STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY (SAN MARCOS), Respondent.	Case No. LA-CE-692-H PERB Decision No. 1584-H January 13, 2004

Appearances: Brian Young, Labor Relations Representative, for California State Employees Association; Marc D. Mootchnik, University Counsel, for Trustees of the California State University (San Marcos).

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 Trustees of the California State University (San Marcos) (CSU) to a proposed decision of the administrative law judge (ALJ). The California State Employees Association (CSEA), which represents non-faculty employees of the CSU, brought this unfair practice charge alleging that CSU unilaterally changed a policy affecting the terms and conditions of employment without providing notice and an opportunity to bargain. Specifically, CSEA alleged that CSU unilaterally implemented a student fee increase which affected CSU employees enrolled in university courses. The ALJ agreed with CSEA and held that CSU violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by its actions.

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

After reviewing the record in this case, including the proposed decision and CSU's exceptions, the Board reverses the proposed decision of the ALJ. CSU filed a request to consolidate and CSEA filed a response to the request after submission of this case to the Board. The Board declines consolidation.

FINDINGS OF FACT

Contract Fee Waiver Provision

Prior to the hearing, the parties submitted a joint stipulation of facts and documents. As a result, no evidentiary hearing was held. Instead, the parties submitted the matter to the ALJ after each filed a closing brief. The stipulated facts and documents are summarized below.

CSU is a higher education employer within the meaning of HEERA section 3562(g). CSEA is an exclusive representative, within the meaning of HEERA section 3562(i), of a statewide unit of CSU's non-faculty employees. CSU and CSEA are parties to a collective bargaining agreement (CBA) effective from July 1, 2002 through June 30, 2005. Article 22, section 22.25 et seq., entitled "Fee Waiver," provides a program whereby certain fees are waived or reduced for unit employees enrolled in CSU courses. Section 22.33, carried over from section 22.32 of the predecessor agreement, reads:

> The term 'fee waiver' as used in this Article means a program that waives or reduces fees as listed below:
>
> The following fees shall be fully waived:
> Application Fee
> Health Services Fee
> Identification Card Fee
> Instructionally Related Activity Fee
>
> The following fees shall be reduced to one dollar ($1):
> Student Body Association Fee
> Student Union Fee
> Health Facilities Fee
>
> The State University Fee shall be waived for the units of courses taken in the CSU fee waiver program.

> Employees taking courses in addition to the CSU fee waiver courses shall pay any difference between the amount waived and the full State University Fee.

Looking only at the CBA, it is unclear whether the seven fees listed in section 22.33 constitute all applicable fees for students. However, other evidence admitted into the record establishes that other fees, in additional to those in section 22.33, did exist. Specifically, in 1986 the CSU chancellor issued Executive Order 491, which provides procedures for implementing the fee waiver program. Executive Order 491 provides that all fees not expressly waived in a CBA "shall be at the regular rate."[2]

Contract Zipper Clause

In addition to the above-referenced provisions on the fee waiver program, Article 4 of the CBA, entitled "Effect of Agreement," contains two relevant sections, including a "zipper clause." Those relevant sections provide:

> 4.1 This Agreement constitutes the entire Agreement of the Trustees and the Union, arrived at as the result of meeting and conferring. The terms and conditions may be altered, changed, added to, deleted from, or modified only through the voluntary and mutual consent of the parties in an expressed written amendment to the Agreement. This Agreement supersedes all previous Agreements, understandings, and prior practices related to matters included within this Agreement. In the absence of any specific provisions in this Agreement, all CSU practices and procedures are at the discretion of the Employer.
>
> The CSU shall provide notification to the Union of proposed changes in written systemwide policies affecting wages, hours and conditions of employment during the term of this Agreement. Whenever possible, such notice shall be prior to the implementation of changes in such policies. Upon written request of the Union, the CSU shall meet and confer regarding the impact of such changes.
>
> 4.2 The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and

[2]Executive Order 491 was superseded by Executive Order 712 in 1999. Executive Order 712 continues the policy that all fees not expressly waived in a CBA "shall be at the regular rate."

> opportunity to make demands with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Except as provided for in this Agreement, the CSU and the Union, for the life of this Agreement, voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to or covered by this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge of or contemplation of either or both of the parties at the time that they negotiated or signed this Agreement.

First Imposition of "Academic Records Fee"

As noted above, the CBA provides for the waiver/reduction of seven specific fees. Other fees are to be paid by CSEA members at the regular rate. Prior to 2000, one of those other fees was a mandatory "diploma and graduation fee." Also prior to 2000, there was a "transcript fee" charged to students when they requested a copy of their transcript. In 2000, the CSU chancellor issued Executive Order No. 722 authorizing CSU (San Marcos) to charge a mandatory "Transcript and Graduation Fee" in the amount of $6 per semester, in lieu of the "diploma and graduation fee" and "transcript fee."

