STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA FACULTY ASSOCIATION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY Respondent.	Case No. LA-CE-609-H PERB Decision No. 1470-H December 5, 2001

Appearances: Rothner, Segall & Greenstone by Glenn Rothner, Attorney, for California Faculty Association; Janette Redd Williams, University Counsel, for Trustees of the California State University.

Before Amador, Baker and Whitehead, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Faculty Association (CFA) of a Board agent's dismissal (attached) of its unfair practice charge. The charge alleged that the Trustees of the California State University (CSU) made a unilateral change when it implemented a pay increase for employees under the provisions of a collective bargaining agreement (CBA) then being bargained for in reopener negotiations. CFA claimed that this action constituted a violation of the Higher Education Employer-Employee Relations Act (HEERA) section 3571 (b), (c) and (e).[1]

[1]HEERA is codified at Government Code section 3560 et seq. Section 3571(b), (c) and (e) provide:

> It shall be unlawful for the higher education employer to do any of the following:

The Board has reviewed the entire record in this case, including the original and amended unfair practice charges and their attachments, the warning and dismissal letters, CFA's appeal[2] and CSU's response. The Board finds the Board agent's dismissal letter to be free from prejudicial error and adopts it as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-609-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Amador and Baker joined in this Decision.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

(e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3590).

[2]CFA raises for the first time on appeal the claim that CSU interfered with its protected rights and derogated its authority by misrepresenting that the salary increase conformed with the CBA. A charging party may not, without good cause, present new evidence or new allegations on appeal. (PERB Regulation 32635(b); Peralta Community College District (2001) PERB Decision No. 1418; Regents of the University of California (1998) PERB Decision No. 1271.) No good cause having been shown for CFA's failure to raise this claim before the Board agent, the Board will not address the merits of this new charge.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1515 Clay Street, Suite 2201
Oakland, CA 94612
(510) 622-1016

June 29, 2001

Edward Purcell
California Faculty Association
5933 W. Century
Los Angeles, CA 90045

Re: **DISMISSAL OF CHARGE/REFUSAL TO ISSUE COMPLAINT**
California Faculty Association v. The Trustees of the University of California
Unfair Practice Charge No. LA-CE-609-H; First Amended Charge

Dear Mr. Purcell:

The above-referenced unfair practice charge, filed February 14, 2001, alleges the Trustees of the California State University (University) unilaterally implemented a pay increase for employees. The California Faculty Association (Association or CFA) alleges this conduct violates Government Code section 3571 (b), (c) and (e) of the Higher Education Employer-Employee Relations Act (HEERA or Act).

I indicated to you, in my attached letter dated May 21, 2001, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to May 28, 2001, the charge would be dismissed. I later extended this deadline to June 4, 2001.

On June 4, 2001, Charging Party filed a first amended charge. The amended charge reiterates facts in the original charge and adds the following legal argument. Charging Party asserts my reliance on Trustees of the California State University (1996) PERB Decision No. 1174-H is misplaced, arguing that the parties herein did not have a specific agreement as to the amount of money to be spent or how such moneys were to be dispersed. In support of this contention, Charging Party adds the following.

Charging Party states the amount of money to be spent on compensation packages for the 2000-2001 year was clearly part of the parties' reopener negotiations. To that end, Charging Party points to the Factfinders Report which states that the total

amount of compensation is open for negotiation. Additionally, Charging Party asserts the June 4, 1999, agreement does not specify how the moneys are to be distributed. Specifically, Charging Party states:

> The June 4 Memorandum of Understanding did not establish the actual dollar or percentage value of the 2000 settlement, leaving both topics to be negotiated subsequently.

Assuming Charging Party's facts as true, however, does not lead to the conclusion that the University unilaterally implemented the salary increase. Instead, such facts merely support the holding in Trustees and the rationale of my May 21, 2001, letter.

The University and the Association are parties to a collective bargaining agreement (Agreement) which expires on June 31, 2001. Additionally, the parties have signed a memorandum of understanding, dated June 4, 1999, (June 4, 1999, agreement) dealing with salary increases for the 2000-2001 fiscal year.

Article 3.1 of the Agreement states the following as a contractual zipper clause:

> This Agreement constitutes the entire Agreement of the Trustees and the CFA, arrived at as a result of meeting and conferring. The terms and conditions may be altered, changed, added to, deleted from, or modified only through the voluntary and mutual consent of the parties in an expressed written amendment to the Agreement. This Agreement supersedes all previous agreements, understandings, policies, and prior practices directly related to matters included within this Agreement. . . .

