**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| CALIFORNIA STATE EMPLOYEES ASSOCIATION, CSU DIVISION,<br><br>Charging Party,<br><br>v.<br><br>TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,<br><br>Respondent. | Case No. SA-CE-191-H<br><br>Remand from Court<br><br>PERB Decision No. 1876a-H<br><br>April 15, 2009 |
| CALIFORNIA FACULTY ASSOCIATION,<br><br>Charging Party,<br><br>v.<br><br>TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,<br><br>Respondent. | Case No. SA-CE-194-H |

Before Neuwald, McKeag and Dowdin Calvillo, Board Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on remand from the Court of Appeal, Third Appellate District. The unfair practice charge alleged that Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] when it prohibited certain

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

members of the faculty and staff from parking in newly built parking structures.[2] The California State Employees Association, CSU Division (CSEA) and the California Faculty Association (CFA) alleged this conduct constituted a violation of HEERA section 3571(a), (b), (c) and (f).

In *Trustees of the California State University* (2006) PERB Decision No. 1876-H (*Trustees*), the Board held, among other things, that parking location, as opposed to parking fees, was not within the scope of representation because it did not involve the employment relationship between the parties. Accordingly, the Board dismissed the unilateral change allegation. CFA appealed. In *California Faculty Assn.* v. *Public Employment Relations Bd.* (2008) 160 Cal.App.4th 609 (*CFA v. PERB*), the Court of Appeal disagreed with the Board and held the terms and conditions on which an employer makes parking available involves the employment relationship. Accordingly, the court set aside the Board's dismissal of this allegation and remanded the matter to the Board to conduct further analysis consistent with its decision.

We have reviewed the entire record in this matter and find that CSU's decision to restrict faculty and staff access to student parking lots is not within the scope of representation. Specifically, based on the past conduct of the parties, we find the subject of parking access is not of such concern to management and employees that conflict is likely to occur. In addition, because students compete directly with the faculty and staff for a limited number of parking spaces, we find the mediatory influence of collective negotiations is not the appropriate means

[2] The charge also alleged that CSU unlawfully consulted with an advisory group on a matter within scope (i.e., parking location) and wrongfully denied a request for information regarding parking. The Board held CSU violated HEERA section 3571(f) when it consulted with an ad hoc task force on parking and also violated HEERA section 3571(b) and (c) when it failed to produce certain requested documents. The Board's rulings on these issues were not appealed and, therefore, final. Accordingly, these charges are not addressed herein.

of resolving such conflicts on CSU campuses. We also find obligating CSU to negotiate this subject would significantly abridge its freedom to exercise those managerial prerogatives essential to the achievement of its mission. For these reasons, we find parking location is not within the scope of representation. Last, we find CSU did not unlawfully fail to bargain the effects of those decisions and, therefore, did not violate its duty to bargain in good faith. Accordingly, we conclude the dismissal of the unilateral charge allegations in this case is appropriate.

## FINDINGS OF FACT

### A. Relevant Contractual Language

CSEA represents employees in CSU bargaining Units 2, 5, 7, and 9. CFA represents employees in bargaining Unit 3. CSEA and CFA shall be referred to collectively as the "Charging Parties" and the employees they represent shall be referred to collectively as the "Represented Faculty."

#### 1. CSEA-CSU MOU

Section 21.15 of the July 1, 2002 to June 30, 2005, memorandum of understanding CSEA and CSU (CSEA-CSU MOU) states, in part:

> Employees wishing to park at any CSU facility shall pay the parking fee in accordance with CSU campus policy. There shall be no parking fee increases for CSEA-represented employees on any campus during fiscal year 2002-2003. Thereafter, any increases in parking fees are subject to a reopener.

#### 2. CFA-CSU MOU

Section 32.17 of the May 14, 2002 to June 30, 2004, memorandum of understanding between CFA and CSU (CFA-CSU MOU) states:

> An employee is required to pay the parking fee as determined by the CSU for parking at any facility of the CSU. . . . The CSU

> shall not change the parking fees payable in effect upon the effective date of this Agreement.

This provision had an accompanying footnote, which states, in pertinent part:

> 'The parties agree that faculty will not be required to pay parking fees in excess of those applicable as of June 30, 2001 during the 2001-2002, 2002-2003 contract years.'

The parties have historically negotiated the cost of faculty parking, but not the specific locations where they were permitted to park. Prior to the events described herein, parking fees for students, faculty and staff at the two campuses had not changed since 1992.

