STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION, LOCAL 1000, SEIU, AFL-CIO,	)	
Charging Party,	)	Case No. S-CE-36-H
v.	)	PERB Decision No. 756-H
CALIFORNIA STATE UNIVERSITY,	)	August 31, 1989
Respondent.	)	

Appearances: Howard Schwartz, Attorney, for California State Employees' Association, Local 1000, SEIU, AFL-CIO; William B. Haughton, Attorney, for California State University.

Before Porter, Shank and Camilli, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California State Employees Association, Local 1000, SEIU, AFL-CIO (CSEA) to the proposed decision (attached hereto) of the PERB administrative law judge (ALJ) in an unfair labor practice case filed by CSEA. CSEA had charged that the California State University (University) changed its past practice by unilaterally increasing parking fees for employees represented by CSEA, thereby violating the Higher Education Employer Employee Relations Act (HEERA) section 3571(c), and, derivatively (b).[1]

[1]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. HEERA section 3571(b) and (c) states:

> It shall be unlawful for the higher education employer to:

The ALJ found that long-standing contractual language gave the University the right to set parking fees unilaterally, and that the fee increase in this instance was in accordance with past practice. He concluded that CSEA failed to establish that the University violated its duty to meet and confer in good faith when it increased the parking fees.

CSEA filed exceptions to the ALJ's proposed decision and the University filed a response. CSEA claims that there is no substantial evidence in the record to support the ALJ's finding that CSEA failed to protest an increase in parking fees in 1985 and that the University established a practice of unilaterally setting fees at that time. CSEA's second exception is that there is no substantial evidence to support a finding that CSEA was excluded from the September 1987 moratorium that the University placed on increasing parking fees. As a third and final exception to the proposed decision, CSEA alleges that:

> Notwithstanding past practice, parking fees are a negotiable subject and substantial evidence on the record establishes that CSU refused and failed to meet and confer over an increase in parking fees in 1988 when requested to do so by CSEA.

. . . . . .

> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

Contrary to PERB Regulation 32300(a)(3),[2] CSEA fails to cite the portions of the record that it contends support its contentions. PERB's own review of the record failed to reveal evidence to sustain CSEA's claims. The Board therefore adopts the attached findings of facts and conclusions of the ALJ as its own, and affirms the proposed decision.

ORDER

Upon the foregoing decision and the entire record in this case, Unfair Practice Charge No. S-CE-36-H, California State Employees Association, Local 1000, SEIU, AFL-CIO v. California State University is hereby DISMISSED.

Members Porter and Camilli joined in this Decision.

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[2]PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq. Regulation 32300(a)(3) states:

> (a) A party may file with the Board itself an original and five copies of a statement of exceptions to a Board agent's proposed decision issued pursuant to section 32215, and supporting brief, within 20 days following the date of service of the decision or as provided in section 32310. The statement of exceptions and briefs shall be filed with the Board itself in the headquarters office. Service and proof of service of the statement and brief pursuant to section 32140 are required. The statement of exceptions or brief shall:
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> . . . . . .
>
> (3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception; . . .

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSN., LOCAL 1000, SEIU, AFL-CIO, Charging Party, v. CALIFORNIA STATE UNIVERSITY, Respondent.	)	Unfair Practice Case No. S-CE-36-H PROPOSED DECISION (4/3/89)

Appearances: Ronald E. Almquist, Senior Labor Relations Representative, for the California State Employees' Association; William B. Haughton, Attorney, for the California State University.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

An exclusive representative here contends that a university employer failed to meet and confer in good faith when it unilaterally increased fees charged to unit members who park in university-owned lots. The university rejects the allegation, arguing that the union waived its right to bargain through specific contractual language and past practice.

The California State Employees Association, Local 1000, SEIU, AFL-CIO, (CSEA) filed the charge which commenced this action on June 27, 1988. The general counsel of the Public Employment Relations Board (PERB) followed on August 29, 1988, with a complaint against the California State University (University). The complaint alleges that on or about May 6, 1988, the University changed its past practice by unilaterally increasing parking fees for employees in four units

represented by CSEA. The complaint alleges that the University thereby violated Higher Education Employer Employee Relations Act (HEERA) section 3571(c) and, derivatively, 357Kb).[1]

The University answered the complaint on September 16, 1988, denying that it had failed to meet and confer in good faith and affirmatively asserting that CSEA had contractually waived the right to bargain over parking fees. In addition, the University filed a motion that the matter be deferred to grievance arbitration. This motion for deferral was later withdrawn on Decembers, 1988.[2]

A hearing was conducted in Sacramento on January 19, 1989. With the filing of post-hearing briefs, the matter was submitted for decision on March 27, 1989.

