STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ACADEMIC PROFESSIONALS OF CALIFORNIA, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	)	Case No. LA-CE-415-H PERB Decision No. 1174-H November 12, 1996
TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Charging Party, v. ACADEMIC PROFESSIONALS OF CALIFORNIA, Respondent.	)	Case No. LA-CO-47-H

Appearances: Rothner, Segall, Bahan & Greenstone by Glenn Rothner, Attorney, for Academic Professionals of California; William G. Knight, University Counsel, for Trustees of the California State University.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (Board) on exceptions filed by both the Academic Professionals of California (APC) and the Trustees of the California State University (CSU) to a Board administrative law judge's (ALJ) proposed decision (attached). In his decision, the ALJ ruled on two consolidated unfair practice charges, the first

of which was filed by APC against CSU (Case No. LA-CE-415-H) and the second filed by CSU against APC (Case No. LA-CO-47-H).

Regarding the complaint in Case No. LA-CE-415-H, the ALJ found that CSU did not violate the Higher Education Employer-Employee Relations Act (HEERA) section 3571(a), (b) or (c)[1] when it maintained the status quo by adhering to the reopened provisions of the collective bargaining agreement (CBA) between the parties. Regarding the complaint in Case No. LA-CO-47-H, the ALJ found that APC violated section 3571.1(d) of HEERA[2] when it

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[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 states, in pertinent part:

> It shall be unlawful for the higher education employer to do any of the following:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to 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.
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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]Section 3571.1 states, in pertinent part:

> It shall be unlawful for an employee organization to:
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> (d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3590).

refused to participate in HEERA's statutory impasse procedure on the subject of employer health benefit contributions.

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript, and APC and CSU's exceptions and responses to exceptions. The Board finds the ALJ's findings of fact to be free from prejudicial error and adopts them as the decision of the Board itself. The Board finds the ALJ's conclusions of law to be free from prejudicial error and adopts them as the decision of the Board itself consistent with the following discussion.

APC'S EXCEPTIONS

On appeal, APC contends that the ALJ erred in making the following findings and conclusions: (1) the conclusion that the parties intended the status quo to prevail if they failed to reach agreement during reopener negotiations; (2) that the parties had agreed that reopened contract terms could not be deleted from the CBA except by mutual agreement of the parties; (3) that the CBA terms reopened by the parties did not terminate on reopening; (4) that the employer was correct in asserting that the status quo between the parties remained in effect after the parties reached impasse on reopener negotiations; and (5) the ALJ's suggestion that the adoption of National Labor Relations Board (NLRB) precedent regarding reopener negotiations would

encourage parties to select reopener topics so as to maximize the pressure on each other.[3]

CSU'S EXCEPTIONS

CSU limits itself to one exception. CSU contends that the ALJ erred when he concluded that the CBA precluded the parties from resorting to their economic weapons at the exhaustion of HEERA's statutory impasse procedure.

DISCUSSION

This case raises novel issues regarding the status of contract provisions reopened for purposes of mid-term contract negotiations. Although this is a case of first impression for this Board, the issue has previously arisen in other fora. In 1989, the NLRB adopted a policy of treating reopened contract provisions as though they had expired. (Speedrack, Inc. (1989) 293 NLRB 1054, 1055 [131 LRRM 1347] (Speedrack) and Hydrologics, Inc. (1989) 293 NLRB 1060, 1061 [131 LRRM 1350] (Hydrologics).) The NLRB found that this policy would foster good faith bargaining by ensuring that each party had access to its economic weapons in case of impasse. (Ibid.) Nonetheless, the NLRB was careful to note that the parties could agree to maintain the status quo and waive the use of their economic weapons during reopener negotiations. (Speedrack, p. 1055; Hydrologics, p. 1061.)

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[3]APC did not except to the ALJ's finding that it violated HEERA when it failed to participate in HEERA's statutory impasse procedures. The Board finds no reason to disturb the ALJ's ruling.

In the instant case, the parties reopened four articles of the CBA. In the hearing below, APC argued that the reopened CBA provisions had effectively expired and that CSU committed an unlawful unilateral change when it insisted on maintaining the status quo as contained in those reopened provisions. While recognizing that the Speedrack/Hydrologics policy might not be applicable to public sector labor relations under the HEERA, the ALJ found it unnecessary to decide that issue because Article 3.1 of the parties' CBA prevented the parties from modifying the CBA absent a written agreement. Article 3.1 provides:

> This Agreement constitutes the entire Agreement of the Trustees and the Union, arrived at as a 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, policies, and prior practices related to matters included within this Agreement. [Emphasis added.]

CSU's lone exception and four of APC's five exceptions challenge the ALJ's conclusion that Article 3.1 of the CBA contained language sufficient to preclude the application of Speedrack/Hydrologics. APC contends that there is no evidence in the record from which the ALJ could have determined that the parties intended Article 3.1 to limit the application of Speedrack/Hydrologics. APC's exception misses the point.

While it is true that neither party presented significant evidence regarding the bargaining history of Article 3.1, it is well established that the language of a written agreement

controls its interpretation. (Cal. Civ. Code section 1638.) Accordingly, if the language of a contract is clear and unambiguous, testimony regarding the intent of the parties is unnecessary. (Cal. Civ. Code section 1639; Marysville Joint Unified School District (1983) PERB Decision No. 314 at p. 10 (noting that clear contract language obviates need for extrinsic evidence).)

The language of Article 3.1 is clear and unambiguous. The parties may delete a term or condition of the CBA "only through the voluntary and mutual consent of the parties in an expressed written amendment to the [CBA]." (Article 3.1.) Since the parties have not produced an expressed written amendment to the CBA, the reopened provisions remain in effect.

APC argues that the foregoing is inconsistent with the Speedrack/Hydrologics decisions. Specifically, APC notes, the NLRB has refused to apply a broad "no strike" clause to reopener negotiations. (See Hydrologics at p. 1062.) APC's argument is unpersuasive.

In Hydrologics, the NLRB held that the no-strike clause, by its own terms, controlled the behavior of the union only during the term of the contract. (Ibid.) Because the "contract, at least as to reopened provisions, ha[d] been effectively terminated", the NLRB refused to apply the no-strike clause to contract reopener negotiations. (Ibid.) The language of Article 3.1 mandates a different result in this case.

Parties may modify an existing CBA by mutual consent. (Speedrack at p. 1055.) This is true even where a collective bargaining agreement does not explicitly provide a mechanism for modification. (Ibid.) Accordingly, unless Article 3.1 applies to reopener negotiations, it is mere surplusage. A written contract must be construed to give effect to every part thereof. (Cal. Civ. Code section 1641.) In order to give effect to Article 3.1, the Board has no choice but to apply it to reopener negotiations. (See Communication Workers (1970) 186 NLRB 625, 627 [75 LRRM 1391] (upholding reopener language limiting modification to agreement between parties).)

For the foregoing reasons, we adopt the ALJ's holding that Article 3.1 precludes the operation of the Speedrack/Hydrologics doctrine in this case. Further, Article 3.1 requires that the parties maintain the status quo as reflected in the reopened CBA provisions unless and until the parties execute an express written amendment to the CBA.