The June 4, 1999, memorandum of understanding states in relevant part:

> Fiscal Year 2000/2001 Increases
> If the final gross general fund budget of the CSU has increased by at least $180 million (including both general fund and student fee revenue) from fiscal year 1999/2000 to fiscal year 2000/01, then the total compensation increases to faculty unit employees shall be distributed as follows: (a) forty percent (40%) of the increases shall be for faculty merit increases, including those for SSI-

> eligible employees, and (b) the remaining sixty percent (60%) shall be for the general salary increase. If the increase in the final gross general fund budget is less than $180 million, then the parties shall give priority to funding a service salary increase, and shall reopen negotiations solely on the amount and distribution of the general salary and merit salary increases.
>
> The CSU Board of Trustees shall adopt a budget request that will fund at least a 6% salary increase for the faculty. The amount of this request will be 62.4 million assuming a 6% salary increase in fiscal year 1999/2000. This amount may change due to retirement adjustments in the compensation base. If the salary increase is less than 6% in fiscal year 1999/2000 this number will be adjusted proportionately. Compensation will be the highest priority for requests in the Trustees' budget after recurring costs and enrollment. . . .

It is undisputed that the University's budget for 2000-2001 increased by at least $180 million.

The Agreement also provides the University with guidelines on how the SSI funds are to be calculated and distributed. With regard to SSI calculation, the Agreement states:

> 31.43: As part of the CSU merit program in fiscal years 1999/2000 and 2000/01, there shall be a separate pool for bargaining unit members eligible for Service Salary Step Increases. It shall be calculated by multiplying the total salary and benefits of such employees by two and sixty-five one-hundredths percent (2.65). This provision shall not be subject to renegotiation during reopener bargaining, if any, in these years.

In January 2001, the University informed bargaining unit members that they would be receiving a pay raise in conformance with the June 4, 1999, agreement and Article 31.43 of the Agreement.

Charging Party asserts the University implemented a unilateral change when it implemented the terms of the June 4, 1999, memorandum. However, as stated in my May 21, 2001, letter, the University's actions do not violate the HEERA.

Charging Party alleges the University committed a unilateral change when it implemented provisions of the June 4, 1999, agreement, which had been an issue in reopener negotiations. As noted above, PERB's holding in Trustees, serves as clear precedent in such cases.

In Trustees, supra, the Board held that reopened provisions were not effectively terminated by reopening, but rather status quo prevailed where the parties had previously agreed that the contract terms could not be deleted except by mutual consent. In that case, the University and the Academic Professionals of California had been engaged in reopener negotiations over several issues, including the employer's contribution to health benefits and contracting out. After completing mediation and factfinding, the parties remained at impasse. The union then contended the reopened articles were no longer operative, and as such, the union was not bound by the contracting out language. The University argued, however, that status quo prevailed, and as such, the parties were bound both by the contracting out provisions and the health contribution requirements in the agreement, as no new agreement had been reached.

In dismissing the union's claim of unilateral change, the Administrative Law Judge noted that the parties made a clear statement, through their zipper clause, that the provisions of their contract could not be changed without voluntary, mutual consent. As such, the ALJ stated:

> Since I conclude that the parties previously had agreed that contract terms could not be deleted except by mutual consent, I reject the argument that the clauses were terminated by the reopening. The clauses remained in effect and the University . . . made no change in a negotiable subject.

Facts herein are nearly identical to those in Trustees. Charging Party and the University are parties to a collective bargaining agreement which includes a zipper clause identical in terms to the one found in Trustees, supra. Additionally, the parties had completed impasse procedures and had reached a stalemate in post-factfinding negotiations. As in Trustees, the University then implemented the terms and conditions of the June 4, 1999, memorandum of understanding by issuing pay increases and merit salary increases pursuant to the agreed-upon contractual provisions. The University's reinstatement of reopened clauses did not constitute a unilateral change, but merely as assertion that the status quo between the parties remained in effect. (Trustees of the California State University (1996) PERB Decision No. 1174-H, p.1.)