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[1]Unless otherwise indicated, all statutory references are to the Government Code. The Higher Education Employer Employee Relations Act is found at Government Code section 3560 et seq. In relevant part, section 3571 provides as follows:

> It shall be unlawful for the higher education employer to:
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> . . . . . .
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

[2]Deferral is not jurisdictional under HEERA because there is no provision for it within the statute. This distinguishes cases under HEERA from those decided under the Educational Employment Relations Act, Government Code section 3540 et seq. See Lake Elsinore School District (1987) PERB Decision No. 646.

FINDINGS OF FACT

The California State University is a higher education employer under HEERA. CSEA at all times relevant has been the exclusive representative of four bargaining units of University employees. Those units are Unit 2 (Health Care Support), Unit 5 (Operations Support), Unit 7 (Clerical/Administrative Support Services) and Unit 9 (Technical Support Services). CSEA and the University have had collective bargaining agreements for units 5 and 7 since 1982. They have had agreements for units 2 and 9 since 1983.

All agreements which the parties have entered since the beginning of their relationship have contained the following provision about parking:

> An employee wishing to park at any CSU facility shall pay the CSU parking fee. The CSU shall provide for payroll deductions for this purpose upon written authorization by the employee.[3]

The provision first appeared in the 1982 agreement covering units 5 and 7 and was picked up without change in 1983 for units 2 and 9. Despite CSEA efforts to change the language, it was carried forward on July 1, 1985, in a three-year successor

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[3]This provision is set out at Article 20.10 of the 1987-1988 agreement between the parties. Parking fees are a negotiable subject under HEERA. Regents of the University of California (1983) PERB Decision No. 356-H.

agreement covering all four CSEA units.[4] CSEA negotiator Harold Horner testified that CSEA elected to continue the status quo in 1985 rather than go to impasse over parking.

The 1985 agreement contained a July 1, 1987, wage and benefit reopener. During the reopener negotiations, CSEA sought several changes in the parking clause including language that "parking fees shall remain at current rates through June 30, 1988." When CSEA discovered, during negotiations, that the University planned an increase in parking fees, it pressed for its proposed freeze in rates. Assistant Vice Chancellor John S. Hillyard attended one negotiating session to explain the need for the increase. However, CSEA was not persuaded and continued to insist on assurances that parking fees would not be increased without prior negotiations.

The University continued to reject CSEA's proposed changes and insisted that the parking language remain unchanged. In July of 1987, CSEA filed a request for determination of an impasse with the PERB. On or about July 27, 1987, the PERB's Los Angeles Regional Office found the existence of an impasse on several issues, including parking fees, and appointed a mediator. After further discussions during mediation, CSEA negotiators, on September 14, 1987, signed a reopener agreement that left the parking provision unchanged.

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[4]University negotiator LaVerne Diggs testified without contradiction that in every round of negotiations since the first contract, CSEA has proposed that the parking fees not be increased during the contract term.

Although the reopener agreement left the contractual parking language as it was, CSEA negotiator Ronald Almquist testified that CSEA did secure a separate oral agreement with the University regarding parking. CSEA contends that the University orally agreed not to increase parking fees until the completion of bargaining over the 1988 successor agreement.

In support of its belief there was such an understanding on fees, CSEA relies upon remarks made by Vice Chancellor Caesar Naples before a committee of University Trustees on September 15, 1987. During the meeting, Mr. Naples told the Trustees that on the advice of counsel "the parking fees cannot be raised for the CFA [California Faculty Association] or CSEA representative [sic] employees until negotiations have been completed." He suggested that the Trustees' resolution on fees be written to reflect the negotiations requirement.[5]

The following day, September 16, 1987, the University Board of Trustees adopted a resolution increasing parking fees to a monthly minimum rate of $12 effective in September of 1988. Regarding negotiations, the resolution reads as follows:

> RESOLVED, That any increase in this fee shall not be implemented for employees represented by certain exclusive representatives until collective bargaining negotiations have been completed on this matter with those certain exclusive representatives.

[5]This remark, as the University points out, did not arise in a discussion about CSEA. It was in response to a comment by a member of the board of directors of the California Faculty Association.

This resolution was shown to Mr. Almquist prior to its adoption and he agreed to it.

Despite his comments the day before the resolution was adopted, Mr. Naples testified that the resolution did not pertain to parking fees for employees represented by CSEA. He said that the reference to "certain exclusive representatives" meant the California Faculty Association and the Statewide University Police Association. He said that the contracts with those two organizations were silent as to parking fees and that the University was required to negotiate with them before increasing parking fees.