With regard to parking locations, each CSU parking lot was designated for the exclusive use of either "student" or "faculty and staff." However, as discussed in more detail below, both California State University, Sacramento (CSUS) and California State University, Northridge (CSUN) began granting the faculty and staff permission to park in both faculty and staff lots, as well as student lots. Students, on the other hand, were not granted reciprocal access to faculty and staff lots and, therefore, continued to be limited to parking in student lots.

B. Parking is a Self-Sustaining Function

Both CSUS and CSUN have experienced a marked increase in the number of students and, therefore, a corresponding increase in the need for parking. In 1995, every CSU campus became responsible for their own parking policies, subject to approval by the Board of Trustees. Parking is a self-sustaining function that does not receive any funding from the State. Thus, all parking related costs, including any new parking structures, must be paid for by campus parking fees. Additionally, all new parking structures and/or improvements are funded through CSU revenue bonds. However, in order to obtain approval for such a bond, each respective campus must demonstrate both fiscal viability and the ability to pay for its expenditures.

C. Parking Fee Increase – Background

During the 2000-01 school year, administrators at both CSUS and CSUN determined that additional campus parking structures were needed. Both administrations determined that, in order to pay for these new structures, it was necessary to raise parking rates for all campus parkers. CSUS designated its new parking structure as PS II, and CSUN designated its new parking structure as B-5.

As set forth above, both the CSEA-CSU MOU and the CFA-CSU MOU contained provisions regarding parking fees paid by their members, and neither contract authorized an increase of those fees. Although CSU proposed reopening the respective MOUs to negotiate a fee increase, it was unable to negotiate an increase with either union. Indeed, CFA's leadership stated that its members would not approve a fee increase in a year that they did not receive a pay increase.

D. CSUN: Restrictions on Parking Location

On June 14, 2001, CSUN informed its students, faculty and staff that parking fees would be raised in two stages. On September 1, 2001, these fees would be increased from $14.00 to $21.00 per month and from $63.00 to $94.50 per semester. On July 1, 2002, the fees would be increased from $21.00 to $28.00 per month and from $94.50 to $126.00 per semester.

CSUN negotiated with and obtained a fee increase for employees in various bargaining units not represented by the Charging Parties (Non-Represented Faculty). Thus, on September 1, 2001, when CSUN raised parking fees for its students, it also raised the fees for the Non-Represented Faculty. It did not, however, raise the parking fees for the Represented Faculty.

Later, on March 17, 2003, CFA and CSEA were informed that the Represented Faculty would not be permitted to park in B-5 (CSUN) when it was completed. In September 2003, when B-5 (CSUN) was opened, the Represented Faculty were permitted to park in all of the areas outside of the B-5 (CSUN) in which they had previously parked, but not inside the structure. In addition to their former parking locations, the Represented Faculty had access to 308 resurfaced spaces in the ground area surrounding the new structure. These 308 spaces constituted an increase of 127 spaces over those available prior to the construction of B-5 (CSUN). In addition to the students, the Non-Represented Faculty paying the higher parking fee were also permitted to park in the structure. Neither CSEA nor CFA offered any evidence that the parking limitations placed on B-5 (CSUN) created a negative impact on the Represented Faculty.

E. CSUN: Parking Location Never Bargained

In 1994, the Northridge earthquake wrought serious damage to the campus. Numerous buildings, including an existing parking structure, were rendered uninhabitable and required demolition. In response, CSUN erected temporary buildings on lawns and parking lots. As a result, parking locations changed frequently. The location of parking remained in flux as reconstruction efforts continued. Neither CSEA nor CFA presented evidence to suggest that these changes in parking locations were bargained. To the contrary, CSUN Vice President for Administration and Finance and Chief Financial Officer, Mohammad Qayoumi (Qayoumi), testified that, to his knowledge, parking location was never negotiated with the unions.

F. CSUS: Restrictions on Parking Location

On May 9, 2002, CSUS President, Donald Gerth (Gerth), issued a memorandum to the campus community discussing parking fees. In this memo he stated, inter alia, the following:

> I have significant concerns about the equity of this situation. Students and a limited number of university employees will be paying higher parking fees than the majority of university employees. The Faculty Senate at its April 25 meeting adopted a resolution recommending to me the creation of 'a funding mechanism whereby faculty and staff who wish to pay an additional sum to equal the student increase can do so.' I think this is a reasonable thing to do.
>
> I have asked the Vice President for Administration to bring together a small group representative of the campus, including students, faculty, and staff to address broader issues of equity in the distribution of parking availability. The group is meeting now.
>
> That group is addressing matters such as how parking spaces are to be allocated to various groups particularly with respect to the level of fees.

