STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ACADEMIC PROFESSIONALS OF CALIFORNIA,	)	
Charging Party,	)	Case No. LA-CE-464-H
v.	)	PERB Decision No. 1243-H
TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,	)	December 22, 1997
Respondent.	)	

Appearances: Edward R. Purcell, Consultant, for Academic Professionals of California; William G. Knight, University Counsel, for Trustees of the California State University.

Before Caffrey, Chairman; Johnson and Jackson, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Trustees of the California State University (CSU) to a proposed decision by a PERB administrative law judge (ALJ). The ALJ found that CSU violated section 3571(a), (b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA)[1] by

[1]**HEERA** is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3571 states, in pertinent 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 interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an

unilaterally adopting and implementing an eligibility date for a one-time cash payment to employees represented by the Academic Professionals of California (APC).

The Board has reviewed the entire record in this case, including the proposed decision and the filings of the parties. The Board hereby reverses the ALJ's proposed decision and dismisses the unfair practice charge and complaint in this case consistent with the following discussion.

BACKGROUND

APC is the exclusive representative of Unit 4, Academic Support within the CSU system. CSU and APC are parties to a collective bargaining agreement (CBA) which expired on July 1, 1995. The parties reached a tentative agreement on a successor CBA on or about March 18, 1996. The tentative agreement provided that "on or before June 30, 1996, full time unit employees active as of April 1, 1996 shall be provided with a cash payment as soon as possible in the amount of $615." Also, the tentative agreement provided that "this proposed settlement is contingent upon ratification by the APC, no later than March 31, 1996."

CSU believed that the parties had agreed during negotiations that the April 1 eligibility date for the one-time

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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.

cash payment was tied to the anticipated ratification of the agreement by APC no later than March 31. APC did not ratify the agreement until April 9. Consequently, CSU planned to utilize April 9 as the eligibility date for the one-time cash payment. On April 24, 1996, CSU sent to its personnel and payroll staff statewide a "Technical Letter" concerning implementation of the agreement, which included April 9 as the eligibility date. On May 3, 1996, CSU sent a memorandum to all Unit 4 employees referencing April 9 as the cash payment eligibility date. The memorandum noted that ratification of the agreement by CSU was required before any increase could be effective. CSU ratified the agreement on May 14, 1996. The ratified agreement included the provision which was in the tentative agreement establishing April 1 as the one-time cash payment eligibility date. There is no evidence that CSU ratified an agreement which included an eligibility date other than April 1.

On May 29, 1996, APC filed a grievance challenging the April 9 eligibility date. During the grievance process, APC indicated that the matter would be resolved if CSU paid the one-time cash payment to any employee hired between April 1 and April 9. CSU agreed and began implementation. APC subsequently realized that its proposed resolution should have indicated that employees who left the bargaining unit between April 1 and April 9 would receive the lump sum payment. CSU declined to take any other action. The grievance did not proceed to arbitration.

CSU used the April 9 eligibility date in implementing the one-time payment. As a result, one employee who was in the bargaining unit on April 1, but who had left the unit by April 9, did not receive the payment. On the other hand, three employees who were not in the bargaining unit on April 1, but who had entered the unit by April 9, received the payment. All other unit members were unaffected by the change in the eligibility date and received the payment.

On August 27, 1996, APC filed an unfair practice charge alleging that CSU unilaterally changed the one-time cash payment eligibility date in violation of the HEERA. The office of the General Counsel of PERB issued a complaint on October 11, 1996, which CSU answered on October 25, 1996. A PERB-conducted settlement conference failed to resolve the dispute, and a formal hearing was conducted on March 18, 1997.

ISSUE

Did CSU breach its obligation to negotiate in good faith, in violation of the HEERA, when it adopted April 9 as the eligibility date for the one-time cash payment made pursuant to the parties' CBA?

DISCUSSION

To prevail in a unilateral change case, the charging party must establish that: (1) the employer breached or altered the parties' written agreement or established past practice; (2) the employer took the action without giving the exclusive representative notice or an opportunity to bargain; (3) the

change has a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment; and (4) the change concerns a matter within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant); Pajaro Valley Unified School District (1978) PERB Decision No. 51; Davis Unified School District, et al. (1980) PERB Decision No. 116.)

There appears to be no dispute between the parties that the one-time cash payment was required by and made pursuant to their agreement.[2] APC asserts that CSU breached or repudiated that agreement and unilaterally changed the eligibility date of the payment in violation of the HEERA. CSU responds that it acted in accordance with the intent of the parties' agreement. Accordingly, the complaint issued in this case indicates that the alleged change was to ". . . Respondent's policy concerning the payment of $615 to full-time employees, as provided by Section 23.18 of Respondent's agreement with Charging Party."

