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. SA-CE-168-H PERB Decision No. 1591-H January 26, 2004

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 Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California Faculty Association (CFA) and cross-exceptions filed by the Trustees of the California State University (CSU) to a proposed decision (attached) of an administrative law judge (ALJ). The proposed decision held that CSU violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by refusing to disclose a salary survey report requested by CFA during contract negotiations and that CSU did not engage in unlawful surface bargaining during those negotiations. CFA filed exceptions to the holding that CSU did not engage in unlawful surface bargaining. CSU then filed cross-

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

exceptions to the holding that it violated HEERA by refusing to disclose the salary survey report.

The Board has reviewed the entire record in this matter, including the proposed decision, CFA's exceptions, CSU's response and cross-exceptions, and CFA's response to the cross-exceptions. The Board finds the ALJ's proposed decision to be free of prejudicial error and adopts it as the decision of the Board itself, subject to the following discussion of CSU's cross-exceptions.

DECISION

In its cross-exceptions, CSU argues that the salary survey – referred to as the "Mercer Report" - was properly withheld from CFA pursuant to the Public Records Act (PRA)[2]. CSU cites to PRA section 6254(p) which provides, in pertinent part, that:

> Except as provided in Sections 6254.7 and 6254.13, nothing in this chapter shall be construed to require disclosure of records that are any of the following:
>
> (p) Records of state agencies related to activities governed by . . . [the HEERA], that reveal a state agency's deliberative processes, impressions, evaluations, opinions, recommendations, meeting minutes, research, work products, theories, or strategy, or that provide instruction, advice, or training to employees who do not have full collective bargaining and representation rights under these chapters. Nothing in this subdivision shall be construed to limit the disclosure duties of a state agency with respect to any other records relating to the activities governed by the employee relations acts referred to in this subdivision.

CSU argues that PRA section 6254(p) creates a general privilege for documents such as the Mercer Report and that the privilege is applicable against information requests arising under HEERA.

[2]The PRA is codified at Government Code section 6250 et seq.

CSU's arguments must be rejected. CFA did not make its information request as a private citizen pursuant to the PRA. Instead, CFA exercised its right under HEERA to request information that is necessary and relevant to the discharge of its duty of representation. This is a right that PERB has expressly recognized. (Stockton Unified School District (1980) PERB Decision No. 143). The exemptions from disclosure provided by the PRA cannot be used to deny an information request that is otherwise required by HEERA. Indeed, the PRA expressly provides that:

> The provisions of this chapter shall not be deemed in any manner to affect the status of judicial records as it existed immediately prior to the effective date of this section, nor to affect the rights of litigants, including parties to administrative proceedings, under the laws of discovery of this state, nor to limit or impair any rights of discovery in a criminal case.
> (Gov. Code sec. 6260, emphasis added.)

Accordingly, CSU's cross-exceptions must be rejected.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a) and (c), by refusing to provide the California Faculty Association (CFA) with necessary and relevant information. All other allegations are hereby dismissed.

Pursuant to Government Code section 3563.3, it is hereby ORDERED that CSU, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to provide CFA with necessary and relevant requested information.

2. Interfering with the right of employees to be represented by CFA.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF HEERA:

1. Immediately provide CFA with the following requested information:

a. Copies of all employment contracts or appointments issued to bargaining unit employees for work in state-supported summer sessions in 2000.

b. A copy of the Mercer Report on merit pay practices in higher education.

2. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of CSU, indicating CSU will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on CFA.

Members Whitehead and Neima joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SA-CE-168-H, California Faculty Association v. Trustees of the California State University, in which all parties had the right to participate, it has been found that the Trustees of the California State University violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a) and (c), by refusing to provide the California Faculty Association (CFA) with necessary and relevant requested information.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Refusing to provide CFA with necessary and relevant requested information.

2. Interfering with the right of employees to be represented by CFA.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF HEERA:

Provide CFA with the following requested information:

1. Copies of all employment contracts or appointments issued to bargaining unit employees for work in state-supported summer sessions in 2000.

2. A copy of the Mercer Report on merit pay practices in higher education.

Dated: _____

TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA FACULTY ASSOCIATION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-168-H PROPOSED DECISION (6/17/02)

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 Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a faculty association alleges that the state university failed and refused to provide requested information and to bargain in good faith. The state university denies any unlawful conduct.