In May 2002, CSUS announced a new parking fee schedule proposing fee increases in two stages for students and the Non-Represented Faculty. In September 2002, semester fees would be increased from $63.00 to $85.50, and in July 2003 they would be increased to $108.00, with corresponding fee increases for summer, weekly and daily parking rates.

On August 26, 2002, a few days prior to its opening, Gerth announced that PS II (CSUS) would be designated for students only. Consequently, notwithstanding the May 2002 announcement, there was not an increase in parking fees for CSUS employees, whether they were represented or not. After PS II (CSUS) was opened, the faculty and staff had more parking spaces on campus. Moreover, they had access to the same proportion (18 percent) of space relative to the overall number of spaces that they had prior to the opening.

G. CSUS: Parking Location Never Bargained

Historically, each CSUS parking lot was designated for the exclusive use of either students or the faculty and staff. In 1991, this policy was changed to permit the faculty and staff to park in student lots, as well as faculty lots. Students, however, were not permitted to park in faculty and staff lots. According to Nancy Fox (Fox), CSUS's transportation and parking services manager since 1991, this was done to "allow more flexibility." Fox testified that parking lots at CSUS are typically allocated by way of an 80/20 split. In other words, approximately 20 percent is allocated to the faculty and staff and approximately 80 percent is allocated to students. In or about 2000, some temporary buildings were replaced by a new parking lot. Rather than allocate the 20 percent of the spaces in this lot to the faculty and staff, and 80 percent to students, all of the spaces were allocated to the faculty, staff and students. Neither CSEA nor CFA presented any evidence that this change in parking allocation was ever bargained.

## ISSUE

Did CSU commit an unlawful unilateral change when it prohibited the Represented Faculty from parking in PS II at CSUS and B-5 at CSUN when they had been previously allowed to park in all areas designated for students?

## DISCUSSION

A. Unilateral Changes

In determining whether a party has violated HEERA section 3571(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if

certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Grant Joint Union High School District* (1982) PERB Decision No. 196 (*Grant*).)

Thus, to prove an unlawful unilateral change, the charging party must establish, by a preponderance of the evidence, that: (1) The employer breached or altered the parties' written agreement or past practice; (2) Such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) The change was not merely an isolated breach of the contract, but amounts to a change of policy (i.e., has a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members); and (4) The change in policy concerns a matter within scope of representation. (*Trustees of the California State University* (2005) PERB Decision No. 1760-H.)

B. Both CSUS and CSUN Altered a Past Practice

In order to establish a past practice, it must be demonstrated that the practice was unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*Riverside Sheriff's Assn.* v. *County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.)

In the instant case, the parties have historically negotiated the cost of faculty parking but not the specific locations where they were permitted to park. Indeed, Section 21.15 of the CSEA-CSU MOU and Section 32.17 of the CFA-CSU MOU both address the issue of parking fees, but not parking lot access. Because the MOUs are silent with regard to parking lot

access, the Charging Parties must demonstrate that CSU changed a past practice when it restricted the Represented Faculty from parking in the new parking structures.

At CSUS, student parking has been available to the faculty and staff since 1991 or 1992. This arrangement was known and acknowledged by both the CSUS administration and the faculty and staff. Given the fact that this parking arrangement had been in existence for over ten years and was known and acknowledged by the parties, this parking arrangement was unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time. Consequently, the parking arrangement at CSUS is properly characterized as a past practice.

At CSUN, student parking has also been available to the faculty and staff. Like CSUS, the arrangement was known and acknowledged by both the CSUN administration and the faculty and staff. Moreover, it was unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time. Consequently, the parking arrangement at CSUN is also characterized as a past practice.

Qayoumi testified that the long standing past practice at both CSUS and CSUN is that the faculty and staff can park where students park as long as they pay the same fee. The argument, however, is tenuous, at best. If, in fact, parking is based on notion of parking fee equity, then students (because they pay the same amount as the faculty and staff) should be authorized to park in the faculty and staff parking areas. They are not. Consequently, we find Qayoumi's description of the past practice lacks merit and is, therefore, rejected.

Based on the foregoing, we conclude that both CSUS and CSUN had a past practice that authorized the faculty and staff to park in student parking areas. Thus, when CSUS limited parking in structure PS II (CSUS) to students only and when CSUN limited parking in

B-5 (CSUN) to students and non-represented employees paying higher parking fees, they altered a past practice.

