanted the impasse proceedings reactivated.

Despite its failure to get assurances of "significant" movement, SUPA met with the University on March 11, 1982. There was some discussion and clarification of certain of SUPA's February 19 proposals which the University said did not conform to prior agreements,[4] and SUPA agreed to change the wording in all but one of those articles. Mannix also presented a dues deduction proposal and the University's newest salary offer: a 6-percent raise to start April 1, 1982, and a $450 one-time "adjustment." He indicated that the one-time

[4]The discrepancies were in provisions regarding vacations, work-incurred injuries, discipline/dismissal, grievance procedures, arbitration procedures, and uniform allowances. These were not areas in which the parties had significant differences.

adjustment might be increased depending on what SUPA would agree to in the uniform allowance provision, but did not mention any specific numbers. Mannix testified at the hearing that the University had the opportunity to respond to all of SUPA's proposals at that meeting. He also testified that he had no authority to offer more than a 6-percent increase and no authority to make concessions on important non-monetary issues where the parties differed widely, and that he had not sought greater authority between the time he received SUPA's February 19 proposals and the March 11 meeting.

SUPA also explained at that meeting that its "last, best and final offer" was not really final, but that SUPA was unwilling to make any substantial concessions beyond what it had already conceded. However, SUPA was willing to listen to any new proposals by the university.

The University asked SUPA to set a date for a later meeting, but SUPA refused to do so. Jones stated that SUPA was "declaring impasse" and requesting a mediator. He said SUPA was unwilling to meet with the University without a mediator. He testified that SUPA's belief that they were at impasse was based on the regressive nature of the University's salary offer and its feeling that the University was trying to drag out negotiations as long as possible before reaching the impasse process.

DISCUSSION

In determining whether a party's negotiating conduct constitutes an unfair practice,[5] PERB uses both a "per se" and a "totality of the conduct" test, depending on the specific conduct involved, and its effect on the negotiating process. Pajaro Valley Unified School District (1978) PERB Decision No. 51; Stockton Unified School District (1980) PERB Decision No. 143; Westminster school District (1982) PERB Decision No. 277. We have said that the duty to bargain in good faith requires that the parties negotiate with a genuine intent to reach agreement and that a "totality of the conduct" test is usually applied to determine if good faith bargaining has occurred. This test looks to the entire course of negotiations to see whether the parties have negotiated with the required

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[5]The University charges SUPA with violating HEERA section 3571.1(c), which makes it unlawful for an employee organization to refuse or fail to engage in "meeting and conferring with the higher education employer." The language of this section is slightly different than the wording of the analogous EERA section 3543.6(c), which refers to a failure to "meet and negotiate in good faith." similarly, the HEERA definition of "meet and confer" (HEERA sec. 3562(d)) is slightly different than the EERA definition of "meet and negotiate" (EERA sec. 3540.1(h)). Despite the differences, the clear thrust of section 3571.1(c) is the same as the thrust of section 3543.6(c).

Both parties, in their post-hearing briefs, cite PERB decisions in EERA cases, and NLRB cases concerning good-faith negotiations standards. Neither party has argued that the differences between the HEERA language and the EERA language require any difference in substantive analysis of bargaining conduct of an employee organization charged with a failure to carry out its statutory duty.

subjective intention of reaching an agreement, Certain acts, however, have such potential to frustrate negotiations and to undermine the exclusivity of the bargaining agent that they are held to be unlawful without any finding of subjective bad faith. These latter acts are considered "per se" violations; an outright refusal to bargain on a subject within the scope of representation is an example of such a violation. Pajaro Valley Unified School District, supra, at pp. 4-5; Stockton Unified School District, supra, at p. 22. We have examined the totality of SUPA's conduct to determine whether it acted in bad faith in its negotiations with the university and, in addition, we have looked at certain aspects of that conduct to see if they amounted to per se violations.

We have also considered the factual record in light of the statutory impasse procedures.[6] We have held that impasse exists where the parties have

> considered each other's proposals and counterproposals, attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile.