Charging Party contends the parties did not agree on an actual dollar amount or percentage value for the 2000-2001 year. However, such facts do not render the University's actions unlawful. As in Trustees, the parties were negotiating reopeners and as such were in the process of attempting to increase the value of some benefits. The mere fact that the parties did not reach an agreement did not render the reopened contract provisions null and void. Trustees does not stand for the position that the University is no longer obligated to continue negotiating the total dollar value of the salary increases. Indeed, as stated in my May 21, 2001, letter, the parties are free to agree to higher salary increases during reopeners. However, the failure to reach an agreement does not repudiate the terms and conditions already agreed upon by the parties. The June 4, 1999, memorandum, clearly sets forth the actions the University must take if the budget is over 180 million. Moreover, the memorandum clearly requires the University to seek at least a 6% salary increase. It appears the University's actions are consistent with the memorandum, and as such, the University did not violate the HEERA.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, sec. 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, sec. 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

Extension of Time

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

Final Date

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

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

By _____
Kristin L. Rosi
Regional Attorney

Attachment

cc: Janette Redd-Williams

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1515 Clay Street, Suite 2201
Oakland, CA 94612
(510) 622-1016

May 21, 2001

Edward Purcell
California Faculty Association
5933 W. Century
Los Angeles, CA 90045

Re: **WARNING LETTER**
California Faculty Association v. The Trustees of the University of California
Unfair Practice Charge No. LA-CE-609-H

Dear Mr. Purcell:

The above-referenced unfair practice charge, filed February 14, 2001, alleges the Trustees of the California State University (University) unilaterally implemented a pay increase for employees. The California Faculty Association (Association or CFA) alleges this conduct violates Government Code section 3571 (b), (c) and (e) of the Higher Education Employer-Employee Relations Act (HEERA or Act).[1]

Investigation of the charge revealed the following. The Association is the exclusive bargaining representative for the University's Faculty unit. The University and the Association are parties to a collective bargaining agreement (Agreement) which expires on June 31, 2001. Additionally, the parties have signed a memorandum of understanding, dated June 4, 1999, dealing with salary increases for the 2000-2001 fiscal year.

Article 3.1 of the Agreement states the following as a contractual zipper clause:

> This Agreement constitutes the entire Agreement of the Trustees and the CFA, arrived at as a result of meeting and conferring. The terms and conditions may be altered, changed, added to, deleted from, or modified only through the voluntary and

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[1] As the conduct complained of occurred while the parties were at impasse, Government Code section 3571(c) is inapplicable. If Charging Party wishes to amend this charge, such a change should be reflected.

> mutual consent of the parties in an expressed written amendment to the Agreement. This Agreement supersedes all previous agreements, understandings, policies, and prior practices directly related to matters included within this Agreement. . . .

The June 4, 1999, memorandum of understanding states in relevant part:

> Fiscal Year 2000/2001 Increases
> If the final gross general fund budget of the CSU has increased by at least $180 million (including both general fund and student fee revenue) from fiscal year 1999/2000 to fiscal year 2000/01, then the total compensation increases to faculty unit employees shall be distributed as follows: (a) forty percent (40%) of the increases shall be for faculty merit increases, including those for SSI-eligible employees, and (b) the remaining sixty percent (60%) shall be for the general salary increase. If the increase in the final gross general fund budget is less than $180 million, then the parties shall give priority to funding a service salary increase, and shall reopen negotiations solely on the amount and distribution of the general salary and merit salary increases.
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> The CSU Board of Trustees shall adopt a budget request that will fund at least a 6% salary increase for the faculty. The amount of this request will be 62.4 million assuming a 6% salary increase in fiscal year 1999/2000. This amount may change due to retirement adjustments in the compensation base. If the salary increase is less than 6% in fiscal year 1999/2000 this number will be adjusted proportionately. Compensation will be the highest priority for requests in the Trustees' budget after recurring costs and enrollment. . . .

It is undisputed that the University's budget for 2000-2001 increased by at least $180 million.

The Agreement also provides the University with guidelines on how the SSI funds are to be calculated and distributed. With regard to SSI calculation, the Agreement states:

> 31.43: As part of the CSU merit program in fiscal years 1999/2000 and 2000/01, there shall be a separate pool for bargaining unit members eligible for Service Salary Step Increases. It shall be calculated by multiplying the total salary and benefits of such employees by two and sixty-five one-hundredths percent (2.65). This provision shall not be subject to renegotiation during reopener bargaining, if any, in these years.

Article 31.53 of the Agreement states the following regarding reopeners:

> The parties will reopen negotiations pursuant to HEERA on Article 31, Salaries and on Article 32, Benefits for fiscal years 2000/2001 in accordance with the timelines provided in provision 40.2 of this Agreement.