Based on Executive Order 722, CSU (San Marcos) unilaterally established a mandatory "Academic Records Fee" for all students, including members of CSEA, effective the fall semester of 2000. CSEA immediately filed unfair practice charge Case No. LA-CE-599-H, alleging that CSU's unilateral imposition of the Academic Records Fee was an unfair practice. On April 27, 2001, PERB issued a complaint alleging that these changes were in violation of HEERA section 3571(a) and (c). Prior to formal hearing, the parties reached a settlement agreement on June 26, 2001. The settlement agreement consisted of three provisions, which are that:

> 1. CSU hereby withdraws the Academic Records Fee of $6.00, as to CSEA employees only. CSU will reimburse all amounts

> paid by CSEA employees for Academic Records Fees. CSU retains the right to re-establish fees for graduation, diplomas and transcripts when such services are requested.
>
> 2. CSU withdraws its policy permitting appeals of classified review decisions by immediate supervisors or appropriate administrators.
>
> 3. CSEA does hereby withdraw, with prejudice, its charge in LA-C-599-H.

Thus, pursuant to the settlement, CSU did not require CSEA members to pay the Academic Records Fee. However, CSU continued to charge the Academic Records Fee to its students not employed in CSEA's unit. CSU also continued to assert its position that imposition of the Academic Records Fee was not a matter within the scope of representation.

Current Attempt at Imposition of "Academic Records Fee"

By letter of April 16, 2002, Joel Block (Block), CSU labor relations manager, notified Brian Young (Young), CSEA labor relations representative, that CSU (San Marcos) was planning to re-implement the Academic Records Fee for CSEA unit members enrolled in university courses. The letter also stated that:

> Although the CSU believes this matter is not a mandatory subject of bargaining, and without waiving the CSU's position, I am providing you with this notice. Please promptly advise the undersigned if CSEA wishes to meet and confer over any aspect of the fee, its implementation or its impact.

Young responded on April 23, 2002, stating that re-implementation of the Academic Records Fee would violate the prior settlement agreement, that it would require re-negotiation of Article 22 of the CBA, and that CSU should therefore send notice of intent to re-negotiate to CSEA headquarters.[3]

[3]At that time, the parties were negotiating what resulted in the current CBA, executed on June 21. There is no evidence that either party attempted to alter section 22.33 or to discuss the new or addition fees at the bargaining table.

Block then wrote to CSEA/CSU Administrator Roderick Gaulman (Gaulman) at CSEA headquarters on May 15, 2002, reciting the history of the Academic Records Fee issue, and stating again that, although CSU was not obligated to bargain regarding its implementation at CSU (San Marcos), it was willing to meet and confer with CSEA. However, Block wrote that if CSEA did not make a written request to meet by May 28, 2002, CSU would assume CSEA waived interest in negotiating the issue and CSU would "immediately begin to charge" the affected unit employees. On May 28, 2002, Young sent an e-mail to Block stating that he had not received a reply to his April 23, 2002, letter. Block responded by e-mail of the same date, stating that he had replied instead to Gaulman at CSEA headquarters, as Young had suggested. However, Gaulman apparently left his position with CSEA at some time during this period and was replaced by Helen Ray (Ray). CSEA neither informed CSU of Gaulman's replacement nor responded to Block's May 28, 2002, letter. Instead, on June 21, 2002, Young filed the original instant charge on behalf of CSEA.

At some time thereafter, Block became aware that Ray had replaced Gaulman. On July 8, 2002, Block wrote to Ray informing her that CSU would begin implementing the Academic Records Fee for CSEA-represented students at CSU (San Marcos) as of the fall semester. The affected unit employees were notified of the Academic Records Fee implementation by memo of August 7, 2002.

ALJ'S DECISION

The ALJ first rejected CSU's argument that this matter must be deferred to arbitration. The ALJ noted that deferral is appropriate only if the conduct complained of is arguably prohibited by the CBA. Here, the CBA lists specific fees that are to be waived but does not prohibit the imposition of other fees. In other words, nothing in the CBA prohibits CSU from imposing additional fees on its students including those who happen to be its employees.

Accordingly, the ALJ refused to defer the charge to arbitration because the CBA did not prohibit the imposition of the Academic Records Fee.