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[6]HEERA section 3562(k) defines "impasse" as when the parties "have reached a point in meeting and conferring at which their differences in positions are such that further meetings would be futile." PERB Regulation 32793(c) sets forth certain factors which the Board may consider when determining whether impasse exists. These factors include: the number and length of negotiating sessions, the time period over which negotiations have occurred, the extent to which the parties have made and discussed counterproposals, the extent to which tentative agreements have been reached and unresolved issues remain, and "other relevant data."

Mt. San Antonio Community College District (1981) PERB Order No. Ad-124, at p. 5.

The thrust of the University's charge is that from February 8, 1982 on, SUPA's actions were designed to bring about commencement of the statutory impasse procedures and avoid having to bargain face-to-face with the University. The University contends that SUPA's allegedly unfounded and otherwise improper declaration of impasse constitutes a failure to bargain in good faith. The university originally pointed to the following conduct by SUPA in support of its contentions: (1) SUPA's failure to present certain proposals at the February 8 meeting and its failure to negotiate at that meeting; (2) its subsequent declaration of impasse without allowing the University to review and respond to its "final" proposals; (3) SUPA's meeting with the University on March 11 without any real intention of negotiating; and (4) its refusal to meet after March 11 without a mediator present.

SUPA contends that there was genuine impasse in the negotiations in February and March, that it had not agreed to any specific pre-impasse procedure and that, therefore, it cannot be faulted for its decision to declare impasse on February 19. It denies that it failed to prepare for the meetings and argues that it did not insist on any preconditions to further meetings after February 8, and that it did not prevent the University from responding to its "final" pre-impasse proposals.

The ALJ found that within the broad context of the bad-faith bargaining charge, the case presents novel questions concerning the negotiating obligations of the parties when it appears they may have reached impasse. He framed these issues as follows:

> 1. What conduct is permitted to an employer or an employee organization which, after a series of negotiation meetings believes in good faith that the parties are at a negotiations deadlock?
>
> 2. May an employer or an employee organization be found to be guilty of an unfair practice under HEERA for a premature or otherwise unfounded declaration of impasse?

He agreed that beginning sometime in February, SUPA determined that its interests would be best served by invocation of the statutory impasse procedures, and that once SUPA arrived at that conclusion, its actions were planned to bring about commencement of those procedures rather than continue with face-to-face negotiations with the University. He noted that SUPA's actions were, to some extent, careless or clumsy, but found that its conduct during February and March did not constitute bad-faith bargaining. Specifically, he found:

(1) SUPA's actions prior to February 8 provided no support for the University's contention that SUPA was acting in bad faith beginning on February 8, 1982;

(2) SUPA acted reasonably on February 8 and when it declared impasse on February 19/22.

(3) Since the Legislature in enacting HEERA intended to encourage the parties to use the statutory impasse procedures, it would be counterproductive to penalize a party for good-faith efforts to invoke those procedures. Therefore, the ALJ found that an untimely or otherwise unfounded declaration of impasse is not a "per se" refusal to bargain.

The ALJ did indicate that an unfounded declaration of impasse could be evidence of bad-faith bargaining under the totality of the circumstances test, but found the declaration here was not unfounded and that SUPA's conduct did not amount to bad-faith bargaining.

(4) SUPA's refusal to meet with the University from February 8 to February 19/22 was reasonable and its refusal to meet after February 22 was privileged.

(5) Although the errors SUPA made in its February proposals were careless and the proposals did need the clarification they received at the March 11 meeting, the ALJ concluded that the discrepancies were not intentionally made with the aim of derailing negotiations. He found no evidence of appreciable impact on the bargaining and concluded that the errors were neither per se violations nor evidence of underlying bad faith. He also concluded that SUPA's withdrawal of its agreement to the waiver proposal was justified as that agreement had been contingent on the one-year contract duration provision on which the University had changed its mind.

The University excepts to the ALJ's decision on three grounds. First, the University argues that the ALJ erroneously expands the role of the impasse procedure at the expense of the collective bargaining process, and that the "impasse procedure is a substitute process and should not be used as a replacement for traditional collective bargaining." According to the University, exchanging and discussing proposals on a face-to-face basis is a minimum requirement of good faith bargaining. The university contends that, until an impasse is certified, the impasse process should not interfere with the affirmative duty to meet and bargain.