The California Faculty Association (CFA) filed an unfair practice charge against the Trustees of the California State University (CSU) on September 19, 2000. CFA later filed amended charges on October 17, 2000, and January 31, 2001. The Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint against CSU on April 10, 2001, to which CSU filed an answer on May 9, 2001.

PERB held an informal settlement conference on May 16, 2001, but the case was not settled. PERB held a formal hearing on September 24-25, 2001. With the receipt of the final post-hearing briefs on January 28, 2002, the case was submitted for decision.

FINDINGS OF FACT

Jurisdictional Facts

CSU is a higher education employer under the Higher Education Employer-Employee Relations Act (HEERA).[1] CFA is an employee organization under HEERA and is the exclusive representative of an appropriate unit of CSU's faculty employees.

Reopener Negotiations

There was a collective bargaining agreement in effect between CSU and CFA for the term July 1, 1998, through June 30, 2001. Article 31 (Salary) stated in part:

> Fiscal Year 2000/01 Compensation
>
> 31.53 The parties will reopen negotiations pursuant to HEERA on Article 31, Salaries, and on Article 32, Benefits[,] for fiscal year 2000/01 in accordance with the timelines provided in provision 40.2 of this Agreement.
>
> 31.54 Additional conditions regarding compensation for fiscal year 2000/01 shall be as provided in the Memorandum of Understanding dated June 4, 1999.

The referenced Memorandum of Understanding (MOU) stated:

> Memorandum of Understanding
> Fiscal Years 1999/2000 & 2000/01 Compensation
>
> The parties hereby agree to the following regarding fiscal years 1999/2000 & 2000/01 compensation:
>
> Fiscal Year 1999/2000 Increases
>
> . . . . . .
>
> Fiscal Year 2000/01 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

[1] HEERA is codified at Government Code section 3560 and following.

be distributed as follows: (a) forty percent (40%) of the increases shall be for faculty merit increases, including those for SSI[Service Salary Step Increase]-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. A "compact" with the governor is currently under negotiation. The proposed compact establishes certain priorities for budget increases as well as performance and accountability measures for the CSU and the UC [University of California]. It is the intention of the CSU and the CFA that the CSU shall abide by the terms of the compact regarding expenditures in specific budget categories.

CFA and CSU disagree on the scope of reopener negotiations under Section 31.53 and the MOU. CFA argues that the broad reopener language of Section 31.53 overrode the MOU, while CSU argues the reverse, relying in part on some general testimony that "the intent [of the MOU] -- understood, communicated and discussed -- was that we were going to limit the scope of bargaining in those years [2000/01]."

Article 40 of the agreement (Duration and Implementation) stated:

40.1 This Agreement shall be effective upon its ratification by both parties. The Agreement shall remain in full force and effect up to and including June 30, 2001.

40.2 Written notice shall be given by either party seeking to commence negotiations on a successor contract no earlier than October 1, 2000, and no later than November 30, 2000. Written notice shall be given by either party

seeking to commence reopener negotiations on salaries and benefits during each fiscal year of this Agreement no earlier than October 1 and no later than November 30 of the preceding fiscal year.

40.3 If the scope of bargaining under HEERA is expanded, the parties agree to reopen negotiations on any new mandatory subjects of bargaining.

40.4 Any term(s) of this Agreement that carries an economic cost shall not be implemented until the amount required therefore is appropriated and made available to the CSU for expenditure for such purposes. If less than the amount needed to implement this Agreement is appropriated and made available to the CSU for expenditure, the term(s) of this Agreement deemed by the CSU to carry economic cost shall automatically be subject to the meet and confer process.

Articles 31 and 40 apparently contained the only provisions in the agreement itself that specifically provided for the reopening of negotiations.

Two other sections of Article 31 (Salary) have some relevance to this case:

Fiscal Years 1999/2000 and 2000/01 Service Salary Increases

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.

Increases for Market or Equity

31.55 The President may grant a salary increase to a probationary or tenured faculty unit employee to address market or equity considerations. . . . The funds dedicated for Faculty Merit Increases pursuant to provisions 31.7 through 31.35 may also be utilized for market or equity purposes.

Section 31.43 was apparently the only provision in the agreement itself that explicitly limited the reopening of negotiations.

