STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA FACULTY ASSOCIATION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	Case No. LA-CE-644-H PERB Decision No. 1597-H February 9, 2004

Appearances: Rothner, Segall & Greenstone by Bernard Rohrbacher, Attorney, for California Faculty Association; Elisabeth Sheh Walter, University Counsel, for Trustees of the California State University.

Before Baker, Whitehead and Neima, Members.

DECISION

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

[1]HEERA is codified at Government Code section 3560 et seq. HEERA section 3571(a) and (c) states, in 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

response to a request from CFA for Weighted Teaching Unit information. The proposed decision dismissed a separate allegation that CSU unlawfully refused to provide faculty merit increase (FMI) information to CFA absent payment of actual costs by CFA. Exceptions have been filed only to the latter holding.

After reviewing the record in this case, including the proposed decision, CFA's exceptions, and CSU's response, the Board affirms the ALJ's proposed decision consistent with the discussion below.

DISCUSSION

The ultimate issue here is whether CSU refused to provide the FMI information requested by CFA. Under HEERA, the failure to provide necessary and relevant information is a per se violation of the duty to bargain in good faith. (Stockton Unified School District (1980) PERB Decision No. 143.) To determine whether CSU failed to provide necessary and relevant information, the ALJ analyzed whether a contract was formed by CSU and CFA regarding the request. The ALJ found that a contract was formed and eventually concluded that CSU did not refuse to provide the information. Citing principles of contract law, CFA argues extensively in its exceptions that no contract was formed.

The Board believes that the issue of whether there was a legally enforceable contract distracts from the central issue in this case. That issue is whether CSU refused to provide necessary and relevant information to CFA. It is not necessary to delve into the realm of contracts to resolve this issue. Regardless of whether there was a legally enforceable contract

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> purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

between the parties, the Board finds that CSU did not violate HEERA by refusing to provide necessary and relevant information to CFA.

It is undisputed that CFA requested necessary and relevant information from CSU. It is further undisputed that complying with CFA's request involved substantial costs for CSU. After CSU demonstrated that substantial costs were involved, the parties were obligated to bargain over what the costs would be and who would bear them. (Los Rios Community College District (1988) PERB Decision No. 670.) At that time, CFA could have insisted on better estimates or negotiated protections, such as a ceiling on the total costs. CFA could have also requested that CSU begin compiling the requested information at only a few campuses to determine whether the resulting information was worth the money. However, CFA did not negotiate such protections, but instead informed CSU that it would pay the "actual costs."

Once CSU completed the project, it presented CFA with a detailed billing statement of its actual costs. A dispute then arose over the adequacy of CSU's billing statement. The parties were unable to resolve their differences, leading CFA to file this unfair practice charge. Under these circumstances, the issue before PERB would normally be whether CSU's billing statement represented its actual and reasonable costs. However, during the hearing CFA repeatedly emphasized that it was not challenging the reasonableness of CSU's costs. Thus, although CSU's bill appears excessive at first blush, there is no evidence in the record to support such conclusion. Instead, the evidence establishes that CFA agreed to pay the actual costs of complying with the information request but failed to do so when confronted with the bill. Although CFA could have argued that the bill was unreasonable, it did not do so. Under these facts, the Board finds that CSU did not violate HEERA by failing to provide necessary and relevant information.

CFA also argues that CSU violated HEERA by refusing to provide CFA direct access to the requested information. CFA urges the Board to adopt the National Labor Relations Board (NLRB) rule expressed in Food Employer Council, Inc. (1972) 197 NLRB 651 [80 LRRM 1440] (Food Employer) which held that:

> If there are substantial costs involved in compiling the information in the precise form and at the internals requested by the Union, the parties must bargain in good faith as to who shall bear such costs, and, if no agreement can be reached, the Union is entitled in any event to access the records from which it can reasonably compile the information. [Emphasis added.]

CFA's argument must be rejected because Food Employer cannot be applied to the facts in this matter. As noted above, it is undisputed that CFA told CSU to begin complying with the information request. CFA knew that the information request involved substantial costs and agreed to pay the "actual costs." Only after CSU had already incurred substantial costs complying with the information request did CFA request direct access to the data. Nothing in Food Employer allows such an outcome. The right of direct access granted in Food Employer must be exercised in the first instance. An employee organization cannot place a costly order for information and then, once the employer has complied, decide that the bill is too high and request direct access. If the employee organization believes that the bill is unreasonable or does not represent the actual costs, the remedy is to file an unfair practice charge with PERB before the employer incurs substantial costs to comply with the request.[2] However, where an employee organization agrees to pay the actual costs without first determining what level of cost is reasonable, it cannot decide to cancel its order after the fact and then accuse the

[2]In situations where irreparable harm may result from the employer's withholding of necessary and relevant information, the employee organization may always seek injunctive relief from the Board. (PERB Reg. 32450, et seq.)

employer of an unfair practice. Thus, under the facts presented here, the holding in Food Employer is of no aid to CFA. Accordingly, for all the above reasons, the dismissal of CFA's charge regarding the FMI information request must be affirmed.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a) and (c), by its delays in responding to a request for Weighted Teaching Unit (WTU) information made by the California Faculty Association (CFA). However, it is found that CSU did not fail to provide CFA with the WTU information and did not refuse to provide CFA with records regarding the faculty merit increase. Accordingly, those charges are dismissed.