Second, the University contends that the ALJ fails to recognize that impasse may be broken by any event that may move the parties and argues that the ALJ's decision creates an "impenetrable barrier to continued negotiations" once impasse is declared. It states that, by refusing to allow the University to consider and respond to its final offer, SUPA cut off negotiations. The University argues that a party which invokes impasse does so at its own risk and says that the ALJ sets a new standard when he says that a party should not be punished for invoking impasse.

Third, the University reiterates its basic charge that, under the facts of this case, impasse is a legal impossibility because SUPA was bargaining in bad faith and created the very atmosphere of futility on which it based its declaration of

impasse, and that SUPA should not be allowed to so profit from this wrongdoing. It points to essentially the same conduct by SUPA that is the basis for the original charge. It also claims that the ALJ, in arriving at the opposite conclusion, credits facts not in evidence and fails to credit facts not in dispute.

Thus, the University's exceptions are twofold: it criticizes the ALJ's legal analysis of the role of impasse and it again accuses SUPA of utilizing an unfounded declaration of impasse created by its own bad-faith bargaining to avoid its obligation to bargain with the University. We will address first the conduct which the University alleges constitutes the bad-faith bargaining and led to the allegedly unfounded declaration of impasse. The findings of fact dispose of some of these allegations.

We agree with the ALJ that nothing prior to February 8 indicates bad-faith bargaining on the part of SUPA. Until that time, the parties had met frequently, offered proposals, discussed proposals, offered revisions on some and, in general, followed the normal course of bargaining, We find the record fully supports the ALJ's finding that there was no agreement to initial tentative agreements, so SUPA's failure to do so has no significance.

At the February 8 meeting itself, we note that there did not seem to be a great deal to discuss. The University submitted slightly modified proposals on nine articles that had

been discussed previously, and its salary offer was for less money than the preceding salary offer. At the February 8 meeting, agreement was reached only on the topic of "out-of-class assignment." Since the parties had both discussed 25 of the outstanding articles and reviewed their outstanding differences during the five previous negotiating sessions, it was not unreasonable for SUPA to conclude that additional detailed discussion of the parties' positions would not be helpful.[7] We agree with the ALJ that the evidence supports a finding that the parties had fundamental differences over enough major issues, including salary and other economic proposals, to prevent them from reaching full agreement. We agree with the National Labor Relations Board and the Federal courts, which have recognized that impasse may exist when the parties are deadlocked on one or several major issues, even if the parties continue to meet and even if concessions on minor issues are possible. NLRB v. Tomco Communications (9th Cir. 1978) 567 F.2d 871 [97 LRRM 2660]; Taft Broadcasting Co. (1967) 163 NLRB No. 55; aff'd sub nom American Federation of Television & Radio Artists v. NLRB (D.C. Cir. 1968) 395 F.2d 622 [67 LRRM 3032]. Here, the parties were far apart on both economic issues and four or five important noneconomic issues.

[7]On exception, the University claims that there was no testimony indicating SUPA arrived at that conclusion. We find that the February 25 letter from SUPA is sufficient basis alone for this statement.

Therefore, by an objective standard, the parties were at impasse. We do not find SUPA's failure to submit a dues deduction proposal on that date to be more than a harmless oversight that was not a unique occurrence in the negotiating process, in any event, it does not rise to the level of bad-faith bargaining. Moreover, we note that, although after caucusing SUPA told the University that it would review the University's proposals further and either set another day for a meeting or send a final offer,[8] there was testimony that SUPA did not then break up the meeting, but rather stayed on for a while at the University's request. Only after they were told by a University negotiator that there was no point in waiting any longer did the SUPA team leave. Thus, the brevity of the meeting cannot be attributed solely to a desire on SUPA's part to cut short the discussions.