Finally, we deny APC's remaining exception. As the ALJ noted, in light of the language of the CBA, it is unnecessary to determine whether Speedrack/Hydrologics applies to public sector labor relations under the HEERA. Nonetheless, the ALJ's dicta regarding the potential disruptiveness of the Speedrack/ Hydrologics doctrine is well reasoned and we see no reason to disturb it.

ORDER

Case No. LA-CE-415-H

The complaint and unfair practice charge in Case No. LA-CE-415-H are hereby DISMISSED.

Case No. LA-CO-47-H

Upon the findings of fact and conclusions of law and the entire record in this case, it is found that the Academic Professionals of California (APC) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571.1(d). The APC violated this section of HEERA by refusing to negotiate during the statutory impasse procedure about a California State University proposal on health benefits.

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

A. CEASE AND DESIST FROM:

Refusing to participate in the impasse procedure in good faith by refusing to negotiate about the subject of employee health benefit contributions.

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

1. Within thirty-five (35) days following the date that this Decision is no longer subject to reconsideration, post at all work locations where APC customarily posts notices to members of Unit 4, copies of the Notice attached as an Appendix hereto. The Notice must be signed by an authorized agent of APC, indicating that APC will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30)

consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

2. Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

Member Johnson joined in this Decision.

Chairman Caffrey's concurrence begins on page 10.

CAFFREY, Chairman, concurring: I concur in the finding in Case No. LA-CO-47-H that the Academic Professionals of California (APC) violated section 3571.1(d) of the Higher Education Employer-Employee Relations Act (HEERA) by refusing to participate in good faith in the impasse procedure concerning a proposal offered by the Trustees of the California State University (CSU) during reopener negotiations on the subject of health benefits.[1]

I also concur in the finding in Case No. LA-CE-415-H that CSU did not fail to negotiate in good faith and deny rights to APC and its members in violation of sections 3571(a), (b) and (c) of the HEERA. I write separately because I do not agree with the conclusion reached by the majority and the administrative law judge (ALJ), that a provision of Article 3 of the parties' collective bargaining agreement (CBA) limited their HEERA bargaining rights and obligations during reopener negotiations.

DISCUSSION

This case presents the issue of the HEERA rights and obligations of the parties when they engaged in reopener negotiations pursuant to their CBA. APC raises the broader issue of the status of CBA provisions which have been reopened for

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[1]I find it interesting that, despite APC's statement that it would not proceed with impasse deliberations on the subject of health benefits, the subject did go before the factfinding panel and was addressed in the factfinder's report. Ironically, health benefits appears to be the only subject which the parties reopened for negotiations on which they reached agreement. However, since neither party offers any exception to the ALJ's finding of a violation, I see no reason to disturb that finding.

negotiations. An examination of these issues begins with a review of the provisions of the parties' CBA as they relate to reopener negotiations. Article 3, the effect of agreement provision, is a zipper clause. It states, in pertinent part:

> 3.1 This Agreement constitutes the entire Agreement of the Trustees and the Union, arrived at as a 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, policies, and prior practices related to matters included within this Agreement.
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> 3.2 The parties acknowledge that, during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to offer proposals 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 Employer 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.

Thus the parties have specifically extinguished their HEERA bargaining rights and obligations except as provided elsewhere in the CBA.

Article 34, the duration clause, states at section 34.3:

> For fiscal year 1994/95, each party may choose to reopen a maximum of two (2) articles, for the purposes of negotiations, subject to the public notice provisions of HEERA. To activate this provision the parties will communicate the name(s) and or number(s) of the chosen articles on March 1, 1994. They will do this either by letter postmarked March 1, 1994, or at a direct meeting. The Union will provide copies of it's [sic] proposals, if any, for public notice, on or before March 31, 1994.

Thus, the parties have renewed the HEERA bargaining rights and obligations extinguished in Article 3 for the purpose of conducting reopener negotiations. This fact is undisputed because the parties engaged in HEERA impasse and have alleged violations of HEERA bargaining rights and obligations during reopener negotiations.

The majority and the ALJ interpret the portion of Article 3.1 which states that the CBA may be changed "only through the voluntary and mutual consent of the parties" as limiting their HEERA bargaining rights and obligations during Article 34.3 reopener negotiations. The majority supports the conclusion reached by the ALJ, who describes the limitation as follows:

> . . . the parties intend that if they fail to reach agreement during a reopener . . . the status quo shall prevail. The University cannot make a unilateral change and the Union cannot resort to a strike, even if the impasse procedures have been exhausted.

The ALJ notes two cases, Speedrack Inc. (1989) 293 NLRB 1054 [131 LRRM 1347] (Speedrack) and Hydrologics Inc. (1989) 293 NLRB

1060 [131 LRRM 1350] (Hydrologics) cited by APC. APC argues that these cases stand for the proposition that CBA provisions are terminated upon reopening and, therefore, do not remain the status quo if agreement is not reached. While declining to reach this question, the ALJ cites "the Speedrack rule" allowing a clear statement of intent by the parties to limit their use of unilateral implementation and economic weapons after impasse proceedings. The ALJ finds that Article 3.1 contains such a clear statement of intent.[2]

In adopting the ALJ's analysis, the majority finds the language of Article 3.1 to be clear, concludes that it must be given effect and, therefore, declines to consider whether the parties intended it to apply to reopener negotiations. Since California Civil Code section 1641 requires a written contract to be construed to give effect to every part, the majority indicates that the Article 3.1 language must be applied to reopener negotiations. (Communication Workers (1970) 186 NLRB 625, 627 [75 LRRM 1391] (Communication Workers).)

In my view, the correct application of "the Speedrack rule" leads to the opposite conclusion. Pursuant to Speedrack and Hydrologics, the general language of Article 3.1 does not

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[2]The ALJ's reasoning here is flawed. APC cites Speedrack to argue that when negotiations were reopened on Articles 3, 7, 24 and 34, those provisions were no longer in effect. The ALJ cites Speedrack to decline to consider APC's argument. Because of "the Speedrack rule," the ALJ finds it unnecessary to determine whether Speedrack applies. This leads to the conclusion that APC's argument that Article 3 was no longer in effect after reopening, need not be considered because of a provision within Article 3. This reasoning is clearly circular.

represent a clear statement that the parties intended to limit their use of unilateral implementation and economic weapons during reopener negotiations.[3] Furthermore, the interpretation offered by the majority and the ALJ is contrary to the clear intent of the parties.

The Public Employment Relations Board (PERB or Board) has previously cited Speedrack for the proposition that, in the absence of a clear agreement to the contrary, an employer's obligation to bargain over a reopened CBA provision carries with it the right to implement a final offer upon the conclusion of impasse proceedings. (Covina Valley Unified School District (1993) PERB Decision No. 968.) Under Speedrack and Hydrologics, a general CBA provision is insufficient to constitute a clear statement that the parties intended to limit their use of unilateral implementation or economic weapons in reopener negotiations. In Speedrack the National Labor Relations Board (NLRB) states that parties agreeing to a reopener provision:

> . . . must intend, in the absence of a clear indication to the contrary, that the bargaining will consist of more than one party asking the other if it would agree to a change, for even in the absence of a reopener provision, changes may be made by mutual consent. [Fn. omitted.][4] In determining

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[3]Note that the parties' ability to limit their HEERA bargaining rights and obligations may itself be limited. For example, the statutory impasse procedure may not be waived by agreement of the parties. (Redwoods Community College District (1996) PERB Decision No. 1141.)