C. Notice

The second element of a unilateral change case requires the charging party to demonstrate that the alleged change of policy or practice was taken without giving the exclusive representative notice and an opportunity to bargain over the change.

With regard to CSUS, the Represented Faculty were not advised of the proposed change until Gerth issued a memorandum dated August 26, 2002, indicating that he was implementing a fee increase for students and that he was designating parking in PS II (CSUS) for students only. Since PS II (CSUS) opened in late August 2002, only days after the issuance of the memorandum, we find the Charging Parties were not provided adequate notice of the change in practice. Accordingly, the second element of the unilateral change allegation is satisfied for the conduct at CSUS.

The Represented Faculty at CSUN, on the other hand, were advised by memorandum dated March 17, 2003, that CSUN intended to limit access to structure B-5 (CSUN) to those individuals paying the higher fees. Because the structure was not scheduled to open until Fall of 2003, the Charging Parties were afforded almost six months in which to request to bargain the change. We find, and the Charging Parties do not dispute, that they did not request to bargain the change.

The Board has held that notice of a proposed change in policy must be given sufficiently in advance of a firm decision to make such a change to allow the exclusive representative a reasonable amount of time to make a demand to negotiate. (*Victor Valley Union High School District* (1986) PERB Decision No. 565.) Moreover, the Board has held

that when an employer has made a firm decision to make a change in policy, the failure to request bargaining will not be considered a waiver of a right to bargain if the request would be futile. (*Fall River Joint Unified School District* (1998) PERB Decision No. 1259.)

Relying on these cases, the Charging Parties argue that the March 17, 2003, memorandum constituted a firm decision and, therefore, they were excused from their duty to bargain because a demand to bargain would have been futile. The Charging Parties, however, presented no evidence that the March 17, 2003, memorandum was, in fact, a firm decision. Thus, the Charging Parties' failure to request bargaining was not excused by operation of the futility exception. In light of the six-month advance notice afforded by CSU, we find the Charging Parties were afforded adequate notice and an opportunity to bargain the proposed change at CSUN. Accordingly, the second element of the unilateral change allegation is not satisfied for the conduct at CSUN.

D. The Decision to Limit Faculty Access to the Parking Structures had a Generalized Effect and Continuing Impact on the Terms and Conditions of Employment

The third element of a unilateral change allegation requires the charging party to demonstrate the change was not merely an isolated breach of contract, but amounts to a change of policy. The Board has ruled that such a change of policy is a change that has a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. (*Grant.*) As explained by the Board in *Grant*:

> This is not to say that every breach of contract also violates the Act. Such a breach must amount to a change of policy, not merely a default in a contractual obligation, before it constitutes a violation of the duty to bargain. This distinction is crucial. A change of policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members.

In the instant case, the decision to restrict parking in the new structures applied to all the Represented Faculty. In addition, the change in policy was applied continuously from the date of its implementation. Consequently, the change had both a generalized effect and continuing impact upon the terms and conditions of employment for the Represented Faculty. Accordingly, the third element of the unilateral change allegation is satisfied for the conduct at both CSUS and CSUN.

E. CSU's Decision to Restrict Access to the New Parking Structures Was Not Within Scope

The fourth element of a unilateral change allegation requires the charging party to demonstrate the change in policy concerned a matter within scope of representation. Under HEERA section 3562(r)(1), the scope of bargaining is limited to wages, hours and other terms and conditions of employment.

1. Parking Location Does Not Impact Wages or Hours of Work

In the *Trustees* case, the Board held the decision to restrict the faculty from parking at PS II (CSUS) and B-5 (CSUN) had no impact on either the employees' wages or hours of work. The Board's rulings on these issues were not appealed and, therefore, final. Thus, the issue in this case is whether the change in past practice falls within scope under "other terms and conditions of employment."