We find SUPA's conduct between the February 8 meeting and the February 19/22 "final" offer and declaration of impasse to be reasonable also. Since the university's February 8 proposals represented little movement on major issues and its salary proposal was for less than the prior proposal, we agree

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[8]The ALJ stated this correctly in his statement of facts, but indicated incorrectly in his discussion that SUPA said it would either set up a further meeting or declare impasse. We find this error to be nonprejudicial as it does not affect our result. See also footnote 9, infra.

with the ALJ that the short delay while SUPA decided what to do was not inordinate under the circumstances.[9]

SUPA's belief that the parties were at impasse following the February 8 meeting was reasonable under the circumstances and genuinely held. While we agree that Mannix's "don't waste our time" comment had no general significance, we find that the other reasons given by SUPA in its February 25 letter were well-founded,[10] and we have no reason to believe SUPA was insincere. The parties were far apart on major issues and the salary proposal was decreasing. We reject the University's continued contention that, because it indicated that there might be more money available for the one-time adjustment if SUPA would accept less money somewhere else, the salary proposal was not regressive, such a statement, without particulars or numbers, does not alter the fact that the actual

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[9]The university excepts to the ALJ's statement that after receiving the University's proposals, Jones indicated that the parties might be at impasse, but SUPA needed more time to arrive at its conclusion on this point. It is true there was no evidence that Jones indicated to the university at that time that SUPA thought the parties might be at impasse. We find this error to be nonprejudicial, however, as the main point of the statement was that SUPA believed the parties might be at impasse after February 8 and took some time deciding what to do. That is logically inferred from the record.

[10]We place some, but not substantial, weight on Mannix's distributing the impasse statutes.

salary offer submitted was for less money than the prior offer. The fact that the University had followed a pattern of submitting decreased salary offers makes it even more reasonable for SUPA to think future negotiations would be futile.

With regard to SUPA's "simultaneous" presentation of its "final" offer and its filing a declaration of impasse, we agree with the ALJ that the declaration of impasse itself was well-founded and that there had been no agreement between the parties as to how they would conduct themselves once either party believed the negotiations were deadlocked. We also agree that SUPA's conduct between the February 19/22 final offer/declaration of impasse and the March 11 meeting, although clumsy, does not rise to the level of bad faith. As discussed below, we agree with the ALJ's holding that once the declaration of impasse was filed, SUPA was privileged not to meet at all. Even were this not so, however, we find SUPA's conduct under the circumstances to be inartful, but not in bad faith. Although SUPA initially conditioned a future meeting with the University on the latter's agreeing in writing that it would make "significant" concessions, SUPA abandoned this requirement and met with the university anyway on March 11. A two-week delay between the "final" offer/declaration of impasse and the March 11 meeting does not constitute the kind of inordinate delay that evidences bad faith, given the pace of the negotiations and the question of impasse.

We also reject the University's contention that it was given no opportunity to discuss SUPA's "final" offer; the March 11 meeting, however reluctantly agreed to, gave the University the opportunity to do just that. The University's March 2 letter to SUPA rejecting its request for written assurances of significant movement indicated that the University wanted to meet to clarify certain aspects of the February 19 proposals and stated that the University would be prepared to discuss areas in which the parties were in disagreement. Moreover, Mannix testified that the University had the opportunity to respond to all of SUPA's February 19 proposals on March 11.

The University also contends that SUPA went to the March 11 meeting without any intention of negotiating and thus showed its bad faith. The burden is on the university to present evidence supporting that contention, and the only evidence proffered is James Harritt's testimony that SUPA believed the parties were at impasse after the February 8 meeting and felt the same way after the March 11 meeting when they refused to meet again without a mediator and reactivated their impasse petition. Harritt's testimony is insufficient evidence of SUPA's alleged unwillingness to negotiate. The facts clearly show that, despite feeling the parties were at impasse after February 8, SUPA allowed its impasse petition to be placed in abeyance and did again meet with the University. It discussed

and agreed to all but one of the "clarifications" the University wanted on March 11.[11] The University presented only one new proposal in the areas in which the parties had vast differences: a new salary proposal. And, consistent with the pattern shown in its prior salary proposals, this one too was for less money than the immediately preceding proposal. Mannix testified that in the interval between the February 19 "final" proposals and the March 11 meeting, he had not sought authority to offer more than a 6-percent increase in pay or to make concessions on other important noneconomic matters, In addition, despite indicating that the University would be willing to discuss the areas in which the parties were in disagreement, Mannix brought no other proposals[12] on such areas to the meeting. Given the circumstances of the March 11 meeting, we find that SUPA acted reasonably. It had no duty to initiate further concessions, especially in the face of the latest diminishing salary proposal from the University.