As contemplated by the MOU, CSU did adopt a budget request that would fund at least a 6 percent salary increase for faculty, and the final gross general fund budget did increase by at least $180 million from 1999/2000 to 2000/01. In March 2000, CSU and CFA entered into reopener negotiations for 2000/01.

On March 31, 2000, CFA presented its initial bargaining proposals for 2000/01, including the following four salary proposals (among others):

(1) A year-long suspension of a controversial Faculty Merit Increase (FMI) program.

(2) An increase in the value of Service Salary Step Increases (SSIs) from 2.65 percent to 4.8 percent.

(3) "Counselor Salary Equity," to be achieved by placing counselors on the pay schedule for teaching faculty.

(4) A pay increase in "an amount equal to the percentage increase in the 'cost-of-living' index as measured by the Consumer Price Index" (CPI).

CFA also made certain benefit proposals.

Ed Purcell (Purcell), CFA's chief spokesperson in the reopener negotiations, testified at hearing that Sam Strafaci (Strafaci), CSU's chief spokesperson, took the position that the four salary proposals were outside the scope of reopeners. In his own testimony, Strafaci admitted taking that position but denied that he ever refused to bargain CFA's proposals.

Purcell testified that Strafaci never made any counterproposals to the four salary proposals. The accuracy of Purcell's testimony on this point depends on how one defines a

"counterproposal." Even CSU's initial proposal, apparently also presented on March 31, 2000, addressed in some way the subjects of the four proposals, as follows:

(1) It proposed to amend certain contractual language concerning the FMI program.

(2) It proposed to keep the value of SSIs at 2.65 percent.

(3) It proposed to maintain the general contractual language on equity increases.

(4) It proposed a general salary increase in "an amount to be negotiated."

CSU's initial proposal apparently did not propose any benefit changes.

There was some movement on both sides as negotiations continued. By May 12, 2000, CFA's proposal had changed in part as follows:

(a) Instead of a suspension of the FMI program, it proposed some language changes and a joint committee on the identification and reward of faculty achievement.

(b) Instead of an increase in the value of SSIs, it proposed an increase in eligibility for SSIs.

(c) It apparently did not mention "Counselor Salary Equity."

(d) Instead of a CPI-based increase, it proposed an unspecified general salary increase.

The proposal apparently no longer addressed benefits.

By May 12, 2000, CSU was proposing a 2.7 percent general salary increase, as part of a 4.5 percent increase in compensation costs. By May 15, 2000, CSU was proposing a 3.6 percent general salary increase, as part of a 6.0 percent increase in compensation costs.

By May 18, 2000, CFA was proposing in part as follows:

(a) An FMI program with language changes and a joint committee.

(b) An increase in SSI eligibility.

(c) An unspecified counselor salary transition to the teaching faculty wage scale.

(d) An unspecified general salary increase to be effective July 1, 2000, plus a CPI-based increase to be effective June 30, 2001 (the last day of the term of the agreement.) CFA was apparently not proposing any benefit changes.

In his hearing testimony, Purcell acknowledged that Strafaci's position on the scope of reopeners did not preclude substantive discussion of the issues. With regard to the proposal to suspend the FMI program, Purcell acknowledged "a fair amount of discussion about whether the union's proposal was good, bad or indifferent." Purcell also acknowledged that "CSU indicated willingness to negotiate changes in the [FMI] program."

On the SSI issue, Strafaci testified that Purcell actually persuaded him that SSI eligibility (as opposed to value) was within the scope of reopeners. Strafaci concluded, however, that CFA's proposal to increase SSI eligibility was basically an attempt to make funds unavailable for the controversial FMI program. Purcell acknowledged in his testimony that CFA was in fact "seeking to use most if not all of the available money to fund the SSI program."

With regard to counselors, Purcell acknowledged "some discussion about whether or not counselor salaries were appropriately raised to faculty salaries." He further acknowledged that Strafaci asked CFA for market data to support CFA's proposal. Purcell did provide some data, but Strafaci was apparently unimpressed.

With regard to a CPI-based salary increase, Strafaci testified that CSU "thought that the general salary increase has the effect of providing an across-the-board pay raise for everyone that takes into consideration, among other things I suppose, the cost-of-living increases." Purcell acknowledged that historically in the CSU "many people have equated an across-the-board pay increase or general salary increase with recognition of increases in cost of living."