The ALJ next considered whether the student fee was a subject within the scope of representation. Citing to HEERA section 3562(r)(1)(B)[4], CSU argued that HEERA expressly places student fees outside the scope of representation. However, the ALJ noted that HEERA section 3652(r)(1)(B) does not apply to any student fee that is a "term or condition of employment." Citing to PERB and National Labor Relations Board (NLRB) decisions, the ALJ held that the scope of representation under HEERA includes "emoluments of value" such as employer provided housing, in-plant food prices, and employee discounts on employer products. (Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District (1984) PERB Decision No. 375; Lehigh Portland Cement Company (1952) 101 NLRB 529 [31 LRRM 1097] (employee housing); Ford Motor Co. v. NLRB (1979) 441 U.S. 488 [101 LRRM 2222] (charges to employees for in-plant food); Optica Lee Borinquen, Inc. (1992) 307 NLRB 705 [141 LRRM 1265] (employee discounts on purchases of employer products).) Relying on these cases, the ALJ concluded that "student fees are certainly 'emoluments of value,' and the [CBA] defines which fees are reduced or waived, and by implication, those which require payment. Thus, student fees under the program have become a term and condition of employment."

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[4]HEERA section 3562(r)(1)(B) provides:

> (r) (1) For purposes of the California State University only, "scope of representation" means, and is limited to, wages, hours of employment, and other terms and conditions of employment. The scope of representation shall not include:
>
> . . . . . .
>
> (B) The amount of any student fees that are not a term or condition of employment.

Having concluded that CSU's implementation of the fee was within the scope of representation, the ALJ next examined whether CSU provided CSEA notice and an opportunity to bargain. CSU argued that notice was provided to CSEA and that CSEA waived its rights by failing to respond to the notice. The ALJ spent considerable time examining the correspondence between CSU and CSEA. In the end, the ALJ concluded that CSU did provide CSEA the required notice and opportunity to bargain.

However, although the ALJ found that CSEA had failed to respond to CSU's notice, the ALJ concluded that CSEA did not waive its rights. The ALJ's holding was based on the "zipper clause" of the CBA. Under the zipper clause, each party has a right to refuse to bargain over any subject matter within the scope of representation. Given the existence of the zipper clause, the ALJ concluded that CSEA's silence cannot be interpreted as a "waiver," since it had the absolute right to refuse to bargain pursuant to the zipper clause. Accordingly, the ALJ held that CSEA did not waive its rights but that its silence must be interpreted as a refusal to bargain. Accordingly, the ALJ found that CSU violated HEERA section 3571(a) and (c) by unilaterally implementing the Academic Records Fee without the consent of CSEA.

CSU'S EXCEPTIONS

CSU raises numerous exceptions which can be categorized into three distinct arguments. First, CSU renews its argument that this matter must be deferred to arbitration. Second, CSU also renews its argument that student fees are expressly removed from the scope of representation by HEERA section 3562(r)(1)(B). Finally, CSU asserts that neither it nor CSEA raised the issue of the "zipper clause" and that it was caught by surprise. CSU claims that in any event the ALJ misinterpreted the zipper clause because she failed to consider it in conjunction with section 4.1. According to CSU, section 4.1 allows CSU to implement system-wide policies and requires CSEA to meet and confer once provided notice, notwithstanding section 4.2.

DISCUSSION

Deferral to Arbitration

PERB Regulation 32620(b)(6)[5] requires the Board agent processing the charge to:

> Place the charge in abeyance if the dispute arises under MMBA or HEERA and is subject to final and binding arbitration pursuant to a collective bargaining agreement, and dismiss the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of MMBA or HEERA, as provided in section 32661.

CSU argues that deferral is required here because the CBA covers the subject matter at issue, namely, the waiver of student fees. While the CBA does cover student fee waivers, this alone does not mandate deferral to arbitration. The Board has long held that deferral is required only where the CBA prohibits the conduct at issue. It is not enough that the CBA cover or discuss the disputed conduct. (Santa Ana Unified School District (1994) PERB Order No. Ad-263; Fremont Union High School District (1993) PERB Order No. Ad-248.) Here, although the CBA contains provisions on student fee waivers, nothing in the CBA prohibits the imposition of new student fees. The CBA merely requires the waiver/reduction of seven specific fees. There is no allegation that CSU has refused to honor the waiver/reduction of those seven fees. Accordingly, the ALJ correctly declined to defer this matter to arbitration.

Scope of Representation

The central issue is this case is whether CSU's imposition of the Academic Records Fee was within the scope of representation. On this issue, the ALJ held that:

> [S]tudent fees are certainly 'emoluments of value,' and the [CBA] defines which fees are reduced or waived, and by implication, those which require payment. Thus, student fees under the Program have become a term and condition of employment.

[5]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

As discussed below, the Board disagrees with this holding.