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[11] The one change that SUPA declined to accept concerned the time period for monetary reimbursement under the arbitration article. Unlike the other changes, which were made to conform to language to which the parties had previously agreed, in this instance there was no prior agreement.

[12] Jones testified without contradiction that the dues-deduction proposal submitted by the University incorporated the settlement agreement the parties had arrived at in an unfair practice case.

Turning now to the university's exceptions to the ALJ's analysis of the role of the statutory impasse procedures and the legislative intent in enacting them, we affirm the ALJ's reasoning. We find he did not "expand the role of the impasse process procedure at the expense of the collective bargaining process."

Impasse procedures are an integral part of the collective bargaining process established for public higher education employees in California. They contemplate a continuation of the bilateral negotiations process. Mediation remains fundamentally a bargaining process, albeit with the assistance of a neutral third party. Moreno Valley Unified School District (1982) PERB Decision No. 206, at p. 5. Mediation is "an instrument designed to advance the parties' efforts to reach agreement . . . ." Modesto City Schools (1983) PERB Decision No. 291, at p. 36. Section 3562(k) of HEERA defines impasse as "a point in meeting and conferring at which [the parties'] differences in positions are such that further meetings would be futile." PERB Regulation 32793(a) states in pertinent part:

> The Board shall, within five working days following the receipt of the written request for appointment of a mediator, orally notify the parties that the Board has determined that: (1) An impasse exists and a mediator has been appointed, or (2) Impasse has not been reached.

Even if the declaration of impasse were untimely or unfounded, it would ordinarily interrupt face-to-face negotiations for not

more than ten days. To rule that such a declaration of impasse is a per se unfair practice would discourage parties from using the impasse procedures at all. A slight delay in negotiations is preferable to such a rule. As indicated above, however, we find that a genuine impasse was reached by February 8 and we agree with the ALJ that a party's refusal to meet and negotiate after it has filed a declaration of impasse, but before PERB has made its determination, is privileged. Once impasse is reached, the duty to negotiate in good faith becomes the duty to participate in good faith in the impasse procedures. We decline to compel a party to participate in a futile negotiating meeting during this short period of time.

In Marin Community College District (1982) PERB Order No. Ad-126, the Board found that the legislative intent that contract settlement "be reached as expeditiously as possible and that stalemates not be permitted to fester into harsh confrontations" outweighed a need to "discourage recalcitrant parties from evading . . . their good-faith negotiating obligations by escaping into impasse proceedings virtually on demand" and, therefore, that certification of impasse was appropriate. We said at pp. 5-6 that:

> Returning the parties to the table cannot be expected to expedite the settlement of this dispute. It is unlikely that the stalemate reached after 17 sessions will suddenly dissolve. It is more likely that the parties' resistance would intensify and delay even further the ultimate reconciliation of their differences, if not make such reconciliation impossible.

We feel that the same situation is likely to exist if a party is forced to participate in further face-to-face negotiations during the short period of time between its sincere and reasonable declaration of impasse and the Board's determination of impasse. We therefore decline to compel a party to do so.[13]

We also reject the University's argument on appeal that the ALJ failed to recognize how impasse may be broken and that his decision creates "an impenetrable fortress to continued negotiations once impasse is declared by a party." In the case in point, SUPA did agree to its impasse declaration being placed in abeyance and acceded to the University's request for another meeting. Thus, the impasse declaration hardly constituted "an impenetrable fortress to continued negotiations" here. Moreover, and more importantly, while it is perhaps possible that some conduct on the part of the party who does not believe impasse exists might break whatever impasse may exist, there was no evidence of such conduct on the part of the University after the declaration of impasse was filed. It requested another meeting for clarification and got it. While we do not say the clarification was unnecessary or unimportant,

[13]We agree with the ALJ, however, that a party declares impasse and refuses to negotiate thereafter at its own risk. If the declaration of impasse is not found to be reasonable and sincere, as in this case, it may constitute evidence of bad faith bargaining under the totality of the circumstances standard.

it essentially brought the language of certain proposals into conformity with prior agreements. The University offered no new proposals in the areas where vast differences existed between the parties except a salary offer which was for less money than the prior salary offer. There is no evidence that it made any real movement on the important issues which separated the parties, and we find SUPA's belief that impasse still existed after March 11 to be reasonable. Moreover. SUPA's refusal to meet again without a mediator cannot be characterized as a refusal to meet and negotiate; instead it indicates an appropriate willingness to participate in the statutory impasse procedures in order to get negotiations moving again.

