* * * OVERRULED IN PART by *Regents of the University of California* (2026) PERB Decision No. 3010-H, pp. 7-8 * * *

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA NURSES ASSOCIATION, Charging Party,	)	Case No. SF-CE-429-H
v.	)	PERB Decision No. 1157-H
REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	June 13, 1996

Appearances: Eggleston, Siegel & LeWitter by William H. Carder, Attorney, for California Nurses Association; Susan H. von Seeburg, Attorney, for Regents of the University of California.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (Board) on appeal from a Board agent's dismissal (attached) of the California Nurses Association's (CNA) unfair practice charge. As amended, the charge alleged that the Regents of the University of California (University) violated section 3571(a), (b), (c), and (e) of the Higher Education Employer-Employee Relations Act (HEERA) by failing to bargain in good faith both before and after the declaration of impasse.[1]

[1]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. HEERA Section 3571 provides, in relevant part:

> It shall be unlawful for the higher education employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to

The Board has reviewed the entire record in this case, including CNA's original and amended unfair practice charge, the warning and dismissal letters, CNA's appeal and the University's response thereto. The Board finds the Board agent's warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself in accordance with the following discussion.

DISCUSSION

CNA's appeal presents a novel argument. While conceding that post-impasse unilateral changes violate HEERA section 3571(e) CNA argues that surface bargaining, after the declaration of impasse, violates HEERA section 3571(c). CNA contends that this is so because the Board's surface bargaining analysis includes a review of the entire course of negotiations. (See, e.g. Pajaro Valley Unified School District (1978) PERB Decision No. 51 at p. 5 (setting forth "totality of the circumstances" test).)

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interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

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

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

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

We disagree for the following reasons:

It is well established that the declaration of impasse ends the parties' formal obligation to meet and confer under section 3571(c). (See Moreno Valley Unified School Dist, v. Public Employment Relations Bd. (1983) 142 Cal.App.3d 191, 202 [191 Cal.Rptr. 60] (interpreting corresponding provision of EERA); Victor Valley Union High School District (1986) PERB Decision No. 565 at p. 8.) That duty remains dormant unless revived by some changed circumstance, such as a significant concession by either party. (Modesto City Schools (1983) PERB Decision No. 291 at pp. 33-34.) Absent such changed circumstances, the Board examines allegations of post-impasse bad faith under section 3571(e), rather than section 3571(c). (Charter Oak Unified School District (1991) PERB Decision No. 873 at pp. 1-2, fn. 1; Compton Community College District (1989) PERB Decision No. 728 at p. 55, fn. 11.)

CNA has not alleged any changed circumstances sufficient to revive the parties duty to bargain. The Board agent, therefore, properly analyzed CNA's allegations of post-impasse surface bargaining under HEERA section 3571(e) rather than 3571(c).

CNA also asserts that the Board agent erroneously found that the parties had discussed overtime rates at the University of California at Los Angeles prior to August 23, 1995. Despite CNA's argument, it is clear that the Board agent presumed that the parties had not previously discussed the overtime proposals. (Warning Letter, p. 3.) The Board agent's presumption is in

concert with Board precedent. (See Mark West Union School District (1993) PERB Decision No. 1011 at pp. 3-4 (noting that the Board presumes the truth of facts alleged in unfair practice charge).)

ORDER

The unfair practice charge in Case No. SF-CE-429-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Johnson joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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December 28, 1995

James E. Eggleston, Esq.
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Re: DISMISSAL AND REFUSAL TO ISSUE COMPLAINT, Unfair Practice Charge No. SF-CE-429-H, California Nurses Association v. Regents of the University of California

Dear Mr. Eggleston:

I indicated to you in my attached letter dated November 15, 1995, that the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to December 22, 1995, the charge would be dismissed.

On December 22, 1995, I received your first amended charge. The original charge alleged the University of California (University) violated HEERA § 3571(a), (b), and (c). The amended charge alleges the University is engaged in two separate violations of HEERA: (1) refusing to meet and confer in good faith in violation of HEERA § 3571(a), (b), and (c); and (2) refusing to participate in good faith in the statutory impasse procedures in violation of HEERA § 3571(e).[1]

In my November 15, 1995, letter I explained the original charge presented facts regarding the University's conduct following the declaration of impasse. I also indicated to you for conduct occurring during and prior to the exhaustion of impasse procedure, only HEERA § 3571(e) could be at issue. (See Moreno Valley Unified School District v. Public Employment Relations Board (1983) 142 Cal.App.3d 191.)