[4]The case cited by the NLRB in this excerpt from Speedrack is none other than Communication Workers, the same case cited by the majority. Communication Workers involved a contract

> what freedom of action the parties may have under our Act during such reopener periods, we must avoid imposing conditions that would turn reopener bargaining into little more than a charade that would barely differentiate it from the kinds of discussion that may lawfully occur even in the absence of a reopener.

Hydrologics considered whether a general no-strike provision within the contract was sufficient to constitute a clear agreement to refrain from the use of economic weapons in reopener negotiations. The NLRB states:

> . . . force of logic leads us to conclude that in the absence of language that the parties intend to include reopener strikes within their no-strike clause, parties intend to have the same economic weapons available in the reopener context as are available at the termination of their contract, at least with respect to proposals encompassed within the reopening. . . .

Further:

> To find otherwise would mean that a reopener clause only entitles the parties to do what they could have done even in its absence, i.e., one party can request a change and the other party can refuse to discuss or agree to the change. Thus, from a practical standpoint, without the ability to resort to economic weapons, negotiations pursuant to a

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provision which allowed the employer to offer wage proposals which expired unless agreed to by the parties within 30 days. The NLRB concluded that the provision added "little of substance" to the rights the parties already possessed. Speedrack cited this case to show that the NLRB must avoid imposing limitations on bargaining rights which turn reopener negotiations into "little more than a charade." Unlike Communication Workers the reopener provision in the instant case contains no language expressly limiting bargaining rights. Communication Workers does not lend support to the majority's position; in fact, it supports the conclusion that the imposition of the general conditions of Article 3.1 on Article 34.3 reopener negotiations must be avoided.

> reopener provision would not differ in any material way from negotiations to modify the agreement during its term when the contract does not include a reopener provision.

The circumstances here are directly analogous to those considered by the NLRB in Speedrack and Hydrologics. The parties' Article 34 reopener provision contains no language indicating any limitation on their HEERA bargaining rights and obligations. The general zipper clause language of Article 3.1 is insufficient to constitute such a limitation, and to interpret it as such renders reopener negotiations no different than any other bargaining conducted outside the reopener provision. Therefore, "the Speedrack rule," to the extent there is one, leads to the opposite conclusion from that reached by the ALJ. Article 3.1 does not represent a clear statement of the parties' intent to limit their HEERA rights and obligations during Article 34.3 reopener negotiations.

The majority finds that the language of Article 3.1 is clear and unambiguous, must be given effect and, therefore, must apply to reopener negotiations. In considering the language of the parties' CBA, it should first be noted that public employment collective bargaining agreements are enforceable contracts that should be interpreted to execute the mutual intent and purposes of the parties. (Glendale City Employees' Assn., Inc. v. City of Glendale (1975) 15 Cal.3d 328, 339 [124 Cal.Rptr. 513] cert. denied 424 U.S. 943 [96 S.Ct. 1411].) Ascertaining the intent of the parties at the time of contracting is the paramount rule governing contract interpretation. (Cal. Civ. Code sec. 1636;

Lemm v. Stillwater Land & Cattle Co. (1933) 217 Cal. 474 [19 P.2d 785]; Healy Tibbitts Constr. Co. v. Employers' Surplus Lines Ins. Co. (1977) 72 Cal.App.3d 741 [140 Cal.Rptr. 375] (Healy Tibbitts Constr. Co.).) The intent of the contract is derived from the language of the contract and the words, phrases and sentences are construed in light of the objectives and fundamental purpose of the parties to the agreement. (Cal. Civ. Code sec. 1638; Healy Tibbitts Constr. Co.) Since it is axiomatic that the intent of the parties must govern the interpretation of their contract, it follows that the particular clauses of a contract are subordinate to its general intent. (Cal. Civ. Code sec. 1650.) Accordingly, a provision will not be given effect if it is contrary to the intent of the parties as evidenced by the contract as a whole. (Wagner v. Shapona (1954) 123 Cal.App.2d 451 [267 P.2d 378].)

As noted above, it is undisputed that Article 34.3 renewed the HEERA bargaining rights and obligations which were extinguished in Article 3, for the purpose of conducting reopener negotiations. Article 3.1 is insufficient to demonstrate the parties' intent to limit their HEERA bargaining rights and obligations during reopener negotiations. On the contrary, it is clear that the parties did not intend any limit on their HEERA bargaining rights and obligations in reopener negotiations.

The very existence of the unfair practice charges before us confirms the intent of the parties. The allegations of both CSU and APC are rendered moot if Article 3.1 applies to reopener negotiations and no change to the provisions of their CBA can be

made without mutual agreement. APC's argument that CBA provisions are terminated through reopener negotiations obviously assumes that the Article 3.1 provision does not apply to reopener negotiations. Similarly, CSU's assertion that APC failed in its obligation to participate in good faith in impasse proceedings is meaningless if, by operation of Article 3.1, a CBA provision can only be changed by mutual consent. Perhaps there can be no clearer indication of the intent of the parties than the fact that both CSU and APC except to the ALJ's application of Article 3.1 to Article 34.3 reopener negotiations and ask the Board to set it aside. As APC states in its response to CSU's exceptions:

> . . . both parties are on record as rejecting the ALJ's assertion that their zipper clause was intended to limit their options during reopener negotiations. . . .

It is evident from considering the cited cases, the specific reopener provision within the contract as a whole, and the actions and statements of the parties, that their HEERA bargaining rights and obligations were not limited by Article 3.1 when they engaged in Article 34.3 reopener negotiations.

Having reached this conclusion, I now turn to the argument offered by APC that the Board should adopt Speedrack and Hydrologics for the added proposition that contract provisions are terminated when they are reopened for negotiations.

APC's argument is without merit for several reasons. First, it misinterprets the meaning of the Speedrack and Hydrologics rulings. The central holding of these cases is that parties must

be free to utilize unilateral implementation and economic weapons upon the completion of reopener negotiations if those negotiations are to represent a meaningful attempt to collectively bargain. In reaching this conclusion, the NLRB describes a reopened contract provision as "terminated." Simultaneously, however, the NLRB clearly states that the terms of reopened provisions must remain in effect during reopener negotiations and may be changed through the unilateral implementation of the employer at the conclusion of negotiations. There is no indication in either Speedrack or Hydrologics that a contract provision is no longer to be given effect upon reopening negotiations over that provision, or at any point prior to the completion of reopener negotiations. Additionally, these cases do not address the issue of the status of contract provisions at the conclusion of reopener negotiations in which no change is made to the provision, as is the circumstance in the instant case.

Second, as noted by the ALJ, the application of private sector labor law principles to the public sector requires a careful balancing of public policy considerations which are not present in the private sector and, therefore, not before the NLRB in these cases. These cases arose under federal collective bargaining statutes which do not contain the mandatory impasse resolution procedures which are part of HEERA. These procedures were almost certainly included in HEERA in order to discourage

the use of economic weapons. (San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1, 8 [154 Cal.Rptr. 893].)