ORDER

For the above reasons, we find that the Statewide University Police Association bargained in good faith from August 1981 to February 1982 and. when it then concluded that the negotiations would not lead to a contract, had the right to invoke impasse. We, therefore, ORDER the charge and complaint in Case No. SF-CO-1-H DISMISSED.

Members Jaeger and Morgenstern joined in this Decision.

Chairperson Hesse's dissent begins on page 27.

Hesse, Chairperson, dissenting: I disagree with the majority holding that "a party's refusal to meet and negotiate after it has filed a declaration of impasse, but before PERB has made its determination, is privileged." The majority view deviates from previous PERB decisions. I am not persuaded by the majority interpretation of HEERA and application of case law.

As the majority states, an exclusive representative is required to negotiate in good faith, and failure to do so is an unfair practice under section 3571.1(c). The majority finds that, once a party declares impasse, it is no longer required to negotiate and that a refusal to negotiate is not a failure to bargain in good faith. This would be correct if the parties' conduct were regulated by the private sector labor law, the National Labor Relations Act (NLRA). Under the NLRA, once impasse is reached, either party may refuse to negotiate further (and the employer may implement its last, best and final offer). (See Dallas General Drivers v. NLRB (D.C. Cir. 1966) 355 F.2d 842 [61 LRRM 2065] and Fine Organics, Inc. (1974) 214 NLRB 158 [88 LRRM 1130].)

However, statutory impasse procedures and PERB case law distinguish public sector impasse from the private sector or NLRA impasse. Unlike the NLRA, HEERA's impasse procedures are statutorily prescribed. (See Gov. Code secs. 3590-3594.) These statutory procedures have a great affect on the negotiating process.

Thus, previous Board decisions have identified two stages of impasse: an initial impasse and a post-statutory procedure or "second" impasse.

> [S]tatutory impasse procedures are exhausted only when the factfinder's report has been considered in good faith, and then only if it fails to change the circumstances and provides no basis for settlement or movement that could lead to settlement. At that point, 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. (Modesto City Schools (1983) PERB Decision No. 291, at pp. 32-33.) (Emphasis added.)

Inherent in Modesto is the requirement that the parties continue to negotiate until "that point" is reached, i.e., when the statutory procedures have been exhausted. Only then is the NLRA "impasse" analogous to HEERA; before then, neither party may decline requests to bargain further.

The majority places emphasis on the parties' declaration of impasse:

> Once impasse is reached, the duty to negotiate in good faith becomes the duty to participate in good faith in the impasse procedures.

However, the Board has previously held that "initial impasse is determined by the Board after a request by either party." (Modesto City Schools, supra, at p. 35.) Only after PERB determines that an impasse exists is a mediator appointed by PERB. If PERB makes a determination that an impasse does not exist, the parties must continue to negotiate in an attempt to

reach a resolution of their differences. It is anomalous to conclude that the parties must continue to negotiate when PERB determines that no impasse exists, but that a party may refuse to negotiate before PERB makes its determination. The duty to bargain is not suspended or terminated when a party declares impasse. It is only when this Board makes a determination that an impasse exists.

The parties may mutually agree to engage in voluntary mediation and follow their own mediation procedure at any stage of the negotiations. However, the law does not require mediation until PERB certifies to an impasse after the request by one party.

In the instant case, SUPA did not confront face-to-face the University negotiators but, rather, mailed its "last, best and final offer" to the University on February 19, 1982, and declared impasse.[1] The University disputed the claim of impasse and asked for further sessions. SUPA conditioned further bargaining sessions upon a University promise to make significant movement. On March 2, 1982, the University renewed the request to meet, asking SUPA to clarify this latest proposal and allow the University to respond to it. Finally, on March 11, SUPA relented, and it met with the University to clarify some of its proposals. Further discussion and movement

[1]Later, on March 11, 1982, SUPA stated that this was not its final offer.