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

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with CFA regarding its requests for necessary and relevant information, by delaying responses to CFA's requests for information.

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

1. Meet and confer in good faith with CFA regarding its requests for necessary and relevant information, by responding promptly to CFA's requests for information.

2. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the notice attached hereto as an Appendix.

3. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on CFA.

Members Whitehead and Neima joined in this Decision.

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-CE-644-H, California Faculty Association v. Trustees of the California State University, in which all parties had the right to participate, it has been found that the Trustees of the California State University violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a) and (c), by its delays in responding to a request for Weighted Training Unit information made by the California Faculty Association (CFA).

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

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with the CFA regarding its requests for necessary and relevant information, by delaying responses to CFA's requests for information.

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

1. Meet and confer in good faith with CFA regarding its requests for necessary and relevant information, by responding promptly to CFA's requests for information.

Dated: _____

TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA FACULTY ASSOCIATION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-644-H PROPOSED DECISION (3/26/03)

Appearances: Rothner, Segall & Greenstone by Glenn Rothner, Attorney, for California Faculty Association; Elisabeth Sheh Walter, University Counsel, for Trustees of the California State University.

Before Ann L. Weinman, Administrative Law Judge.

PROCEDURAL HISTORY

A union representing faculty members claims that the employer, a university, unlawfully failed its duty to provide certain information requested by the union, and unlawfully refused to allow access to certain other information. The employer contends that some information was not provided because the union failed to respond to its requests for clarification and confirmation, and that access to certain other information was denied because the employer had already compiled the information and the union refused to pay the agreed-upon cost.

On August 21, 2001, the California Faculty Association (CFA) filed an unfair practice charge against Trustees of the California State University (CSU) for violations of the Higher Education Employer-Employee Relations Act (HEERA).[1] A first amended charge was filed on September 12, 2001, and a second amended charge on January 7, 2002, alleging in part that

[1] HEERA is codified at Government Code section 3560 et seq.

CSU ignored CFA's request for information regarding voluntary work overload. The charge also alleges that CFA requested information regarding the Faculty Merit Increase Program (FMI), that the parties negotiated regarding the costs CFA would pay for the production of this information but failed to reach agreement, and that CSU thereafter refused CFA's request for access to the information.[2] On May 6, 2002, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that CSU failed to provide CFA with the requested work overload information and refused to grant CFA access to the requested FMI information, in violation of Government Code section 3571(a) and (c).[3]

CSU denies any wrongdoing. It contends that it could not provide the work overload information until CFA responded to its request for clarification on the specific type of information sought, and that it still cannot provide the information until CFA confirms that it will pay the costs and wants CSU to proceed. As to the FMI data, CSU contends that an agreement was reached that CFA would pay the actual costs of production, that CSU gathered the data in reliance on the agreement, that CFA has refused to pay the costs, and that CFA is therefore not entitled to the data or access to it.

An informal conference was held on August 8, 2002, but the matter was not resolved.

Formal hearing was held at the PERB offices in Los Angeles on November 12, 13, and December 4, 2002, before the undersigned. After the filing of post-hearing briefs, the matter was submitted for decision on March 11, 2003.

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[2] The charge contained other allegations which were withdrawn by CFA.

[3] HEERA section 3571(a) makes it unlawful for a higher education employer to "interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter." Section 3571(c) makes it unlawful to "[R]efuse or fail to engage in meeting and conferring with an exclusive representative."

FINDINGS OF FACT

CSU is a higher education employer within the meaning of HEERA section 3562(g). CFA is an employee organization within the meaning of section 3562(f)(1). At all relevant times, CFA has been the exclusive representative, within the meaning of section 3562(i), of an appropriate statewide unit consisting of approximately 20,000 of CSU's full-time and part-time teachers, counselors, and library personnel employed at CSU's 23 campuses.