Third, and most importantly, the interpretation of these cases advanced by APC could lead to great disruption and instability, contrary to the fundamental purposes of HEERA, and is simply unworkable. Wages is a common subject of mid-contract reopener negotiations. It is self evident that the parties' existing wage schedule must be maintained throughout reopener negotiations unless they expressly provide otherwise. It is equally self evident that the existing wage schedule must remain in effect at the conclusion of reopener negotiations if no change is agreed upon or unilaterally implemented. The uncertainty, disruption and instability which would result if an existing wage schedule was suspended without replacement merely by reopening wage negotiations, or upon completion of those negotiations which do not produce a change in the wage schedule, demonstrates how unworkable it would be to implement the principle advocated by APC.

As noted in Speedrack and Hydrologics, the status of terms and conditions of employment subject to reopener negotiations is similar to the status given most terms while parties are negotiating a successor agreement following expiration of a CBA. The status quo, embodied in the existing CBA provisions, must be maintained unless the parties have contractually agreed to some other approach. For example, during mid-contract reopener negotiations over health benefits, the existing benefit plan

remains in effect, just as during post-contract expiration negotiations. However, there is a fundamental distinction between post-contract expiration negotiations and mid-contract reopener negotiations. In post-contract expiration negotiations, the provisions of the CBA have expired. The employer is required to maintain the status quo of terms and conditions of employment embodied in those expired provisions until agreement is reached, or the bargaining process is completed. (Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]; Department of Personnel Administration v. Superior Court (1992) 5 Cal.App.4th 155 [6 Cal.Rptr.2d 714].) In mid-contract reopener negotiations, the provisions of the CBA have not expired and remain in effect throughout reopener negotiations unless the parties contractually specify to the contrary. This is true of all reopened provisions, regardless of whether they involve mandatory or permissive subjects of bargaining, or provisions which include a waiver of the statutory right to bargain. Those provisions are still part of the CBA and are still in effect. This approach promotes stability and is consistent with the fundamental holdings of Speedrack and Hydrologics.

Turning to the facts of this case, APC reopened negotiations on Articles 3 and 7, and CSU reopened on Articles 24 and 34. As noted above, the parties obligated themselves to conduct reopener negotiations with the full rights and obligations provided by

HEERA, including the obligation to complete the HEERA impasse procedure before resorting to unilateral implementation or economic weapons in the event agreement was not reached. However, APC asserted, pursuant to its interpretation of Speedrack and Hydrologics, that Articles 3 and 7 were no longer part of the CBA after CSU rejected APC's proposed changes. As a result, the record clearly establishes that negotiations on Articles 3 and 7 ended, and the factfinding panel did not consider the dispute over those articles. The parties did not complete the HEERA bargaining process with regard to these articles, and the existing contract provisions remained in effect. Therefore, APC's allegation that CSU unilaterally implemented policies embodied in these provisions in violation of HEERA section 3571(a), (b) and (c) is clearly without merit and must be dismissed.

The factfinding panel did consider Articles 24 and 34 which were reopened by CSU. While APC, following mediation, stated that it would not "proceed further in impasse deliberations" on the topic of health benefits (Article 24), factfinding proceeded, following which the parties apparently agreed to continue the status quo embodied in Article 24 with regard to health benefit contribution rates. It appears that the parties completed the reopener negotiations process relative to Article 24 and resolved their dispute. (See Fn. 1 above.)

With regard to Article 34, the parties apparently proceeded through the impasse procedure on this subject, at the conclusion

of which APC stated that it considered portions of Article 34 "to be no longer operative." CSU responded that the article "must remain in full force and effect unless and until the parties agree otherwise." Thus, it appears that the parties completed the HEERA reopener negotiations process relative to Article 34 without reaching agreement, and CSU pursued no unilateral implementation of a change. As discussed above, absent the parties' contractual agreement otherwise, Article 34 has not expired and remains in effect. It is irrelevant that Article 34 may include a waiver of the statutory right to bargain. It remains a bargained, valid, effective provision within the parties' CBA.

It must also be noted that under these circumstances - reopener negotiations completed without agreement or the employer's unilateral implementation - the exclusive representative retains the right to lawfully utilize its economic weapons. Through this approach, the instability which would result from tampering with the effectiveness of existing, unchanged CBA provisions during the term of the contract is avoided, while both parties enjoy the full range of HEERA bargaining rights and obligations. In this case, the parties completed the impasse procedure on Article 34 and, since no change was agreed to or unilaterally implemented, it remained in effect without change. APC's assertion that by continuing its effectiveness CSU committed an unlawful unilateral change is without merit.

Finally, APC argues that Rowland Unified School District (1994) PERB Decision No. 1053 (Rowland) prohibits CSU from continuing in effect, after reopener negotiations, a CBA provision such as Article 34, which includes a waiver of the statutory right to bargain. To a large extent, APC's argument is premised on its interpretation of Speedrack and Hydrologics, and argument that Article 34 was rendered ineffective upon reopening. As noted above, APC's argument is incorrect and Article 34 remained in effect. Furthermore, the circumstances presented by this case are simply not analogous to those presented in Rowland. Rowland involved post-contract expiration negotiations and the unilateral implementation of a provision which included a waiver of the statutory right to bargain. This case involves mid-contract reopener negotiations. The parties' CBA had not expired and Article 34 remained in effect during and subsequent to reopener negotiations, so Rowland does not apply.[5]

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[5]There may be circumstances in which Rowland would apply to reopener negotiations. For example, if an employer seeks to unilaterally implement a change to a CBA provision following reopener negotiations, and the change includes a waiver of the statutory right to bargain which is not part of the existing CBA, Rowland may apply. However, since those circumstances are not presented by the instant case, I see no need to reach this issue.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CO-47-H, Trustees of the California State University v. Academic Professionals of California, in which all parties had the right to participate, it has been found that the Academic Professionals of California (APC) violated the Higher Education Employer-Employee Relations Act (HEERA) Government Code section 3571.1(d). The APC violated this provision of HEERA by refusing to negotiate during the statutory impasse procedure about a California State University proposal on health benefits.

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

A. CEASE AND DESIST FROM:

Refusing to participate in the impasse procedure in good faith by refusing to negotiate about the subject of employee health benefit contributions.

Dated:_____ ACADEMIC PROFESSIONALS OF CALIFORNIA

By:_____
Authorized Representative

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STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ACADEMIC PROFESSIONALS OF CALIFORNIA, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	)	Unfair Practice Case No. LA-CE-415-H
TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Charging Party, v. ACADEMIC PROFESSIONALS OF CALIFORNIA, Respondent.	)	Unfair Practice Case No. LA-CO-47-H PROPOSED DECISION (10/13/95)

Appearances: Rothner, Segall, Bahan & Greenstone by Glenn Rothner, Attorney, for the Academic Professionals of California; William G. Knight, Assistant General Counsel, for the Trustees of the California State University.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

These consolidated cases present novel issues about bargaining positions taken by a union during negotiations. One case raises the question of whether a union can declare inoperable certain contract clauses that were reopened but not changed during mid-term bargaining. Although the complaint alleges a unilateral change by the employer, it actually challenges the employer's insistence that the disputed clauses

remained in effect. The other case raises the question of whether the union may terminate further bargaining about health benefits on the ground that the subject is regulated by statute.