2. Parking Location Does Not Fall Within Scope Under Other Terms and Conditions of Employment

In determining if non-enumerated matters fall within the scope of representation as a "term or condition of employment," PERB applies a three-part test. A subject is within the scope of representation if: (a) it involves the employment relationship; (b) the subject is of such concern to management and employees that conflict is likely to occur, and the mediatory

influence of collective negotiations is the appropriate means of resolving the conflict; and (c) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employers mission. (*Trustees of the California State University* (2001) PERB Decision No. 1451-H.) PERB has indicated a matter is outside the scope of bargaining if "imposing a bargaining obligation would significantly abridge the employer's managerial prerogatives." (*Regents of the University of California* (1987) PERB Decision No. 640-H.)

a) First Element of the "Term or Condition of Employment" Test

Applying this test to the present case, the court in *CFA v. PERB* held that the "terms and conditions on which an employer makes parking available to its employees 'involves the employment relationship.'" Consequently, the first element of this test has clearly been satisfied.

b) Second Element of the "Term or Condition of Employment" Test

The second element under the "other terms and conditions" test requires the charging party to demonstrate that the subject is of such concern to management and employees that conflict is likely to occur, and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict.

(1) Changes to Parking Location Have Not Resulted in Conflict

At both CSUS and CSUN, the availability of parking and the location of the parking lots has varied over time. Qayoumi characterized the parking situation at CSUN as dynamic because it changes as different buildings are constructed and as student enrollment changes. According to Qayoumi, areas of parking have shifted to accommodate these changes. As an example, Qayoumi noted that following the 1994 Northridge earthquake, many areas formerly

used for parking were no longer available. Consequently, new parking areas were designated and, later, even more parking areas were shifted to accommodate the subsequent reconstruction efforts following the earthquake. Similarly, according to Fox, parking locations have also changed at CSUS due to various construction projects. Neither CSEA nor CFA presented evidence to suggest that these changes in parking locations were grieved or otherwise challenged in the form of an unfair practice charge.

In addition to parking location, parking allocation has also been changed. At CSUS, parking lots have been typically allocated by way of an 80/20 split since 1992. Under this allocation method, approximately 20 percent of the parking spaces in a lot are designated as faculty and staff parking and the remaining spaces are designated as student parking. However, in 2000, CSUS did not use this allocation method for a new parking lot. Instead, the university allocated all of the spaces to the faculty, staff and students on a first-come, first-served basis. Neither CSEA nor CFA presented any evidence that this change in parking allocation was grieved or otherwise challenged in the form of an unfair practice charge.

Notwithstanding these changes, the Charging Parties' collective bargaining agreements with CSU have never addressed parking access, location, or allocation. Moreover, with the exception of the instant dispute, these parking changes have not been grieved or otherwise challenged in the form of an unfair practice charge. Thus, based on our review of the record, we find that these changes have not typically resulted in conflict between the Charging Parties and CSU at either CSUS or CSUN. Accordingly, we find the Charging Parties failed to demonstrate that the subject is of such concern to management and employees that conflict is likely to occur.

(2) Collective Negotiations is Not the Appropriate Means of Resolving the Conflict

Parking resources at both campuses is limited and must be shared by students, faculty, staff and, in some instances, members of the public. Unlike parking fees which may be independently negotiated between the parties, any change to the location and/or number of faculty and staff parking spaces will result in a corresponding change to the location and/or number of parking spaces available to the students. Thus, both students and the Represented Faculty compete directly for access to parking spaces.

According to Eric Guerra, former president of the associated students, students at CSUS were very concerned regarding the issue of access to PS II (CSUS) in light of the significant fee increase borne by the students. At CSUN, discontent regarding the adequacy of parking led student leaders in the Spring of 2000 to request the construction of a new parking structure to alleviate the inadequate availability of parking. Clearly, the availability of parking is very important to CSU's primary constituents, the students. Thus, under these circumstances, any resolution of a dispute regarding the location/availability of parking spaces must take into consideration the interests of both the Represented Faculty and the students. However, collective negotiations between the Charging Parties and CSU can only focus on the needs of the Represented Faculty, thereby depriving the students of the opportunity to assert and defend their parking interests. Accordingly, even if parking location is a subject of such concern that conflict is likely to occur, we find collective negotiations is not the appropriate means of resolving the conflict between the interested parties.

(3) Prior Decisions

In *Regents of the University of California* (1983) PERB Decision No. 356-H (*Regents*), the Board adopted a proposed decision in which the administrative law judge (ALJ), relying

heavily on the United States Supreme Court's decision in *Ford Motor Co.* v. *NLRB* (1979) 441 U.S. 488 (*Ford*), held that increases to parking fees are within the scope of representation. In the *Ford* case, the Supreme Court ruled that in-plant food services and prices are terms and conditions of employment and subject to mandatory collective bargaining. (*Id.* at p. 503.) In reaching its decision, the court did not apply a specific test to determine whether in-plant food services and prices were within scope; rather, the court approved the National Labor Relations Board's conclusion that such subjects are mandatory and supported its approval by examining industry practices regarding these subjects of bargaining and also the history of bargaining those subjects at the particular plant.[3] (*Id.* at pp. 497-501.)