Under HEERA, the scope of representation is limited to "wages, hours or employment, and other terms and conditions of employment." (HEERA sec. 3562(r)(1).) The Board has long interpreted the term "wages" to include more than an employee's hourly, weekly or piece work compensation. (Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District (1984) PERB Decision No. 375 (Healdsburg).) Instead, the Board has followed the definition of "wages" employed under the National Labor Relations Act (NLRA). (Healdsburg, at p. 29.) Under the NLRA, "wages" is defined to include "emoluments of value" which accrue to employees out of their employment relationship. (Inland Steel Co. (1948) 77 NLRM 1, 4, enfd. 170 F.2d 247 (7th Cir. 1948), cert. denied 336 U.S. 960 (1949).) Examples of such "emoluments of value" include gas discounts given to employees of a gas company (NLRB v. Central Illinois Public Service Co. (1963) 324 F.2d 916 [54 LRRM 2586] (Central Illinois)); employee "layaway plans" (Master Slack (1977) 230 NLRB 1054 [96 LRRM 1309]); education and relocation assistance (Tocco, Inc. (1997) 323 NLRB 480 [155 LRRM 1138]); and employee discounts on eyewear (Optica Lee Borinquen, Inc. (1992) 307 NLRB 705 [141 LRRM 1265] enf'd 991 F.2d 786 (1st Cir. 1993)).

In Healdsburg, the Board held that employee achievement awards are an "emolument of value" and thus within the scope of representation. Based on this reasoning, the ALJ held that student fees are similarly an "emolument of value" within the scope of representation. The ALJ's holding, however, fails to distinguish between CSU's imposition of fees applicable to all students versus CSU's waiver, subsidy, or reduction of those fees for its employees. As the Board holds below, the former action is a management right while the latter action is within the scope of representation.

To better understand the distinction it is helpful to use an analogy. For example, imagine a widget-maker which gives its employees a $1 discount on widgets, which are priced

at $2. Under Healdsburg, the $1 discount is an "emolument of value" within the scope of representation. However, nothing in Healdsburg or the NLRA line of cases suggest that the employer must also negotiate the setting of the retail price of widgets. Thus, the employer's decision to raise the price of widgets to $3 is not within the scope of representation. However, since the discount is within the scope of representation, if the employer raised the price of widgets to $3 it would still be required to provide employees a $1 discount. As long as the employer continued to provide the $1 discount, there is no change in the terms and conditions of employment – even though the raising of the retail price means that employees must now pay $2 out of pocket for a widget instead of $1. If, on the other hand, the employer's policy is to provide each employee a 50 percent discount on widgets, then the employer's decision to raise the price of widgets to $3 would also require the employer to increase its "discount" to $1.50 (50 percent of the retail price).

Applying the above example to the present case, a distinction must be drawn between the imposition of fees applicable to all students and the waiver of fees for CSEA members. Here, CSU's imposition of the Academic Records Fee on all students is akin to the widget-maker raising the retail price of widgets. Such action is not within the scope of representation. This conclusion is further supported by the language of HEERA which provides that the scope of representation under HEERA does not include, "The amount of any student fees that are not a term or condition of employment." (HEERA sec. 3562(r)(1)(B).)

While CSU's imposition of the Academic Records Fee on all students is not within the scope of representation, any waiver or reduction of the fee by CSU for its employees is within the scope of representation. However, as discussed above, the waiver or reduction of student fees is an issue covered by the CBA. Under the CBA, CSU is obligated to waive or reduce seven specific fees for CSEA unit members. Significantly, the CBA does not require CSU to waive or reduce all fees or a percentage of all fees, or otherwise prohibit the imposition of new

fees. If the CBA had contained such provisions, CSU's imposition of a new Academic Records Fee would have triggered an obligation to bargain, if it was not altogether prohibited by the zipper clause. However, since the CBA contained no such restrictions, and there is no allegation that CSU has not continued to waive or reduce the seven specified fees, the Board finds that CSU's imposition of the Academic Records Fee for all its students was not a change within the scope of representation for CSEA unit members.

Effect of Settlement Agreement

The Board's finding above would normally necessitate the dismissal of CSEA's charge. However, there is one outstanding issue not addressed in the ALJ's decision. That issue involves the effect, if any, of the parties' settlement of unfair practice charge number LA-CE-599-H. That charge involved the same set of facts at issue here. In the settlement agreement, CSU agreed not to impose the Academic Records Fee on CSEA unit members. CSU, however, reserved the right to re-establish fees for "graduation, diplomas and transcripts." From the settlement agreement itself, it is not entirely clear whether the fees charged for "graduation, diplomas, and transcripts" are the same as the Academic Records Fee. In any event, CSEA asserted in its charge that the settlement agreement created a policy and practice that CSU would waive the Academic Records Fee for its unit members.

Unfortunately, the settlement agreement is ambiguous as to whether it was intended to create a new policy or practice. Since CSEA carries the burden of proof in a unilateral change case, it was incumbent on CSEA to provide extrinsic evidence to support its interpretation of the settlement agreement. No such evidence was submitted. Thus, CSEA has not established that there was any violation of the settlement agreement.

Accordingly, CSEA's charge must be dismissed.

ORDER

The unfair practice charge in Case No. LA-CE-692-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Whitehead and Neima joined in this Decision.