[1]The amended charge actually states, "A continuing refusal to participate in good faith in the statutory impasse procedures in violation of Government Code section 3571(3). [sic]"

Your amended charge argues a bad faith bargaining proposal, designed to prolong the impasse and undermine the statutory-procedures, could be a violation of both HEERA § 3571 (a), (b), (c) and of HEERA § 3571(e). In support, you cite Compton Community College District (1989) PERB Decision No. 728 and San Marino Unified School District (1989) 13 PERC f 20219. However, the Board in Compton Community College District, supra specifically noted in footnote 11, since the District's act of repudiation took place during impasse proceedings it must be considered a violation of section 3543.5(e) . Similarly in San Marino Unified School District, supra the administrative law judge separated conduct occurring during negotiations from conduct occurring during impasse proceedings. Accordingly for conduct occurring since the declaration of impasse, only HEERA § 3571(e) will be at issue.

On May 26, 1995, CNA filed its impasse determination request with PERB. The University's August 23, 1995, proposals occurred during the impasse procedures and could only be considered violative of HEERA § 3571(e). Thus, to the extent that the charge alleges these proposals violated HEERA § 3571(a), (b) , and (c) it is dismissed.

As discussed in my December 1, 1995, letter, the totality of conduct test is generally applied to determine whether an employer engaged in good faith bargaining. This test examines the entire course of negotiations to determine whether the employer had the requisite subjective intention of reaching an agreement. (Pajaro Valley Unified School District (1978) PERB Decision No. 51). Factors considered indicative of bad faith bargaining include: (1) frequent turnover in negotiators, (2) negotiator's lack of authority, (3) lack of preparation for bargaining sessions, (4) missing, delaying of cancelling bargaining sessions, (5) insistence on ground rules before negotiating substantive issues, (6) taking an inflexible position, (7) regressive bargaining proposals, (8) predictably unacceptable counterproposals, and (9) repudiation of a tentative agreement. However, the presence of one indicia alone is insufficient to establish bad faith.

The amended charge fails to demonstrate that the University's conduct during the impasse procedures presents a prima facie violation of HEERA 3571(e) under the totality of conduct test. The amended charge does not present new factual allegations regarding the University's conduct during the impasse procedures, but merely repeats the original charge's allegations regarding the University's August 23, 1995, proposals. Therefore I am dismissing the original allegations, as amended based on the facts and reasons contained in my December 1, 1995, letter.

To the extent that the charge alleges the University's conduct prior to impasse on May 26, 1995, violated HEERA § 3571 (a), (b), and (c), this charge does not present a prima facie violation for the reasons explained below. The amended charge alleges the following conduct occurred before May 26, 1995: (1) on March 29, 1995, the parties reached a tentative agreement, (2) in April of 1995, the CNA membership rejected that tentative agreement, (3) on May 19, 1995, the University "repudiated the tentative agreements it had made with CNA on March 28 and 29, 1995, and presented a regressive 'Last, Best, and Final Proposal' in which it reverted to its pre-March 28th position on a number of economic and non-economic items."

Under the totality of conduct test, the charge's allegations of conduct prior to impasse do not present a prima facie violation of HEERA § 3571(a), (b), and (c). The charge indicates the parties began negotiating on September 14, 1994, and by March 29, 1995, had reached a tentative agreement. Although the charge alleges on May 19, the University "repudiated" the tentative agreement, the CNA membership had already voted to reject that tentative agreement in April. As previously noted, one indicia alone does not demonstrate bad faith. Thus, accepting the charge's characterization of the University's last, best, final offer as regressive, the totality of conduct does not demonstrate bad faith. The charge fails to demonstrate the University lacked the subjective intent to reach an agreement in violation of HEERA § 3571(a), (b), and (c), and therefore it is dismissed.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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

Service

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

Extension of Time

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

Final Date

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

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

Tammy L. Samsel
Regional Attorney

Attachment

STATE OF CALIFORNIA PETE WILSON. *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

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November 15, 1995

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Re: WARNING LETTER, Unfair Practice Charge No. SF-CE-429-H, California Nurses Association v. Regents of the University of California

Dear Mr. Eggleston:

The above-referenced charge alleges the University of California (University) violated HEERA Section 3571(a), (b), and (c) when the University offered alternative impasse settlement proposals which were regressive. My investigation revealed the following information.

The California Nurses Association (CNA) and the University began bargaining in November of 1994. In March of 1995[1] the parties reached a tentative agreement. However, in April the CNA membership voted to reject that agreement. On May 19, CNA declared impasse after receiving the University's last, best and final offer. PERB certified the impasse and appointed John. Jaeger mediator. The parties failed to reach an agreement during the mediation session on July 24.