The most recent Memorandum of Agreement between the parties prior to the events herein (the Agreement) contained certain provisions regarding the furnishing of information;[4] there is no contention that CSU failed these contractual obligations. However, between the

[4] Section 6.11 of the Agreement reads in part as follows:

> Upon the request of CFA, employee lists including those generated by PIMS and other public information shall be provided to CFA as soon as reasonably practicable. ... The cost of such employee lists or public information shall be borne by CFA except as provided elsewhere in the Agreement.

Section 31.29 reads in part as follows:

> For each year that there are [FMI's], the CSU shall provide to the CFA ... a report containing a list by campus of individual faculty unit employees receiving [FMI's], the amount of each increase, and the total funds expended on the increases. ... In addition, a list of individual faculty unit employees receiving [FMI's], their rank, the amount of the increase received, and their department shall be made public on each campus. ... Awards shall also be reported by amount of increase, gender, and ethnicity but without individual names.

commencement of negotiations for a new contract and its execution,[5] disputes arose regarding CFA's requests for certain information; several letters were exchanged and conversations held between CFA's Research Specialist Andrew Lyons (Lyons), his superior, Consultant Ed Purcell (Purcell), and CSU's Assistant Vice Chancellor, Human Resources, Samuel Strafaci (Strafaci). It is these disputes which inform these proceedings.

Weighted Teaching Unit Information

The Agreement contained, as did the parties' prior agreements, an article entitled "Workload", which set forth general guidelines for the professional responsibilities, assignments, and scheduling of CSU's faculty, whose worktime is measured in Weighted Teaching Units (WTUs). The standard for tenured faculty was twelve WTUs, and fifteen WTUs for temporary faculty. In addition, a Memorandum of Understanding (MOU), which has remained in effect since its execution in 1983/1984, provides that faculty members may engage in "voluntary work overload," i.e., work without pay.

During the early 2001 negotiations, CFA had submitted a proposal for changes in the Workload article; the proposal did not mention voluntary work overload. However, by letter of May 10, 2001,[6] CFA notified CSU that upon reaching a new contract, "CFA will expect that all faculty working in excess of the standard 15 WTU workload ... be paid at their appropriate salary rate for all such work." CSU responded by letter of May 22, stating that "CFA cannot unilaterally change any campus practice," as change could occur only by agreement of the parties through negotiations, or unilaterally by CSU after impasse resolution proceedings,

[5] The parties commenced bargaining for a successor contract in the spring of 2001; impasse was declared in July; mediation and fact-finding were pursued; the parties then resumed negotiations and executed a new contract in March 2002.

[6] All dates hereafter refer to the year 2001 unless otherwise specified.

should the parties reach impasse. In a letter dated May 27, CFA clarified that its intention was to negotiate changes in the overload practice and to terminate the 1983/84 MOU. In that letter, CFA requested the following information:

> ... a list of all faculty who in the current semester or quarter teach in excess of 12 WTU's ... in tenure track positions or 15 WTU's ... in temporary positions. Please include in this list the campus and department of each employee listed, the amount and nature of the overload in question, and the compensation (if any paid.).

CSU made no response to this request, and CFA did not mention it again, nor did it raise the issue of voluntary work overload until, in CFA's Request for Impasse Determination submitted to PERB on June 19, it listed "Overload Payments" as one of the disputed issues. However, during impasse resolution proceedings as well as during the subsequent resumption of bargaining, CFA did not mention its information request or the issue of voluntary work overload. CFA contends it could not make a legitimate proposal on work overload because CSU had not provided the requested WTU information. During the resumption of bargaining, Strafaci finally responded to CFA's May 27 request by email of September 27, in which he asked Purcell whether CFA wanted the data only for the time period after the Agreement expired, or also for the time period during which the Agreement was still in effect. In testimony, Strafaci admitted that his response was belated. However, he defended the lapse in time on the grounds that when CFA sent its May 27 letter, CSU was busy filling other information requests from CFA as well as from labor organizations representing other units of employees, that CSU and CFA were at the "peak" of their negotiations, and that it was CSU's busiest time of year.

Having received no response from CFA, Strafaci gave Purcell a copy of his September 27 email at the parties' November 9 bargaining session; Purcell claimed he had not previously received it, and there is no evidence to the contrary. Accordingly, I find that CFA

did not receive Strafaci's September 27 email until November 9. By letter of November 11, Purcell clarified that CFA would accept overload information for only the spring and fall quarters of 2001. Strafaci claims that he was later informed by various campuses of the difference between WTUs earned during direct student instruction and those earned during non-teaching duties. Thus, by letter to Purcell dated January 14, 2002, Strafaci said he assumed Purcell wanted only direct instruction data, and asked Purcell to confirm his assumption before CSU began to collect the data. Receiving no response, Strafaci sent another letter to Purcell dated February 18, 2002, again asking for clarification. In this letter, Strafaci informed Purcell that data for the spring quarter 2001 could be provided quickly, but data for the fall quarter 2001 would not be available until late August/early September 2002, and that the estimated total cost would be $928, based on 16 hours' work by staff with salaries of $50 per hour.