Sometime in late May 2000, CSU created an internal discussion document entitled "Alternatives Analysis." This document set forth pros and cons for accepting, rejecting or modifying CFA bargaining proposals. One of the listed proposals was to increase SSI eligibility at the expense of the FMI program. Another proposal was to put counselors on the pay schedule for "faculty" (presumably teaching faculty). The document was shared and discussed with CSU's presidential advisory group, but it apparently caused no changes in CSU's bargaining position.

Ultimately, on June 28, 2000, Strafaci and Purcell signed under penalty of perjury and submitted to PERB a joint request for impasse determination and appointment of a mediator. The attached statement of facts stated in part:

> Bargaining began on March 31, 2000; and the parties have met on eight (8) separate days, culminating with a meeting on June 22, 2000, in an effort to negotiate on compensation matters for fiscal year 2000/01.
>
> During this period of bargaining, the CSU and the CFA discussed relevant issues, and exchanged contract language proposals in an effort to reach tentative agreement. Despite these efforts, we were unable to reach tentative agreement on the following issues contained in Article 31, Salaries, Article 32, Benefits, and the Memorandum of Understanding dated 6/4/99:
>
> · Total cost/distribution of settlement
> · Total amount of general salary increase
> · CPI wage increase component
> · The Faculty Merit Increase Program
> · Compensation for Department Chairs and equivalent titles
> · Transition of Counselor Faculty to teaching faculty wage scale
>
> The CSU and the CFA jointly believe that this bargaining deadlock cannot be broken without the assistance of a mediator.

A footnote added:

> The parties are in dispute regarding whether some of the issues are properly subject to bargaining during these re-opener negotiations.

PERB determined the existence of an impasse on July 6, 2000, but the subsequent impasse procedures did not yield an agreement.

Requests for Information

Around the beginning of 2000, CFA became aware that CSU was moving towards year round operations (YRO) on a system-wide basis. CFA asked CSU to bargain regarding YRO at San Diego State University (SDSU) in particular. On February 6, 2000, CSU spokesperson Strafaci sent CFA a letter stating in part:

> Regarding your request to bargaining [sic] regarding year round operations at SDSU, I suggest that both parties review the agreement that we signed today regarding year round operations at Humboldt State University, in order to determine whether it can serve as a model for SDSU, or for that matter a system-wide agreement on this issue. We can of course agree to meet to discuss this issue at your earliest convenience.

On May 8, 2000, CFA spokesperson Purcell sent Strafaci a letter stating in part:

> In order for the Union to further monitor this situation, please provide us with the following information:
>
> A. Copies of any and all correspondence between the CSU and various state agencies (DOF [Department of Finance], Legislature, etc.) concerning the funding or operation of state-supported summer sessions in 2000;
>
> B. Copies of any and all correspondence between the Chancellor's Office and the campuses concerning the funding or operation of state-supported summer sessions in 2000;
>
> C. Copies of all campus plans and or planning documents related to the operation of state-supported summer sessions in 2000;
>
> D. Copies of all communications between the Chancellor's Office or campus administrations and their

> respective Academic Senates pertaining to the operation of state-supported summer sessions in 2000;
>
> E. Copies of all communications from the Chancellor's Office or campus administrations to bargaining unit members related to state-supported summer sessions in 2000:
>
> F. Copies of all employment contracts or appointments issued to bargaining unit employees for work in state-supported summer session[s] in 2000;
>
> In regard to all of the documents requested, please consider this request to cover both documents already issued and all documents on the requested topics which will be issued in the coming months.

On July 18, 2000, Purcell sent Strafaci a memo stating in part:

> This will serve as a follow-up to CFA's May 18 [sic] information request concerning state-funded summer sessions. As of this date, I do not believe this request has been fully met, particularly in regard to communications between the Chancellor's Office and campuses and/or state government on the topic, or in regard to copies of all employment contracts issued to teach in such programs.

In effect, Purcell reiterated paragraphs A, E and F of the request for information in his May 8 letter.

In response to paragraph A of the request, CSU provided CFA with copies of an April 2000 feasibility study on YRO that CSU had prepared for the state Legislature. In response to paragraph E of the request, CSU provided copies of some communications from CSU to unit members concerning YRO. Strafaci testified that he had requested such information from an assistant vice chancellor who was working on YRO implementation and that he then gave everything to CFA. Purcell testified that "because of the paucity of the response, I believe we did not receive all of the communications," but there is no other evidence that CSU withheld any information described in paragraphs A and E.