On August 23, the University sent an impasse settlement proposal to CNA. The University proposed two substantive agreement alternatives: a two-year agreement and a one-year agreement. The University's third alternative stated unless ratification of an agreement occurred by September 25, 1996, the University would revert back to its pre-March 28 proposals, and that the matter should be forwarded to factfinding.

The two substantive agreement alternatives proposed reductions in overtime pay rates for nurses at UCLA. The charge alleges that the parties had not previously discussed the subject of overtime at UCLA. The charge further alleges that the University's new proposals are regressive and made in bad faith without any genuine attempts to reach agreement.

[1]Unless otherwise stated, all dates refer to 1995.

As an initial matter, the charge presents facts regarding the University's conduct following the declaration of impasse. The California Court of Appeal explained, "the failure to meet and negotiate in good faith, and the failure to participate in good faith in the statutory impasse procedure, are made *separate* unlawful practices . . . ." (Moreno Valley Unified School District v. Public Employment Relations Board (1983) 142 Cal.App.3d 191.) For conduct occurring during and prior to the exhaustion of the statutory impasse procedure, only HEERA § 3571(e) can be at issue. Conduct within that time-frame cannot also be the basis for violations of HEERA § 3571(a), (b), and (c). (See Moreno Valley Unified School District, supra.) For this reason the charge fails to demonstrate a prima facie violation of HEERA § 3571(a), (b), and (c).

Thus, the appropriate inquiry is whether the University's conduct violated HEERA § 3571 (e). However, even assuming the charge properly alleged the University violated HEERA § 3571(e), the charge fails to present facts establishing a prima facie violation of that section.

The totality of conduct test is generally applied to determine whether an employer engaged in good faith bargaining. This test examines the entire course of negotiations to determine whether the employer had the requisite subjective intention of reaching an agreement. (Pajaro Valley Unified School District (1978) PERB Decision No. 51). Although the totality of conduct test is generally applied, some conduct is considered to be a "per se" violation without a determination of the employer's subjective intent.[2] As the conduct alleged in the charge does not fall into one of the per se categories, the totality of conduct test will apply.

The facts of this case, fail to demonstrate under the totality of conduct test that the University lacked the subjective intent to reach an agreement. The charge's only allegation of bad faith bargaining is that the University proposed an impasse settlement

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[2]The per se categories include: (1) an outright refusal to bargain; (2) refusal to provide information necessary and relevant to the employee organization's duty to represent bargaining unit employees; (3) insistence to impasse on a nonmandatory subject of bargaining; (4) bypassing the employee organization's negotiators; and (5) implementation of a unilateral change in working conditions without notice and an opportunity to bargain. South Bay Union School District (1990) PERB Decision No. 815, citations omitted.

alternative proposal *on* August 23, which CNA found unacceptable. Although an employer must negotiate with a sincere intent to reach an agreement, there is not a requirement that the parties actually reach an agreement. (San Ysidro School District (1980) PERB Decision No. 134.)

The charge alleges the University's alternative proposals included reductions in overtime pay rates for nurses at UCLA, and indicates that the subject of overtime pay rates for nurses at UCLA was "entirely new," and never been previously discussed by the parties. In contrast to the charge's allegation, the August 23 letter indicates that the parties' chief negotiators, Gayle Cieszkiewicz and Kent Buchholz, had previously discussed these proposals on the telephone. However, even accepting the charge's allegations as true, my research failed to reveal support for the proposition that new proposals are indicia of bad faith bargaining.

The charge also contends the University engaged in bad faith bargaining because its proposals were regressive. Although regressive bargaining is considered a factor indicative of bad faith bargaining this charge does not factually support the allegation that the proposals were regressive.

It is noteworthy that the University's proposals are package proposals covering 40 articles in the agreement, because the charge only alleges one aspect of the proposals is regressive, namely, the overtime rates for nurses at UCLA. By singling out only one aspect of the package proposals, the charge fails to address that other aspects of the proposals were clearly not regressive. For example, Alternative 1 of the August 23 proposal indicates on-call rates will only be incrementally reduced to a flat rate, whereas the March 28 proposal provided an immediate flat rate. In addition, although the charge characterizes the proposals as containing "significant concessionary demands" of CNA, Alternative 1 contains a 2-year duration term, which is a term the University included at the suggestion of CNA.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The

amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before December 15. 1995. I shall dismiss your charge. If you have any questions, please call me at (213) 736-7508.

Sincerely,

Tammy L. Samsel
Board Agent