In March 2000, the parties commenced reopener negotiations in accordance with Article 31.53. During the first bargaining session, the Association introduced an initial proposal which included a variety of new wage and benefit programs described in general terms. In July 2000, PERB declared the parties at impasse. The parties were unable to reach agreement with the assistance of a mediator and ultimately proceeded to factfinding. The factfinders report was issued in November 2000. The parties have engaged in post-factfinding negotiations without resolution of the outstanding issues.

On January 26, 2001, University Chancellor, Charles Reed, informed Association President, Susan Meisenhelder, that he was pleased the faculty would be receiving the pay raises they deserved. Additionally, Mr. Reed requested the parties form a task force to make recommendations on the unresolved compensation issues.

On January 26, 2001, bargaining unit employees at California State University-Chico, received an electronic message stating they would be receiving pay increases in accordance with the contractual provisions cited above.

Based on the above stated facts, the charge as presently written fails to state a prima facie violation of the HEERA, for the reasons provided below.

Charging Party contends the University implemented a unilateral change when it implemented the terms of the June 4, 1999, memorandum of understanding, and increased bargaining unit

members salary accordingly. The University contends they merely implemented contractual provisions as called for in the Agreement.

It is well established that an employer's pre-impasse unilateral change of a past practice violates the duty to meet and confer in good faith. (Grant Joint Union High School District (1982) PERB Decision No. 196.) As such changes are inherently destructive of employee rights, they are considered a per se violation of the duty to negotiate in good faith. (Regents of the University of California (1983) PERB Decision No. 356-H.)

Herein, however, the facts are different. Unlike the normal repudiation theory, Charging Party alleges herein that the University made a unilateral change when it implemented provisions of the collective bargaining agreement currently being bargained for in reopener negotiations. PERB has, however, addressed this matter, and its holding in Trustees of the University of California (1996) PERB Decision No. 1174-H, serves as clear precedent in such cases.

In Trustees, supra, the Board held that reopened provisions were not effectively terminated by reopening, but rather status quo prevailed where the parties had previously agreed that the contract terms could not be deleted except by mutual consent. In that case, the University and the Academic Professionals of California had been engaged in reopener negotiations over several issues, including the employer's contribution to health benefits and contracting out. After completing mediation and factfinding, the parties remained at impasse. The union then contended the reopened articles were no longer operative, and as such, the union was not bound by the contracting out language. The University argued, however, that status quo prevailed, and as such, the parties were bound both by the contracting out provisions and the health contribution requirements in the agreement, as no new agreement had been reached.

In dismissing the union's claim of unilateral change, the Administrative Law Judge noted that the parties made a clear statement, through their zipper clause, that the provisions of their contract could not be changed without voluntary, mutual consent. As such, the ALJ stated:

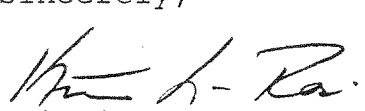
> Since I conclude that the parties previously had agreed that contract terms could not be deleted except by mutual consent, I reject the argument that the clauses were terminated by the reopening. The clauses remained in effect and the University . . . made no change in a negotiable subject.

Facts herein are nearly identical to those in Trustees. Charging Party and the University are parties to a collective bargaining agreement which includes a zipper clause identical in terms to the one found in Trustees, supra. Additionally, the parties had completed impasse procedures and had reached a stalemate in post-factfinding negotiations. As in Trustees, the University then implemented the terms and conditions of the June 4, 1999, memorandum of understanding by issuing pay increases and merit salary increases pursuant to the agreed-upon contractual provisions. The University's reinstatement of reopened clauses did not constitute a unilateral change, but merely as assertion that the status quo between the parties remained in effect. (Trustees of the California State University (1996) PERB Decision No. 1174-H, p.1.)

Charging Party contends Trustees, supra, is not applicable in this situation. However, Charging Party fails to explain why it should not be bound by the zipper clause and the terms and conditions of the June 4, 1999, agreement. While the parties are free to agree to a higher salary increase in reopeners, the parties failure to reach an agreement does not repudiate the terms and conditions already agreed upon. As such, this charge fails to state a prima facie violation of the HEERA.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondent's representative and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before May 28, 2001, I shall dismiss your charge. If you have any questions, please call me at (510) 622-1016.

Sincerely,



Kristin L. Rosi
Regional Attorney