In response to paragraph F of the request, CSU did not provide any copies of employment contracts or appointments. CSU had already provided CFA with a two-page "matrix" document showing the results of a campus-by-campus survey on "YRO Calendar and Salary." Purcell testified that the "matrix" document:

> . . . really provides the union with no information as to how individual faculty are being hired in summer YRO. About in the middle category, for instance, it indicates a couple of different pay options: extra pay, spread or substitute. We have no way of knowing from this document how many people are being paid as so-called extra pay, how many people are spreading, how many people are substitutes.
>
> It basically doesn't give us any of the hard data that we would need to be able to understand the scope of the summer YRO program or the conditions of employment, the salary conditions of employment for the people who are being hired in summer YRO.

Strafaci nonetheless testified that the "matrix" document "answered the questions he [Purcell] needed answered without giving him the contracts."

In the late 1990's, CFA became aware that CSU had commissioned William M. Mercer, Inc., to produce a report on merit pay practices in higher education (the Mercer report). On February 1, 2000, in anticipation of negotiations, CFA sent CSU spokesperson Strafaci a letter stating in part:

> Please provide CFA with the detailed data results of the survey that the Chancellor's Office had conducted by William Mercer on Merit Pay in other CPEC [California Post-Secondary Education Commission] institutions.

On February 8, 2000, Strafaci responded with a letter stating in part:

> The Mercer Report that you requested was prepared to assist the CSU in its preparation of bargaining proposals with the California Faculty Association. Therefore, it is confidential and need not be disclosed to the CFA.

> However, as you are aware, we have provided to the CFA during the last negotiations a more recent, and more detailed, compilation of the merit pay programs of the CPEC institutions. The most recent July 24, 1998 version, which I have attached again for your information, was provided to the CFA in the fact-finding presentation by the CSU.

On July 18, 2000, CFA spokesperson Purcell sent Strafaci another letter, stating in part:

> Prior to the commencement of CFA/CSU bargaining this year, CFA requested that you provide a copy of the merit pay study commission[ed] by CSU from Mercer Company. You declined that request citing privilege.
>
> I have now had an opportunity to review both HEERA and Public Records Act precedent on such matters and believe your position to be incompatible with these statutes unless it can be established with certainty that this study was commissioned specifically for collective bargaining purposes and reveals strategies upon which CSU intended to rely at the bargaining table.
>
> For that reason, I ask you here to reconsider your position and to provide me with copies of all communications between CSU and Mercer -- including RFPs [Requests for Proposals] and correspondence -- which authorize Mercer to conduct this study and the parameters of the study. Also, to the degree that the study itself may contain both privileged and non privileged information, I state here CFA's willingness to accept a copy of the study in redacted form which deletes appropriately confidential information.

According to Purcell, there was no response to this letter.

In his testimony at hearing, Strafaci acknowledged that William F. Mercer, Inc. does not provide labor relations advice to CSU. In fact, Strafaci testified that he found the Mercer report too "generic and non-specific" to be very helpful at all. Although Purcell testified that Strafaci had referred to the Mercer report in negotiations, Strafaci denied ever using the report to justify bargaining proposals.

ISSUES

1. Did CSU unlawfully fail or refuse to provide requested information?

2. Did CSU unlawfully fail or refuse to bargain in good faith?

CONCLUSIONS OF LAW

Information

The PERB complaint alleges in part that CSU violated HEERA section 3571(c) by failing and refusing to provide information requested by CFA. Under PERB law, an exclusive representative like CFA 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 discovery-type standard to determine the relevance of requested information. (Trustees of the California State University (1987) PERB Decision No. 613-H.) Failure or refusal to provide such information is a per se violation of the employer's duty to bargain in good faith, violating HEERA section 3571(a).

With regard to paragraphs A and E of the request for information made by CFA on May 8, 2000, and reiterated on July 18, 2000, CFA spokesperson Purcell testified he believed CSU's response was incomplete, but CFA did not prove CSU actually withheld any of the requested information. With respect to paragraph F of that request, however, it is undisputed that CSU withheld what CFA had requested: copies of YRO employment contracts or appointments.