Notwithstanding her reliance on the *Ford* case, the ALJ in *Regents* declared her analysis was consistent with the "narrower" scope test adopted by the Board in *Anaheim Union High School District* (1981) PERB Decision No. 177 (*Anaheim*)[4] for cases arising under the Educational Employment Relations Act (EERA).[5] However, the ALJ's analysis only focused

[3] In 1981, two years after the *Ford* decision was issued, the court adopted a balancing test to determine whether certain business decisions were mandatory subjects of bargaining. (*First National Maintenance Corp.* v. *NLRB* (1981) 452 U.S. 666, 678.)

[4] Under *Anaheim,* a subject is within the scope of representation if: (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge [its] freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the district's mission. In *Trustees of the California State University* (2001) PERB Decision No. 1451-H, the Board adopted the modified version of the *Anaheim* test applied herein to determine whether a subject is within scope under HEERA.

[5] EERA is codified at Government Code section 3540 et seq.

on the third element of the *Anaheim* test and did not analyze the second. The Board affirmed both the ALJ's conclusion and the rationale underlying the conclusion.

The instant case is distinguishable from *Regents* for several reasons. First, *Regents* involved parking fees, not access to parking facilities. Increases to parking fees have a direct pecuniary impact on employees. Access restrictions for parking facilities, on the other hand, have no such direct impact. The "other terms and conditions" test clearly looks to the nature of the subject to determine whether it is within scope. In light of the significant distinction between parking fees and access to parking facilities, we find it is necessary to consider each topic separately under the modified *Anaheim* test.

Next, unlike *Regents*, the record in this case contains numerous examples in which both campuses unilaterally changed the location of parking lots (and, on at least one occasion, changed the manner in which parking spaces were allocated). However, except for the instant unfair practice charges, the record is devoid of any conflict arising from this conduct.

Last, in *Regents*, there was no third party in direct competition with the employees in question. In this case, however, the students, faculty and staff directly compete for access to each campus' limited parking spaces. Consequently, in order to resolve this problem, the interests of each interested party must be taken into consideration. Since collective bargaining would, by definition, exclude the students, we find that it would not be the appropriate means to resolve the conflict.

For the foregoing reasons, we find the *Regents* case is properly distinguished based on the facts of this case. Accordingly, we find that the Charging Parties failed to establish the second element of the "other terms and conditions" test.

c) Third Element of the "Term and Condition of Employment" Test

The third and final element under the "other terms and conditions" test requires the charging party to demonstrate the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives essential to the achievement of the employer's mission.

In *California State University* (1990) PERB Decision No. 799-H (*CSU (CFA)*), the Board considered whether changes to parking rates in lots controlled by coin-operated parking meters, coin-operated parking gates, or daily parking permits (collectively daily-use lots) were within the scope of representation. At the outset, the ALJ noted that pursuant to *Regents* the general subject of parking was negotiable under HEERA. However, the ALJ distinguished *Regents* because the daily-use lots were used not only by bargaining unit members, but also by other members of the staff, students and members of the public.

In his analysis, the ALJ carefully examined the third element of the "other terms and conditions" test and concluded the element was not satisfied. The ALJ explained:

> However, the decision to increase parking rates at such facilities is in large part aimed beyond employees at the broader objective of providing adequate parking facilities at a large public university where State policy requires that the parking system be financially self-supporting. Such decisions are designed to raise revenue for the overall CSU parking program so that adequate parking facilities can be made available to the public, students, and staff, as well as to Unit 3 employees. Imposing an obligation to negotiate such a decision would carry the bargaining process beyond the bargaining unit and into CSU's overall mission and its relationships with third parties. As such, it would significantly abridge the employer's freedom to exercise those managerial prerogatives essential to the efficient operation of the campuses and thus the achievement of its mission. Therefore, it is concluded that the decision to increase rates at daily-use parking facilities is not within the scope of representation under the Act.

The Board affirmed the ALJ's conclusion. In so doing, the Board recognized an exception to the rule set forth in *Regents* that the general subject of parking is negotiable under HEERA.