By contrast, Mr. Naples testified, the University already was empowered by existing contractual language to increase the parking fees for employees in the units represented by CSEA. Mr. Naples testified that when he referred to negotiations during the Trustees meeting he was describing the time period after the expiration of the existing agreement with CSEA. The contract between the University and CSEA was scheduled to expire on June 30, 1988, and the University did not intend to increase the fees until the fall semester of 1988, which would have been several months after expiration of the contract. He said his remarks anticipated that the parties would have negotiated a new agreement by the effective date of the fee increases.

Following the Trustees meeting of September 16, 1987, CSEA believed that the parking fee question was settled until the 1988

negotiations. However, in April and May of 1988, circulars[6] announcing parking fee increases were distributed on several campuses. On June 1, 1988, Mr. Almquist wrote to Vice Chancellor Naples questioning the announced fee increases and requesting that they be rescinded. CSEA's protest notwithstanding, the parking fees were increased as scheduled in September of 1988. The minimum rate was raised from $7.50 to $12 per month.

Negotiations for a successor agreement commenced in May and were underway at the time plans for the September parking fee increases became generally known. The contract expired on June 30, 1988, and the parties remained without a negotiated agreement at the time of the hearing in January of 1989.

There has been one other increase in parking fees since CSEA became exclusive representative of the four bargaining units. That increase occurred in 1985 when the minimum rate was boosted from $5 to $7.50 per month. In 1985, as in 1988, the amount of the increase was fixed by the University at rates calculated as necessary to fund existing and planned parking facilities.[7]

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[6]The content of the circulars was formalized in a memo of May 6, 1988, from University administrators to campus presidents. The memo also informed the presidents that the parking fee increases would not apply immediately to members of the faculty unit. The delay was to permit compliance with "all requirements in connection with HEERA." A second memo, on July 20, 1988, advised campus presidents that members of the campus police unit also were exempt, for the time being, from the fee increase.

[7]By law, the construction, maintenance and operation of University parking lots is a self-supporting activity. Fees must be set to generate sufficient income to cover all costs.

Although the University notified CSEA in advance of the 1985 increase and discussed the matter at the table, the increase essentially was unilateral. Vice Chancellor Naples described the 1985 increase as a matter of the University "exercis[ing] our right to increase the parking fees." CSEA had no voice in setting the amount or timing of the 1985 parking fee increase and CSEA filed no grievance or unfair practice charge as a result of that action.

LEGAL ISSUE

Did the California State University fail to meet and confer in good faith by unilaterally increasing parking fees in units represented by CSEA and thereby violate HEERA section 3571(c) and, derivatively, 3571(b)?

CONCLUSIONS OF LAW

It is well settled that an employer that makes a pre-impasse unilateral change in an established, negotiable practice violates its duty to meet and negotiate in good faith. NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]. Such unilateral changes are inherently destructive of employee rights and are a failure per se of the duty to negotiate in good faith. See Davis Unified School District, et al. (1980) PERB Decision No. 116, State of California (Department of Transportation) (1983) PERB Decision No. 361-S. These principles are applicable to cases decided under HEERA. See Regents of the University of California (1983) PERB Decision No. 356-H.

Established practice may be reflected in a collective bargaining agreement, Grant Joint Union High School District (1982) PERB Decision No. 196, or where the agreement is vague or ambiguous, it may be determined by an examination of bargaining history, Colusa Unified School District (1983) PERB Decisions No. 296 and 296(a), or the past practice, Rio Hondo Community College District (1982) PERB Decision No. 279, Pajaro Valley Unified School District (1978) PERB Decision No. 51.

The question here is whether the employer made a unilateral change. An employer makes no unilateral change where it acts in accord with past practice, Oak Grove School District (1985) PERB Decision No. 503, or takes actions authorized by specific contractual language, Marysville Joint Unified School District (1983) PERB Decision No. 314.

CSEA argues that prior to entering into the 1987 reopener agreement, it reached an understanding with the University that the parking fee issue would be deferred for resolution in the 1988 negotiations. This agreement, CSEA contends, is reflected in the comments of Vice Chancellor Naples to the Trustees and the proviso adopted by the Trustees when they ordered the fee increase. However, CSEA concludes, the University did not live up to the deal and increased unilaterally before agreement was reached on a successor contract.

The University argues that the gravamen of the complaint is that CSEA was not given prior notice and the opportunity to meet and confer over the decision to implement the parking fees. The

University asserts that the facts are clear that CSEA was given notice, thereafter had the opportunity to bargain, did bargain, and ultimately consented to the increase by signing the September 14, 1987 agreement. In light of the past practice and bargaining history, the University concludes, CSEA's signature on the September 1987 reopener agreement was an acceptance of the fee increase.