CSU spokesperson Strafaci testified that the two-page "matrix" document CSU provided "answered the questions he [Purcell] needed answered," but, as stated above, Purcell testified in some detail why that was not so. Strafaci did not, of course, have the benefit of Purcell's hearing testimony back in 2000, when the information was requested. Strafaci did,

however, have reason to know that CFA found the "matrix" document inadequate for its purposes, in that CFA already had the "matrix" document at the time it requested more specific and detailed information. Strafaci apparently did not bother, however, to ask CFA why it wanted such information. Under these circumstances, it was unlawful for Strafaci to withhold relevant YRO employment information from CFA simply because he thought CFA already had enough other information.

With regard to CFA's request for the Mercer report, Strafaci gave two apparently inconsistent reasons for withholding the information. In his letter of February 8, 2000, Strafaci told CFA that the report was "prepared to assist the CSU in its preparation of bargaining proposals" and was therefore "confidential." In his hearing testimony, on the other hand, Strafaci asserted that the report was too "generic and non-specific" to be helpful at all. In effect, Strafaci argued that the report was both so central to negotiations as to be privileged and so unimportant to negotiations as to be irrelevant.

The evidence as a whole supports neither argument. Strafaci himself testified that William F. Mercer, Inc., does not provide labor relations advice to CSU, and that CSU did not use the Mercer report to justify bargaining proposals. Given this testimony, one cannot see how disclosure of the Mercer report could possibly compromise CSU's bargaining strategy. On the other hand, it is clear that the kind of information contained in the Mercer report was relevant to negotiations. In fact, Strafaci quite willingly gave CFA a similar report on merit pay programs that Strafaci asserted was "more recent, and more detailed," than the Mercer report.

Remarkably, CFA and CSU litigated essentially the same issue several years ago, in Trustees of the California State University, supra, PERB Decision No. 613-H. In that case,

PERB held that wage survey data gathered by CSU was both relevant and unprivileged. CSU has not argued persuasively why that case should be distinguished from the present case.

With the Mercer report, as with the YRO employment information, it appears that Strafaci withheld relevant information from CFA essentially because he thought CFA already had enough other information. In both instances, this conduct was a per se violation of HEERA section 3571(c). Furthermore, because the conduct interfered with the rights of employees to be represented by CFA, it was also a violation of HEERA section 3571(a).

Bargaining

The PERB complaint also alleges that CSU violated HEERA section 3571(c) by engaging in bad faith "surface" bargaining. It is the essence of surface bargaining that a party goes through the motions of negotiating but is 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. PERB 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.)

The indicia of surface bargaining are many. Entering negotiations with a "take-it-or-leave-it" attitude evidences a violation of the duty to bargain because it amounts to merely going through the motions of negotiating. (General Electric Co. (1964) 150 NLRB 192, 194 [57 LRRM 1491], enf. 418 F.2d 736 [72 LRRM 2530].) Recalcitrance in the scheduling of meetings is evidence of manipulation to delay and obstruct a timely agreement. (Oakland Unified School District (1983) PERB Decision No. 326.) Dilatory and evasive tactics

including canceling meetings and failing to prepare for meetings are evidence of bad faith. (Oakland Unified School District, supra, PERB Decision No. 326.) Conditioning agreement on economic matters upon prior agreement on non-economic matters is evidence of an unwillingness to engage in a give-and-take process. (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S.)

Other factors that have been held to be indicia of surface bargaining include a negotiator's lack of authority that delays and thwarts the bargaining process (Stockton Unified School District (1980) PERB Decision No. 143), a party's insistence upon agreement on ground rules before negotiating substantive issues (San Ysidro School District (1980) PERB Decision No. 134), and a party's reneging on tentative agreements the parties already have made (Charter Oak Unified School District (1991) PERB Decision No. 873; Stockton Unified School District, supra, PERB Decision No. 143; Placerville Union School District (1978) PERB Decision No. 69).

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].)

As stated above, in the present case CFA and CSU disagree on the scope of reopener negotiations under Section 31.53 of their 1998-2001 agreement and the MOU of June 4, 1999. In their post-hearing briefs, both parties make rather extreme arguments on this issue. CFA argues that the broad reopener language of Section 31.53 overrode the MOU to the extent that

even the MOU itself could be reopened. CSU argues that the MOU overrode Section 31.53 to the extent that only the total amount of the compensation package could be reopened. Neither of these extreme arguments actually makes much sense.