We find *CSU (CFA)* is directly applicable to the instant case. Here, the decision to restrict parking was aimed at the broader objective to provide adequate parking for the students, Represented Faculty, other members of the staff, and the general public. The record demonstrates CSU's need for flexibility in parking access in order to accommodate changes in the student population, construction and new challenges facing each campus. Thus, as in the *CSU (CFA)* case, imposing an obligation to negotiate such decisions would carry the bargaining process beyond the bargaining unit and into CSU's overall mission and its relationships with third parties. Accordingly, it would significantly abridge CSU's freedom to exercise those managerial prerogatives essential to the efficient operation of its campuses and, thus, the achievement of its mission. Therefore, we find the third element of the "other terms and conditions" test was not met.

F. The Students are Properly Characterized as Third Parties

In the proposed decision, the ALJ concluded *CSU (CFA)* was inapplicable due to the lack of the third party. However, as indicated above, changes regarding the access of the faculty and staff to student parking lots have a direct impact on the availability of parking for the students. Under these circumstances, students clearly constitute third parties for the purpose of this analysis. CFA contends that granting student third party status would absolve CSU from bargaining over any subject because virtually any subject can have an impact on students. As an example, if students were deemed a third party, CFA argues that CSU would not be required to bargain with staff over wages because a wage increase might have an impact

on higher academic fees charged to students. We disagree. Faculty wage increases may impact CSU campuses in a variety of ways. While such an increase may ultimately impact students, the impacts, at most, would be indirect. We find that under such circumstances, students are not properly identified as third parties. In contrast, the students in this case are in direct competition with the faculty and staff for the same limited resource. We, therefore, conclude students are appropriately characterized as third parties for the purposes of this analysis.

For the foregoing reasons, we find that CSU's decision to restrict the Represented Faculty's access to PS II (CSUS) and B-5 (CSUN) is not within the scope of representation under HEERA and, therefore, find the fourth element of the unilateral change allegation is not satisfied. Accordingly, we hold that CSU did not commit an unlawful unilateral change when it failed to negotiate the decision to restrict faculty access to the B-5 (CSUN) and PS II (CSUS) parking structures.

G. Effects Bargaining

Our conclusion that CSU's decision was not within scope, however, does not end the inquiry in this case. Even when a decision is not within scope, an employer is obligated to provide the exclusive representative with notice and an opportunity to bargain the effects of the decision on matters within scope. (*Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223.) However, the union must demand to bargain the effects of the decision and the demand must clearly identify the negotiable effects. (*Beverly Hills Unified School District* (2008) PERB Decision No. 1969.) Absent such an identification, the employer has no duty to bargain. (*Ibid.*)

With regard to the nature of the identified effect, the Board has ruled that the union must show an actual effect or impact to a negotiable matter. (*Regents of the University of California* (1999) PERB Decision No. 1316-H, adopting an ALJ's proposed decision.) Said another way, a unilateral change that does not actually change a condition of employment is not unlawful. (*Ibid.*)

In the instant case, the Represented Faculty at CSUN were advised by memorandum dated March 17, 2003, that the administration intended to limit access to structure B-5 (CSUN) to those individuals paying the higher fees. Because the structure was not scheduled to open until Fall of 2003, CFA was afforded almost six months in which to request to bargain the change. CFA, however, failed to demand bargaining over either the decision or the effects of the decision. Assuming, arguendo, that the Charging Parties made an adequate request to bargain effects, neither CSEA nor CFA offered any evidence that the parking limitations placed on B-5 (CSUN) had a negative impact on the Represented Faculty. Thus, the Charging Parties failed to demonstrate that the change in parking access had an actual impact on the Represented Faculty's conditions of employment. Accordingly, we find CSU did not have a duty to bargain the effects of the CSUN decision with the Represented Faculty.

The Represented Faculty at CSUS, on the other hand, were not advised of the proposed change until Gerth issued a memorandum dated August 26, 2002, indicating that he was implementing a fee increase for students and that he was designating parking in PS II (CSUS) for students only. Since the structure opened in late August 2002, only days after the issuance of the memorandum, we find the Charging Parties were not provided adequate notice of the change and an opportunity to bargain the effects of the decision on matters within scope.

However, like the change in parking access at CSUN, the Charging Parties failed to demonstrate that the change in parking access had an actual impact on the Represented Faculty's conditions of employment at CSUS. Indeed, after PS II (CSUS) was opened, the faculty and staff had more parking spaces on campus. Moreover, they had access to the same proportion (18 percent) of space relative to the overall number of spaces that they had prior to the opening. Accordingly, we find CSU did not have a duty to bargain the effects of the CSUS decision with the Represented Faculty.