The earlier of these unfair practice charges, LA-CE-415-H, was filed on January 5, 1995, by the Academic Professionals of California (APC or Union) against the Trustees of the California State University (University). The office of general counsel of the Public Employment Relations Board (PERB or Board) followed with a complaint against the University on April 17, 1995. The complaint alleges that on or about July 5, 1994, the University unilaterally implemented policies that "waived and/or limited" the right of the Union to negotiate:

> 1) "with respect to any subject or matter referred to or covered by [the parties' collective bargaining] Agreement, or with respect to any subject or matter not referred to or covered in [that] Agreement;" and
>
> 2) "the decision to contract out unit work and/or the effects of contracting out unit work."

The complaint also alleges that on or about November 18, 1994, the University implemented a policy that "waived and/or limited" the right of the Union:

> "under Government Code section 3572 to negotiate further concerning the entire collective bargaining agreement if the Legislature or the Governor fails to fully fund the agreement or to take the requisite curative action."

By these acts, the complaint alleges, the University failed to negotiate in good faith and denied rights to the Union and its members in violation of Higher Education Employer-Employee Relations Act (HEERA) section 3571(a), (b) and (c).[1] The University answered the complaint on April 28, 1995, denying that it had made a unilateral change or otherwise violated the Act.

The University's charge against the Union, LA-CO-47-H, was filed on January 26, 1995. The office of the PERB general counsel followed on March 3, 1995, with a complaint against the Union. The complaint alleges that beginning August 1, 1994, and continuing thereafter, the Union "refused to participate in impasse procedures on the subject of employer health benefit contributions." By this action, the complaint alleges, the Union failed to participate in the impasse procedure in good faith in

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

> It shall be unlawful for the higher education employer to do any of the following:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. . . .
>
> (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.

violation of HEERA section 3571.1(d).[2] The Union answered the complaint on April 7, 1995, denying the allegation. The two complaints were consolidated for a hearing which was conducted in Los Angeles on July 14, 1995.

With the filing of post-hearing briefs, the matter was submitted for decision on September 26, 1995.

FINDINGS OF FACT

The University is a higher education employer under HEERA. APC at all times relevant has been the exclusive representative of University Unit 4. This unit is composed of 1,400 academic support employees who work throughout the 21-campus system as analysts, evaluators, technicians and library assistants. They also work in departments that provide such student services as financial aid, transcripts and housing.

Throughout the relevant period APC and the University have been parties to a memorandum of understanding. This agreement was ratified by the University in February of 1994 and by the Union in April or May of 1994. Despite the Union's delayed ratification, the parties conducted themselves throughout the relevant period as if the contract were in effect.

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[2]Section 3571.1 provides in relevant part as follows:

> It shall be unlawful for an employee organization to:
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> (d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3590).

The contract provided for a reopener in 1994. Under this provision, each party was permitted to open for renegotiation a maximum of two articles.[3] The reopener provision set out specific dates by which a party wishing to reopen an article should notify the other party and provide a copy of its proposal. Although both of the contractually specified dates occurred prior to the Union's ratification of the agreement, the Union exercised the right to reopen as if the contract already had been signed. The reopener provision was silent about what should happen if the parties failed to reach agreement during the reopener.

On March 1, Union negotiator Edward Purcell notified the University that the Union was exercising its right to reopen on Article 3 (Effect of the Agreement)[4] and Article 7 (Contracting

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[3]The agreement between the parties is set forth in Joint Exhibit no. 1. Section 34.3 of the agreement reads as follows:

> For fiscal year 1994/95, each party may choose to reopen a maximum of two (2) articles, for the purposes of negotiations, subject to the public notice provisions of HEERA. To activate this provision the parties will communicate the name(s) and or number(s) of the chosen articles on March 1, 1994. They will do this either by letter postmarked March 1, 1994, or at a direct meeting. The Union will provide copies of it's [sic] proposals, if any, for public notice, on or before March 31, 1994.

[4]Article 3, the effect of agreement provision, is a rather standard zipper clause in which each party forgoes its right to bargain during the life of the contract. It reads as follows:

> 3.1 This Agreement constitutes the entire Agreement of the Trustees and the Union, arrived at as a result of meeting and conferring. The terms and conditions may be altered, changed, added to, deleted from, or

Out).[5] The Union followed on April 1 with a specific proposal

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> 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, policies, and prior practices related to matters included within this Agreement.
>
> 3.2 The parties acknowledge that, during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to offer proposals 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 Employer 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.
>
> 3.3 When the CSU determines that a study to develop new classifications or to revise current classifications is necessary, the CSU shall notify the Union. Within fifteen (15) days of such notification, the Union may request a meeting with the CSU to discuss the classification study. Such a meeting shall be held at the Office of the Chancellor.

[5]Article 7 sets out a complete waiver by the Union of its right to bargain about contracting out of unit work. It reads:

> 7.1 When the President deems it necessary in order to carry out the mission and operations of the campus, the President

which, as to each provision, stated simply: "Delete entire article."

The University also opened the contract on two articles, Article 24 (Benefits) and Article 34 (Duration and Implementation). As to the benefits article, the University proposed to substitute specific dollar amounts for its contribution toward health and dental insurance premiums. The University also proposed a limitation on the benefit level for long term disability. As to the contract duration article, the University proposed an extension through June 30, 1997, with reopeners on salary and benefits in the 1995-96 and 1996-97 fiscal years.

The parties conducted three negotiating sessions during the 1994 round of bargaining, the first of which was held on May 19. During the meeting and in a May 25 follow-up letter, the Union made counter-proposals to the University's opening proposals. Most of the proposals dealt with the level of benefits. The Union also proposed that any reopeners that followed the contract extension be broader than proposed by the University, allowing each side to reopen two articles. In a proposal, critical to the events at issue, the Union also called for elimination of

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may contract out work.

> 7.2 The Union may request to meet and confer on the impact of contracting out work when such contracting out is to be on a long-term basis. The CSU shall meet with the Union for this purpose within thirty (30) days of such a request.

section 34.4 from the duration article of the agreement, which reads as follows:

> Any term(s) of this Agreement which is deemed to carry an economic cost shall not be implemented until the amount required therefor [sic] is appropriated and made available to the CSU for expenditure for such purpose(s). If less than the amount needed to implement this Agreement is appropriated and made available to the CSU for expenditure, the term(s) of this Agreement deemed by the CSU to carry economic cost shall automatically be subject to the meet and confer process.

The parties next met on May 31. During this meeting, they reached a tentative agreement on one minor issue but remained apart on all critical matters. The Union invited the University to make counter-proposals on its demand for the elimination of articles 3 and 7. To this invitation the University responded that it wanted to retain the articles as they were.

The final negotiating session was held on June 24. The University modified its proposal on health benefits by increasing the dollar amounts it was willing to pay. The Union rejected the proposal and insisted that the University provide the level of benefits set out in section 22825.1.[6] Mr. Purcell told

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[6]Section 22825.1 establishes a formula for employer contributions toward health benefits for employees at the California State University. It provides in relevant part as follows:

> (a) . . . the employer's contribution for each employee or annuitant shall be an amount equal to 100 percent of the weighted average of the health benefits plan premiums for employees or annuitants enrolled for self alone plus 90 percent of the weighted average of the additional premiums required for

University negotiators that he believed the Union had an absolute right to the level of benefits set out in the Government Code and that negotiation about other benefit levels was permissive.