CFA's argument would render the MOU essentially ineffective. The MOU's provisions on 2000/01 compensation would obviously not take effect until 2000/01, but by then, in CFA's view, either party could renounce those provisions and demand to bargain everything anew. It is difficult to imagine why the parties would bother to negotiate and sign an MOU that would thus bind neither of them. Although CSU offered only general testimony that "the intent [of the MOU] -- understood, communicated and discussed -- was that we were going to limit the scope of bargaining in those years [2000/01]," it would be difficult to believe that the parties had no such intent.

CSU's argument, on the other hand, would give the broad reopener language of Section 31.53 almost no effect. In authorizing the parties to reopen Articles 31 and 32 without limitation, that language would appear to authorize the parties to reopen every provision of those articles.[2] If the parties had intended for the relatively brief MOU to foreclose the reopening of all those provisions, and to limit reopeners to a single issue, one would expect the parties to have said so.

The more sensible view lies between these two extremes. In this view, the MOU resolved exactly the issues it purported to resolve, in particular the distribution of total compensation increases between FMIs and SSIs on the one hand and a general salary increase on the other. The MOU was not itself subject to reopeners, nor were the issues it specifically

[2] Article 31 consisted of 59 sections, Article 32 of 22 sections.

resolved. Under Section 31.53, however, all the provisions of Articles 31 and 32 were subject to reopeners, except as specifically resolved by the MOU.[3]

Fortunately, the actual bargaining conduct of the parties, and of CSU in particular, was not as extreme as the arguments in the post-hearing briefs. Despite its argument that only the total amount of the compensation package could be reopened, CSU actually proposed in bargaining to amend contractual language concerning the FMI program. Furthermore, CSU spokesperson Strafaci testified that CFA spokesperson Purcell persuaded him that SSI eligibility (as opposed to value) was within the scope of reopeners. CSU's May 2000 "Alternatives Analysis" indicates that CSU did consider CFA's proposal to increase SSI eligibility, as well as CFA's proposal to put counselors on the pay schedule for teaching faculty.

As stated above, the evidence shows that CSU's position on the scope of reopeners did not preclude substantive discussion of the issues. Furthermore, the evidence as a whole does not show that CSU engaged in a pattern of conduct intended to subvert the process or to delay or prevent agreement. Although I have concluded that CSU's withholding of requested information was a per se violation of its duty to bargain in good faith, I do not conclude that CSU also engaged in bad faith "surface" bargaining in violation of that duty.

REMEDY

HEERA section 3563.3 gives PERB:

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including, but not limited to, the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter [HEERA].

[3] The only other exception would appear to be Section 31.43, which by its own terms was not subject to reopeners.

In the present case, CSU has been found to have violated HEERA section 3571(a) and (c) by refusing to provide CFA with relevant requested information. It is therefore appropriate to direct the University to cease and desist from such conduct and to provide the requested information.

It is also appropriate to direct the CSU to post a notice incorporating the terms of the order in this case. Posting of such a notice, signed by an authorized agent of CSU, will provide employees with notice that CSU has acted in an unlawful manner, is being required to cease and desist from this activity and take affirmative remedial actions, and will comply with the order. It effectuates the purposes of HEERA that employees be informed both of the resolution of this controversy and of CSU's readiness to comply with the ordered remedy. (Placerville Union School District, supra, PERB Decision No. 69.)

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law, and upon the entire record in this matter, it is found the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA or Act), Government Code section 3571(a) and (c), by refusing to provide the California Faculty Association (CFA) with relevant requested information. All other allegations are hereby dismissed.

Pursuant to HEERA section 3563.3, it is hereby ORDERED that CSU, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to provide CFA with relevant requested information.

2. Interfering with the right of employees to be represented by CFA.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Within ten (10) workdays of the service of a final decision in this matter, provide CFA with the following requested information:

a. Copies of all employment contracts or appointments issued to bargaining unit employees for work in state-supported summer sessions in 2000.

b. A copy of the Mercer Report on merit pay practices in higher education.

2. Within ten (10) workdays of the service of a final decision in this matter, post copies of the Notice attached hereto as an Appendix at all work locations where notices to unit employees customarily are posted. The Notice must be signed by an authorized agent of CSU, indicating CSU will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board, in accord with regional director's instruction.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

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

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

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, secs. 32135(a) and 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 California Code of Regulations, title 8, section 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, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Thomas J. Allen

THOMAS J. ALLEN
Administrative Law Judge