This case can be decided on the basis of the past practice. The past practice, which is set out in the contract, provides that an "employee wishing to park at any CSU facility shall pay the CSU parking fee." The article does not specify the amount of the fee but the description of the fee as "the CSU parking fee" implies that the University will set the amount. This indeed is what happened on the only prior occasion that the fee has been increased since CSEA became the exclusive representative. In 1985, the University purporting to act under its contractual authority raised the minimum parking fee from $5 to $7.50. CSEA made no effort to challenge this increase.

Although the contract had expired by the date the parking fees were increased in 1988, the contractually created practice remained in effect. The contract as interpreted and applied by the parties strongly suggests that CSEA had long ago ceded to the University the authority to unilaterally increase parking fees.

Bargaining history supports this conclusion. Despite its position here, it is apparent that CSEA has not previously believed that the University was required to negotiate before

increasing parking fees. In various negotiations, CSEA has proposed changes that would limit the authority of the University to increase parking fees. The most recent example was in 1987 when CSEA proposed that "parking fees shall remain at current rates through June 30, 1988." CSEA would have had no need to make such a proposal if it believed that the University were obligated by the existing language to negotiate prior to implementing fee increases.

In arguing that the increase in fees was a unilateral change, CSEA relies on the remarks of Vice Chancellor Naples and the resolution subsequently adopted by University Trustees. CSEA contends, in effect, that these statements show that the parties agreed to change the past practice and subject future fee increases to negotiations. CSEA argues that the University reneged on the agreement when it put the new rates into effect in September of 1988.

I do not doubt the sincerity of CSEA's belief that it had an agreement with the University not to increase parking fees until after the completion of negotiations. But CSEA has not shown that the University joined in such an understanding. Neither the Trustees' resolution nor the comments of Mr. Naples support a conclusion that the University had committed itself not to increase parking fees until after the completion of negotiations.

The resolution is unclear on its face. It makes no specific mention of CSEA and its use of the terminology "certain exclusive representatives" is ambiguous at best. The Naples statement was

a brief comment during a lengthy discussion on parking fees. While the remark was a recognition of the University's statutory obligations, it does not purport to set out some newly agreed-to duty to bargain with CSEA.

As the University argues, there is no evidence that the University at any time during the reopener ever retracted or modified its position on parking fees. To the contrary, the record establishes that the University's consistent position was maintenance of the status quo, i.e., the existing language on parking fees. Only hours before Mr. Naples spoke to the Trustees, CSEA acceded to the University's position by entering into a reopener agreement that left the contractual parking fee language unchanged. CSEA's own conduct in signing the reopener agreement was inconsistent with its position that it was the University that conceded on parking fees. If the University made the concession, why was it CSEA that dropped its contractual proposal? The written document suggests that it was CSEA, not the University, that gave up on parking fees.

A further problem with CSEA's reliance upon the Trustees' resolution and the Naples' statement is that neither changes the past practice. Changing the past practice would have required some affirmative action, such as new contract language, that would have restricted the authority of the University to increase fees. No such language was placed in the contract on September 14, 1987, when the reopener was entered into. As the University argues, CSEA agreed to continue the status quo when it

accepted continuation of the unchanged parking fee language in the September 14, 1987, agreement.

In a case involving a unilateral change, the charging party must show action which deviated from the status quo. Santa Maria Joint Union High School District (1985) PERB Decision No. 507. Here, long-standing contractual language appears to give the respondent the right to set parking fees unilaterally. The past practice is that the respondent in fact has previously set parking fees unilaterally. The charging party has sought, but failed, to get the contract changed. There were some ambiguous discussions between the parties in 1987 about a change in the past practice. However these discussions are nowhere reflected in the text of the subsequent contractual agreement. The parking fee language remains unchanged.

The burden of proof for showing a change in the past practice is that of the charging party. Oak Grove School District, supra. PERB Decision No. 503. On this set of facts, I cannot conclude that CSEA has met its burden of proof. The charging party has failed to establish by a preponderance of the evidence that the University made any unilateral change and thereby failed to meet and confer in good faith. Accordingly, I conclude that the complaint must be dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, unfair practice charge S-CE-36-H, California State Employees Association, Local 1000,

SEIU, AFL-CIO v. California State University, and the companion PERB complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. 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. See California Administrative Code, title 8, part III, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing. . . ." See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. 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 California Administrative Code, title 8, part III, sections 32300, 32305 and 32140.

Dated: April 3, 1989

RONALD E. BLUBAUGH
Administrative Law Judge