The parties also discussed again the Union's proposal to remove articles 3 and 7 from the agreement. The Union invited the University to make counter proposals. Irene Cordoba, the University's chief negotiator, replied that the University wanted to retain the contract provisions and would not make counter proposals. She said the University would be willing to entertain Union modifications of its proposal. This led to an assertion by Mr. Purcell that the Union would not continue to waive its

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> enrollment of family members in the four health benefits plans which have the largest number of enrollments during the fiscal year to which the formula applied. Notwithstanding any other provision of this section, the employer's contribution, with respect to each state employee annuitant identified by the board who lives where there is no available, competitive health maintenance organization and a fee for service health plan is the only option, shall be an amount equal to 90 percent of the PERS Care premium for employees and annuitants enrolled for self alone plus 90 percent of the PERS Care premium required for enrollment of family members for the 1989-90 fiscal year. . . .
>
> (b) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5 or Chapter 12 (commencing with Section 3560) of Division 4 of Title 1, the memorandum of understanding shall be controlling without further legislative action, except that if those provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

statutory rights to bargain and that it considered articles 3 and 7 to be permissive subjects of bargaining.

Mr. Purcell confirmed his statements made in negotiations in a June 27 letter to University negotiator Cordoba. He stated that the Union had reopened articles 3 and 7 because it intended "to modify or end the waiver of bargaining rights contained in both articles." He wrote that the Union considered the further waiver of its statutory bargaining rights "to be (at a minimum) a permissive topic of bargaining and perhaps a non-waivable statutory right." He also advised the University that he would not be listing the dispute over articles 3 and 7 in a request for the appointment of a mediator that he would be making the same day. He explained that this was because the Union was unwilling to bargain further on those topics "at least to the degree that both articles contain waiver provisions."

In his letter to the PERB requesting an agency determination that the parties were at impasse and appointment of a mediator, Mr. Purcell listed only two subjects as being in dispute. These were "benefits (multiple issues) and reopener provisions." He noted that the Union originally had reopened bargaining on articles 3 and 7 but "was no longer willing to discuss these permissive topics of bargaining, and was, therefore, removing them from the bargaining table."

There followed an exchange of letters between the University and the Union regarding whether articles 3 and 7 would remain

in effect if there was no agreement at the end of negotiations.

On July 5, Ms. Cordoba wrote:

> . . . please understand that since the University has declined to agree to the Union's proposal that Articles 3 and 7 be deleted from our agreement, these Articles remain in full force and effect.

On July 20, Mr. Purcell replied:

> I understand that CSU has declined to agree with APC's bargaining proposals concerning Articles 3 and 7 or to make counter proposals in these areas. As a consequence, the Union has removed these permissive topics from bargaining. Therefor, [sic] at the conclusion of the present round of bargaining, they will no longer be part of the MOU.

This drew a July 29 reply from the University which, in relevant part, reads:

> Please be advised that the University strongly disagrees with your position. At the end of the present round of bargaining, unless the parties have agreed to the contrary, these articles will remain in full force and effect.

The content of the dialogue between the parties did not change in subsequent months.

Mediation was conducted on August 1. The mediator separated the parties and relayed proposals between them. The University opened with a modification of its health benefit proposal. The Union replied with its proposal that the health benefits be set according to the statutory formula. This produced from the University a proposal that would return health benefits to the statutory level but also would delete the life insurance and long term disability benefits. The University's rationale for this

change was that the life insurance and disability benefits had been funded by an earlier agreement providing for a smaller employer contribution of health benefits. If the employer contribution was to increase to the statutory level, the University argued, it would have to drop the other benefits that had been paid for by the lower health costs. When the mediator relayed the University proposal to the Union, the Union promptly rejected it and informed the mediator that it would not bargain further about health benefits.

The day after the mediation, Union negotiator Purcell touched off another exchange of letters with the University by setting out in writing his position on fringe benefits. Mr. Purcell's letter explained his interpretation of the interplay between section 22825.1 and the bargaining obligations under HEERA. The letter concluded with the following statement:

> . . . we have notified you that APC withdraws its voluntary agreement to continue bargaining on the permissive topic of Employer health insurance contribution rates as set for [sic] in Government Code 22825.1. In this context we will entertain no further proposals involving this topic nor will we agree to proceed further in impasse deliberations on this topic.

In the exchange of letters that followed, the parties elaborated on previous positions.

The dispute went before a fact-finding panel on October 11. The fact-finding panel did not consider the dispute about articles 3 and 7. However, despite Mr. Purcell's statement that he would not "proceed further in impasse deliberations" on the

topic of health benefits, it is quite clear that this subject did go before the fact-finding panel. The fact-finder's report, which was issued on October 28, outlines the same positions of the parties as they had set out in mediation and subsequent exchange of letters.

The fact-finder's report also discusses the contractual limit on reopener negotiations authorized if the Legislature fails to fund contractual agreements. Under the provision, a reopener is permitted if the Legislature fails to appropriate funds necessary to cover the cost of negotiated provisions. The provision was put into dispute by the Union's response to the University's proposal to extend the agreement. Any reopener entered under this provision would be limited to:

> . . . the term(s) of this Agreement deemed by the CSU to carry economic cost. . . .

The Union wanted no limitation on the subjects that could be reopened if there was a failure of legislative funding.

Upon the issuance of the fact-finding report, the Union on November 9, repudiated contract articles 3 and 7. In a letter to the University, Mr. Purcell stated:

> . . . I write now to inform you that APC will no longer be bound by (nor consider part of the MOU) those provisions of the previous Article 3 "Effect of the Agreement" and the previous Article 7 "Contracting Out" which served as a waiver of the Union's right to bargain. Further, we consider those portions of Article 34 "Duration and Implementation"

> which are at variance with HEERA Section 3572[7] to be no longer operative.

Regarding health benefits, Mr. Purcell wrote that should the University decide to maintain the status quo on all benefits, "APC will not challenge that determination."

Mr. Purcell's letter prompted a November 18 reply from University negotiator Cordoba expressing a willingness "to accept the approach to fringe benefits" set out by Mr. Purcell. In exchange, the University promised "to maintain the status quo on all current fringe benefits and contribution rates, including health insurance."

However, Ms. Cordoba rejected the other positions set out by the Union. She restated the University's position that

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[7]Section 3572 provides as follows:

> This section shall apply only to the California State University.
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> . . . . . .
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> No written memoranda reached pursuant to the provisions of this chapter which require budgetary or curative action by the Legislature or other funding agencies shall be effective unless and until such an action has been taken. Following execution of written memoranda of understanding, an appropriate request for financing or budgetary funding for all state-funded employees or for necessary legislation will be forwarded promptly to the Legislature and the Governor or other funding agencies. When memoranda require legislative action pursuant to this section, if the Legislature or the Governor fail to fully fund the memoranda or to take the requisite curative action, the entire memoranda shall be referred back to the parties for further meeting and conferring; . . . [Emphasis added.]

articles 3 and 7 "remain in full force and effect." She accused the Union of going "through the motions of 'reopening' these articles and then, pretending that they involved permissive subjects" in order to withdraw them prior to meaningful bargaining or impasse. As to article 34, the duration provision, Ms. Cordoba asserted that while provisions of the article are not identical to section 3572, "none are at odds with it and, therefore, all provisions must remain in full force and effect unless and until the parties agree otherwise." She invited Mr. Purcell to contact her for further negotiations.