CSU responds to the complaint by arguing that this case involves an alleged, isolated breach of the CBA, and PERB has no authority to resolve disputes between the parties involving the interpretation of their contracts. CSU asserts that its conduct does not involve a policy change having a generalized effect or continuing impact on bargaining unit members under Grant since

[2]The dispute only arises if the parties have an agreement to make the payment. As CSU pointed out to all Unit 4 employees in its May 3, 1996, memorandum "no pay increase will take effect until and unless the tentative agreement is ratified by the [CSU] Trustees."

"use of the April 9 date adversely affected only one terminated employee."

APC argues that CSU's change in the eligibility date was directed at an entire class of employees - bargaining unit members. Therefore, under Grant it should be considered to have had a generalized effect despite the fact that apparently only one employee was denied the one-time cash payment as a result of the change. APC notes that the Board has found a generalized effect or continuing impact in a case involving a unilateral change affecting as few as two employees. (Hacienda La Puente Unified School District (1997) PERB Decision No. 1186 (Hacienda La Puente).)

Initially, the Board must address itself to the question of whether CSU's alleged breach of the CBA also constitutes an unfair practice under HEERA. HEERA section 3563.2(b) states:

> The Board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

In Grant, the Board discussed this statutory limit on its authority to enforce agreements between parties.[3] The Board observed:

> This is not to say that every breach of contract also violates the Act. Such a breach must amount to a change of policy, not

[3]Grant was a case decided under the Educational Employment Relations' Act (EERA or Act). (EERA is codified at Government Code section 3540 et seq.) EERA section 3541.5(b) contains language nearly identical to that of HEERA section 3563.2(b).

> merely a default in a contractual obligation, before it constitutes a violation of the duty to bargain. This distinction is crucial. A change of policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. On the other hand, when an employer unilaterally breaches an agreement without instituting a new policy of general application or continuing effect, its conduct, though remediable through the courts or arbitration, does not violate the Act.

Thus, an alleged contract breach must also constitute a change in policy having a generalized effect or continuing impact on the terms and conditions of employment of bargaining unit members before PERB can find it to be a violation of the HEERA duty to bargain.

One allegation considered by the Board in Grant involved a contingency pay provision of the parties' contract. The provision called for the parties to review income and expenditures of the employer on or about a specified date to determine if additional funds were available for one-time payments to employees. The provision set various parameters governing the income and expenditure review process. The employer conducted the review and concluded that a specific amount of funds was available for distribution to employees. The charging party alleged that the employer unilaterally changed the contractual parameters governing the review process with the result that fewer funds were available for distribution to employees. The Board dismissed the allegation, finding that it

involved a contract dispute and did not constitute a unilateral change in policy. The Board stated:

> . . . the facts asserted by the Association actually challenge the District's application of the contract's provision. The District does not deny its contractual obligation but claims it properly implemented the provision both as to the use and the amount of the surplus funds. We find,in these competing claims nothing which demonstrates a 'policy change.'

The circumstances presented by the instant case are analogous to those presented by the contingency pay allegation in Grant. CSU does not deny its contractual obligation to make a $615 one-time cash payment to bargaining unit members. CSU claims that it properly implemented the provision in accordance with the agreement. That claim is what APC disputes. This case does not involve a policy change, but a disagreement over implementation of a contractual provision involving the eligibility date agreed to by the parties.

Further, the facts of this case demonstrate that the alleged change has no generalized effect or continuing impact on the terms and conditions of employment of bargaining unit members. The payment was one-time only and had no impact on the retirement or ongoing compensation of employees. CSU made the payment to all bargaining unit members, and the only apparent effect of the eligibility date change was that one employee who left the bargaining unit between April 1 and April 9 did not receive the payment. This can hardly be characterized as a generalized effect.

APC's citation of Hacienda La Puente is misplaced. In that case, the Board rejected the employer's argument that its unilateral change in the shift of a bargaining unit member represented nothing more than a possible isolated breach of the parties' contract. The Board concluded that the employer's action constituted a change in policy, based on the employer's belief that it had the contractual right to make shift changes. Therefore, the conduct had the generalized effect of exposing other bargaining unit members to such shift changes. In the instant case, there has been no showing of a change in policy by CSU, or of any generalized effect or continuing impact resulting from the eligibility date change.

The Board concludes that the dispute in this case involves an alleged contract breach which does not constitute a change in policy having a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment„ The Board's standard for demonstrating an unlawful unilateral change has not been met and, therefore, the charge and complaint must be dismissed.

ORDER

The unfair practice charge and complaint in Case No. LA-CE-464-H are DISMISSED WITHOUT LEAVE TO AMEND.

Members Johnson and Jackson joined in this Decision.