## CONCLUSION

For the reasons set forth above, we find the Charging Parties failed to establish the second and fourth elements of the unilateral change allegation for CSU's conduct in connection with CSUN. In addition, we find the Charging Parties failed to establish the fourth element of the unilateral change allegation for CSU's conduct in connection with CSUN. Accordingly, we hold CSU did not commit an unlawful unilateral change when it failed to negotiate the decision to restrict faculty access to the B-5 (CSUN) and PS II (CSUS) parking structures. Last, we find CSU did not unlawfully fail to bargain the effects of those decisions. Accordingly, the Board holds CSU did not violate HEERA section 3571(c) (unilateral change) when it prohibited the faculty from parking in the newly built parking structures.

## ORDER

The allegations regarding unlawful unilateral changes in Case Nos. SA-CE-191-H and SA-CE-194-H are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Neuwald joined in this Decision.

Member Dowdin Calvillo's concurrence begins on page 25.

DOWDIN CALVILLO, Member, concurring: I concur in the majority's conclusion that the Trustees of the California State University (CSU) did not commit an unlawful unilateral change in violation of Higher Education Employer-Employee Relations Act section 3571, subdivision (c), by prohibiting faculty and staff from parking in newly built parking structures at its Sacramento and Northridge campuses. I also join in the majority opinion's analysis, with one exception. Unlike the majority, I would find that the California State Employees Association, CSU Division (CSEA), and the California Faculty Association (CFA) (collectively Charging Parties), did not establish that CSU's decision to limit faculty and staff access to the parking structures had a "generalized effect or continuing impact" on the terms and conditions of employment of their bargaining unit members.

To establish an unlawful unilateral change, a charging party must show that the change had "a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members." (*Grant Joint Union High School District* (1982) PERB Decision No. 196.) In other words, the charging party "must demonstrate an actual impact on employment conditions." (*Regents of the University of California* (1999) PERB Decision No. 1316-H; *Alum Rock Union Elementary School District* (1983) PERB Decision No. 322.) In *Regents of the University of California*, *supra*, the Board held that the employer's decision to cease applying a system-wide staff personnel policy to a particular facility resulted in no actual change in employment conditions because the local personnel policy that had governed the facility for the past 17 years remained in place. Similarly, in *Alum Rock Union Elementary School District*, *supra*, the Board held that the employer's revision of written job specifications did not constitute an unlawful unilateral change because the revisions did not result in an actual change in teachers' job duties or qualifications.

While PERB has not addressed "actual impact" in the context of employee parking, the National Labor Relations Board (NLRB) has ruled on the issue in several cases. In *United Parcel Service* (2001) 336 NLRB 1134, the board held the employer was required to bargain over the relocation of employee parking to a lot one and a half miles from the employer's facility. (*Id.* at p. 1135.) The board found that because the relocation required employees to spend an additional 40 minutes per day traveling between the parking lot and the work facility, it "resulted in material changes to the employees' conditions of employment." (*Id.* at pp. 1134-1135.) Conversely, the NLRB has held that a change in parking location that results in only "a relatively minor inconvenience to the employees" does not constitute a significant change in employment conditions. (*Berkshire Nursing Home* (2005) 345 NLRB 220.) In *Berkshire Nursing Home*, *supra*, the NLRB held the employer was not required to bargain over a change to parking location that increased employees' walk time from one minute to three-to-five minutes. (*Ibid.*) Similarly, the NLRB found no bargaining obligation when a change in parking location required employees to walk 200 additional yards to reach the work facility. (*Success Village Apartments, Inc.* (2006) 348 NLRB 579, 580.)

Here, Charging Parties presented no evidence that any employee in the bargaining units represented by CSEA or CFA had to travel a longer distance from a faculty/staff parking lot to his or her work location after the change then he or she did before the change. Nor does the record show that these employees had fewer available parking spaces as a result of the change. Faculty and staff at the Sacramento campus had access to the same proportion of total parking spaces, 18 percent, as they had before the change. Moreover, at both campuses there were more total faculty/staff parking spaces after the change than before. This evidence shows that the change had no actual impact on employment conditions because it did not result in even "a relatively minor inconvenience" to employees in the CSEA and CFA bargaining units.

Consequently, I would find that CSU's decision to prohibit faculty and staff from parking in the new parking structures at its Sacramento and Northridge campuses did not have a "generalized effect or continuing impact" on bargaining unit members' terms and conditions of employment.