The final communication in the 1994 reopener negotiations was written by Mr. Purcell. In a letter of November 22, he restated his prior position that the Union no longer would be bound by articles 3, 7 and 34. He also rejected the University's invitation to further negotiations. He wrote that the Union had gone through months of talks in good faith "which have produced no results whatsoever." Thus, he concluded, "the statutory bargaining process has . . . run its course and both sides will need to live with its results."

LEGAL ISSUES

A) Did the University fail to meet and confer in good faith by unilaterally implementing policies that waived and/or limited the right of the Union to negotiate about:

1) any subject or matter referred to or covered by the parties' collective bargaining agreement, or with

respect to any subject matter not referred to or covered in the agreement; and

2) the decision to contract out unit work and/or the effects of contracting out unit work; and

3) the entire collective bargaining agreement should the Legislature or the Governor fail to fully fund the agreement or to take the requisite curative action?

B) Did the Union fail to participate in the impasse procedure in good faith by excluding from that procedure any consideration of employer health benefit contributions?

CONCLUSIONS OF LAW

Case No. LA-CE-415-H

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 confer in good faith.[8] (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.)

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[8]Here, the established practice at issue originally was reflected in the collective bargaining agreement. (See Grant Joint Union High School District (1982) PERB Decision No. 196.)

This case approaches a unilateral change allegation in a highly novel manner. The past practice here is found in three articles of the agreement which were opened but not amended in mid-term negotiations between the parties. These articles comprise a zipper clause, a clause waiving the Union's right to bargain about the contracting out of unit work and a clause limiting the nature of any reopener that might follow legislative failure to provide contractually anticipated funding. The Union contends that these provisions ceased to exist when agreement was not reached during the reopener. The University contends that the provisions remained in effect.

It is the theory of the complaint that the University made a unilateral change when it insisted that the provisions remained in effect despite the Union's repudiation of them. This assertion reverses the normal position of the parties in a unilateral change case. Here, the party seeking to maintain things as they were is accused of making a unilateral change by the party that has repudiated things as they were. The Union argues, nevertheless, that its position "is neither novel nor complex." Rather, the Union contends, its position follows logically from National Labor Relations Board (NLRB) and PERB decisions.

The Union begins its analysis with two companion federal cases, Speedrack Inc. (1989) 293 NLRB 1054 [131 LRRM 1347] (Speedrack) and Hydrologics Inc. (1989) 293 NLRB 1060 [131 LRRM 1350] (Hydrologics). These cases, the Union argues, hold

that upon reaching impasse in reopener negotiations an employer may unilaterally implement changes and a union may strike. In the absence of clear evidence of a contrary intent, these rights obtain even though the unopened provisions, including the no-strike clause, remain in effect. Applied to the present facts, the Union contends, Speedrack and Hydrologics mean that the reopened provisions were terminated when the parties reached impasse.

To its analysis of the NLRB cases, the Union links Rowland Unified School District (1994) PERB Decision No. 1053 (Rowland). Rowland, the Union argues, precludes an employer from unilaterally implementing, upon impasse, a waiver or limitation of a union's right to bargain. Since each of the three disputed contractual clauses constitutes a waiver of its right to bargain,[9] the Union concludes, the University was precluded from reinstating the clauses after impasse.

The University rejects out of hand any applicability of Speedrack and Hydrologics. The University observes that in both of the federal cases, the prevailing parties had followed all procedures required under federal law prior to making a unilateral change or striking. Here, the University argues, the

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[9]Article 3, the effect of agreement or zipper clause, waives the Union's right to negotiate during the term of the agreement. Article 7, the provision on contracting out, waives the Union's right to negotiate about the subcontracting of unit work. Article 34, the duration and implementation provision, waives the Union's right under section 3572 to negotiate about the entire memorandum of understanding in the event of legislative failure to fund contract provisions.

Union did not wait until the completion of the statutory impasse procedures before purporting to declare the disputed contract clauses null. Moreover, the University continues, neither the federal cases nor Rowland can be read to support the proposition that a union can declare null a provision of a reopened contract if the parties reach impasse. Finally, the University contends, the rules of Speedrack and Hydrologics should not be adopted by the PERB. There are significant differences between private and public sector labor relations, the University argues, and the mid-contract resort to economic weapons blessed in Speedrack and Hydrologics is not appropriate under HEERA.

It should be noted, initially, that Speedrack and Hydrologics are decisions rooted in the logic and operation of private sector labor relations laws. The central concern of the two decisions is that mid-contract reopeners will become a "charade" (Speedrack at 131 LRRM 1348) unless the parties are free to resort to their economic weapons upon impasse. To avoid a charade, the NLRB concluded in Speedrack that the employer should be allowed to unilaterally implement its final offer upon reaching impasse in mid-contract reopener negotiations. To balance the employer's economic weapon, the NLRB concluded in Hydrologics that the union should be permitted to strike after reopener negotiations, notwithstanding the existence of a no-strike clause in the contract.

Such a resort to economic weapons might well be an appropriate private sector approach for dealing with an impasse

in reopener negotiations. But, as the University argues, it is by no means clear that adoption of this rule is appropriate for the public sector. Unlike the federal collective bargaining statutes, HEERA contains mandatory impasse resolution procedures that almost certainly were included for the purpose of heading off strikes. (See discussion in San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1 at p. 8 [154 Cal.Rptr. 893].)

It is settled law that until the impasse procedure has been completed, the employer may not make a unilateral change in a negotiable subject (Moreno Valley Unified School District v. Public Employment Relations Board (1983) 142 Cal.App.3d 191, [191 Cal.Rptr. 60] (Moreno Valley)) and the exclusive representative may not strike (Westminster School District (1982) PERB Decision No. 277 and Fresno Unified School District (1982) PERB Decision No. 208).

Thus unlike the federal laws for the private sector, HEERA encompasses a system of impasse resolution designed to discourage the use of economic weapons. The statute establishes a "legislative process structured to bring about peacefully negotiated agreements." (Modesto City Schools (1983) PERB Decision No. 291.) The system requires the parties to go through a series of procedures intended to help them reach an agreement without the potential for disruption that occurs with unilateral changes or strikes. If adopted by the PERB, the rules set out in Speedrack and Hydrologics would encourage parties to select

reopener topics so as to maximize the pressure on each other. Inevitably, such a course would introduce significant potential for mid-contract disruption.

It is not necessary, however, to reach the ultimate question of whether the federal rules should be adopted by the PERB. Because even if the PERB were to follow Speedrack and Hydrologics there would be no basis here for finding that the University had made a unilateral change. This is because the parties have made a clear statement that the provisions of their contract cannot be changed except through voluntary, mutual agreement.

Where there is such an expression, it is reasonable to conclude that the parties have rejected the use of economic weapons if they reach impasse in a mid-contract reopener. In Speedrack the NLRB observed:

> . . . the parties could agree to place constraints on themselves with respect to unilateral implementation after impasse or the use of economic weapons; and that agreement would be controlling. . . . (131 LRRM 1349.)

Thus, evidence of contrary intent to the use of economic weapons will defeat the Speedrack rule and will turn a mid-contract unilateral change into a failure to negotiate in good faith.