on some issues took place at that meeting. Even after SUPA informed the University that its latest proposals were not the final offer, SUPA refused the University's request to schedule further negotiating sessions and refused to meet with the University unless a mediator was present. Since both parties had not agreed to engage in informal mediation and PERB had not yet determined whether the parties were at impasse, no mediator was available. It was not until March 22, 1982, five weeks after SUPA's declaration of impasse, that the Board agent made a determination that an impasse existed. This determination, however, was reversed by the Board in Regents of the University of California (SUPA) (1982) PERB Order No. Ad-129-H.[2]

SUPA's actions in mailing its "last, best and final offer," refusing for a time to meet and clarify its proposals, and in conditioning further negotiations on significant movement are very similar to conduct which this Board has condemned in other cases. Decisions of this Board have firmly established that an

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[2]In this June 23, 1982 Order, the Board took notice of the inordinate amount of time that had elapsed since the beginning of the negotiations and urged the parties "to act with dispatch" in resolving their differences. On July 1, 1982, the parties reached agreement on a new contract.

Nevertheless, pursuant to SUPA's request for reconsideration on August 9, 1982, the Board issued Order No. Ad-129a-H, which remanded the case to the regional director to render an impasse determination. The proposed decision did not state whether such a determination was made and what the determination was. The ALJ, however, made a finding that the parties were at impasse, but failed to note that the parties reached agreement on a new contract on July 1, 1982.

employer commits an unfair practice when it engages in evasive tactics and delay, fails to seek clarification, and conditions bargaining on economic matters upon agreement of noneconomic matters. Muroc Unified School District (1978) PERB Decision No. 80 — frequent change of negotiators and delaying negotiating sessions; Stockton Unified School District (1980) PERB Decision No. 143 — cancelling meetings and recalcitrance in scheduling new ones, and refusing to discuss substantive issues until new ground rules were established; Oakland Unified School District (1983) PERB Decision No. 326 — delaying meetings for seven weeks and arriving late and unprepared; Davis Joint Unified School District (1984) PERB Decision No. 393 — failing to seek clarification of union proposals; Gonzales Union High School District (1985) PERB Decision No. 480 — refusing to negotiate during summer recess, and refusing to negotiate on employee discipline and employee layoffs.

The NLRB has found that mailing proposals is not helpful in bringing parties together even where they appear to be hopelessly apart. In R. James Span (1971) 189 NLRB 219, at p. 222, the NLRB said:

> It has long been proven that usually only personal discussion between the parties can be effective to narrow it, rather than the more impersonal and distant communication by telephone calls and letters.

SUPA's failure to present its "last, best and final offer" directly to the University, and its subsequent refusal to meet and clarify proposals as well as the "final offer" is

indicative of an intent not to reach an agreement. As the Board requires an employer to seek clarification from the union regarding its proposals (Davis, supra), so must we require the union to meet and make such a clarification. Upon request, the clarification of the last, best and final offer is crucial to the statutory procedures. A unilateral suspension of the negotiation process frustrates the HEERA purpose of achieving mutual agreement.

I find that the totality of SUPA's conduct in February and March 1982 evidences bad faith bargaining and a violation of EERA section 3571.1(c).

Since PERB had not made a determination that an impasse existed, the statutory dispute resolution procedure was not triggered, and SUPA did not have the right to refuse to meet until a mediator was present. Thus, SUPA was required by its duty to bargain in good faith to meet with the University and attempt to resolve their differences. The refusal to do so, before PERB issued its determination, is "per se" bad faith bargaining and a violation of section 3571.1(c).

This finding is required by SUPA's actions when it declared impasse. While a party may in good faith believe impasse exists and is allowed to seek an impasse certification from the Board, such good faith belief is not determinative. The majority is correct that, in Marin Community College District (1982) PERB Order No. Ad-126, the Board found an impasse; however, it did not do so lightly. That the parties met in 17

sessions for 85 hours was not determinative. Other factors were considered. Certainly, meeting 15 times for only 30 to 45 hours on a broad collective bargaining agreement cannot give the declaring party a "pass" on its negotiating duty. SUPA evaded its "negotiating obligations by escaping into impasse proceedings." (Marin, supra.) This conduct must not be condoned.

Member Porter concurs in this Dissent.