The parties to this case have expressed a contrary intent to the use of economic weapons authorized in Speedrack and Hydrologics. The evidence of such intent can be found in the contractual zipper clause, one of the provisions that the Union seeks to nullify. Section 3.1 of the zipper clause (footnote 4, supra) reads as follows:

> This Agreement constitutes the entire Agreement of the Trustees and the Union, arrived at as a 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, policies, and prior practices related to matters included within this Agreement. [Emphasis supplied.]

Through the underlined language, the parties have agreed that there shall be no deletion from the terms of the agreement except by mutual consent and in writing. From this language I would infer that the parties intend that if they fail to reach agreement during a reopener, or at any other time during the life of the contract, the status quo shall prevail. The University cannot make a unilateral change and the Union cannot resort to a strike, even if the impasse procedures have been exhausted.[10]

The Union, citing Hydrologics argues that the terms of the agreement that were reopened were effectively terminated by the act of listing them for the reopener. Once terminated, the Union argues, the terms could not be reasserted by the University under Rowland. Since I conclude that the parties previously had agreed that contract terms could not be deleted except by mutual consent, I reject the argument that the clauses were terminated by the reopening. The clauses remained in effect and the University, by its letter of July 5, 1994, made no change in a negotiable subject. The letter was nothing more than an

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[10]Strikes are prohibited under article 9 of the agreement between the parties.

assertion that the status quo between the parties remained in effect. In making this assertion, the University was correct.

Accordingly, I conclude that the allegation that the University failed to meet and confer in good faith by unilaterally implementing policies that waived and/ or limited the right of the Union to negotiate must be dismissed.

Case No. LA-CO-47-H

To achieve its public policy goal of "harmonious and cooperative labor relations"[11] and to head off strikes, HEERA requires the parties to use the statutory impasse procedure. It, therefore, is unlawful for an exclusive representative to "refuse to participate in good faith in the impasse procedure set forth in Article 9" of the HEERA. (Section 3571.1(d).)

The complaint here alleges that the Union refused to participate in the impasse procedure on the subject of employer health benefit contributions. The mediation was conducted on August 1 and initially the Union exchanged proposals with the University about health benefits. Ultimately, the Union proposed that employer health benefit contributions be set according to the statutory formula. In reply, the University agreed but only on the condition that the Union agree to a deletion from the contract of life insurance and long term disability benefits. When the mediator relayed this University proposal, the Union promptly rejected it and informed the mediator that it would not bargain further about employer health benefit contributions.

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[11]Section 3560(a).

Union negotiator Purcell explained in a subsequent letter that the Union considered the amount of employer health benefit contributions to be a "permissive topic" of bargaining. As more fully explained in its brief, the Union contends that section 22825.1(a)[12] establishes for employees of the University "a mandatory contribution formula, which governs in the absence of a superseding collective agreement." Because the formula is mandatory, the Union asserts, it had a right to insist upon the formula and was under no obligation to go to impasse.

In support of this proposition, the Union cites San Mateo County Community College District (1993) PERB Decision No. 1030 (San Mateo) and Lake Elsinore School District (1986) PERB Decision No. 603. In those cases, the Union argues, the PERB has made it clear that an employer cannot insist to impasse on a proposal concerning a statutory right. Since it had given proper notice that it would not negotiate away its statutory right, the Union argues, it was free to refuse to negotiate about health benefits by participating in the impasse procedure.

The University argues that section 22825.1 in no way excuses a party from negotiating about a subject within the scope of representation. Rather, the University continues, the section contains a supersession clause by way of which a negotiated agreement will automatically supersede the statute. The section clearly contemplates, the University argues, that the parties will bargain and adjust the statutory formula for health

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[12]See footnote no. 6, supra.

benefits. Moreover, the University continues, section 22825.1 is an employee benefit provision that affords no rights to the Union and is distinguishable from San Mateo, a case involving statutory rights of labor organizations.

It is clear that the subject of this dispute, the amount of the employer contribution for health benefits, is a negotiable matter. Although not specifically identified as a negotiable subject in HEERA,[13] the amount of the employer's contribution toward health benefits would be negotiable as "wages." The negotiability of the level of the employer's contribution is well established in both public and private sector cases.[14] Indeed, both parties here acknowledge that the level of the employer's contribution for health benefits is a mandatory subject.

The Union's refusal to pursue the issue through the impasse procedure rests, once more, on its theory that when a contract provision is reopened it ceases to exist. The University opened the provision on benefits, article 24 of the agreement, as one of its subjects in the reopener. When that occurred, the Union contends, the Union was no longer bound by the contract and could demand that the benefit level revert to the formula set out in section 22825.1(a).

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[13]The scope of representation for CSU is set out at Section 3562(r).

[14]See San Joaquin County Employees Association v. City of Stockton (1984) 161 Cal.App.3d 813 [207 Cal.Rptr. 876]; Palo Verde Unified School District (1983) PERB Decision No. 321; W.W. Cross & Co. v. NLRB (1st Cir., 1949) 174 F.2d 875 [24 LRRM 2068].

But contrary to the Union's view, I have concluded that provisions of the agreement between these parties do not cease to exist simply because they are reopened. These parties have agreed that terms and conditions in their contract:

> . . . 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.

Therefore, the University's act of reopening the benefits article did not nullify the provision. The benefits article remained in effect. By remaining in effect, the benefits article continued to supersede the statutory formula.

Moreover, as the University argues, section 22825.1 clearly envisions that there will be bargaining about employer health benefit contributions. Although it sets a level of benefits if there is no agreement, it becomes inoperative if there is an agreement. As the University acknowledges, if there were no agreement then the statutory formula would apply. But since there is an agreement, which continued through the reopener, the Union cannot simply elect to return to the statutory formula.

Although the Union no longer wished to be bound by the contractual benefits provision, that provision was the status quo. The status quo endured during the impasse. Since the level of the employer's contribution toward health benefits is a mandatory subject of bargaining, the Union did not have the right to remove it from the impasse resolution process. By taking this action, the Union failed to participate in the impasse procedures in good faith in violation of HEERA section 3571.1(d).

REMEDY

The PERB in section 3563.3 is given:

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

The appropriate remedy here is an order that the Union cease and desist from its refusal to participate in the impasse procedure in good faith. Also appropriate is an order that the Union post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the Union, will provide notice that the Union has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the HEERA that employees be informed of the resolution of this controversy and the Union's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Case No. LA-CE-415-H

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, unfair practice charge LA-CE-415-H, Academic Professionals of California v. Trustees of the California State University and companion PERB complaint are hereby DISMISSED.

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the Academic Professionals of California (Union) violated Government Code section 3571.1(d). The Union violated this provision of the Higher Education Employer-Employee Relations Act (Act) by refusing to negotiate during the statutory impasse procedure about a California State University proposal on health benefits.

Pursuant to section 3563.3 of the Government Code, it hereby is ORDERED that the Union and its representatives shall:

A. CEASE AND DESIST FROM:

Refusing to participate in the impasse procedure in good faith by refusing to negotiate about the subject of employer health benefit contributions.

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

1. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where the Union customarily posts notices to members of Unit 4, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the Union, indicating that the Union will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

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

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the 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 Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc., sec. 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 Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Ronald E. Blubaugh
Administrative Law Judge