By letter of August 20, 2002, Strafaci acknowledged Purcell's verbal clarification that CFA wanted only direct instruction data. Strafaci testified that Purcell had not made this clarification until shortly before his August 20 letter. In contrast, Purcell testified that he gave Strafaci a verbal clarification after his January 14 letter but before his February 18 letter; however, Purcell did not provide any written substantiation of this conversation. Further, CSU's February 18 letter would make no sense if Purcell had already responded to the January 14 letter. Accordingly, I do not credit Purcell in this regard, but find that he did not clarify the request until shortly before August 20.

Strafaci's August 20 letter also provided estimated costs for production of the WTU data and asked for CFA's confirmation that it would pay the costs and that CSU should proceed with gathering the data. CFA has not responded to the August 20 letter, and CSU has not produced the WTU data.

FMI Information

The Agreement also contained provisions for FMI.[7] On April 2, during contract negotiations, Lyons, by letter to Strafaci, requested 21 items of information including the following:

> 21. An electronic data file in Microsoft Excel format containing the following information for period 3 (2000/01) of the FMI program: faculty name, faculty identifier, department, campus, faculty rank (class code and class title), gender, ethnicity, FMI application status (whether or not the faculty member applied for a FMI award), FMI award status (whether or not the faculty member received an FMI award, Department-level FMI award, Dean-level FMI award, President-level FMI award), Appeal status (whether or not the faculty member appealed his/her FMI award), and Final FMI.

Strafaci responded by letter of April 16, describing generally what efforts would be needed to compile each item, approximately how long it would take, and the estimated total cost for several items;[8] no breakdown was given for item 21. In the letter, Strafaci requested CFA to confirm that it would pay "the associated reasonable costs." He also noted that some of the data, including FMI data, had already been included in the monthly tapes which CSU had periodically provided CFA pursuant to section 31.29 of the Agreement. However, although CSU's compliance with this section, as well as with section 6.11, is not contested, at no time did either CSU or CFA claim that the FMI data requested in item 21 was covered by either of

[7] The parties' new agreement does not contain an FMI program.

[8] CSU believed some of the items would be easy to produce, thus no costs would be involved. According to past practice, when complex or voluminous data was requested, CSU would notify CFA of the expected cost, CFA would agree to pay, CSU would gather the data and bill CFA, CFA would pay the bill, and CSU would then turn over the data. Pursuant to a side-agreement between the parties, CSU had previously provided FMI data under section 31.29 of the Agreement and had not charged CFA; that side-agreement did not extend to the 2000-2001 school year.

these sections or that the Agreement required CFA to bear the cost. To the contrary, Strafaci acknowledged that item 21 seeks data in addition to that required by the Agreement.

In a letter dated April 16, Lyons requested the following accounting for the items sought on April 2:

> ... please provide the CFA with a detailed accounting as to how you arrived at the estimated amounts ... for each information item ... total number of pages ... charge per page ... estimated number of person hours ... hourly wage paid ... any other applicable costs. [Emphasis supplied.]

By letter of April 25, Strafaci explained that his estimates were based on a $50 per hour wage rate plus benefits, and a $.25 per page copy cost.

On May 7, the parties exchanged several letters by facsimile transmission: [9]

(1) Lyons wrote that CFA "requests that you proceed in processing the following information request items," basically restating the April 2 request. Lyons also requested the following:

> Please maintain a detailed work log that tracks the number of hours Chancellor's Office employees spend on accumulating this data. Please forward a detailed accounting of the actual costs of completing this request to CFA. [Emphasis supplied.]

(2) Strafaci sent Lyons a letter providing for CFA's signature to its agreement to pay "for the actual cost of collection of the data." According to Strafaci, when he had previously presented Lyons with certain other requested data, Lyons reviewed it, complained it was not in the proper form, questioned its usefulness, and refused to pay for it; CSU reconfigured the data in a different form and provided it to CFA at no cost. Thus, Strafaci

[9] It appears that the facsimile transmissions were in the chronological order cited herein; however, it is not clear in what order the letters themselves were written.

wanted to ensure that CFA was committed to paying for the remaining items before he ordered them produced.

(3) In yet another letter of the same date, Lyons told Strafaci that:

> [CFA] agrees to pay for the actual cost of the collection of data requested per the May 7, 2001 letter ... provided the costs assessed accurately reflect the work performed and the CFA is provided with a detailed accounting as to how the actual costs were calculated. Along with the accounting, please include a work log tracking the number of hours Chancellor's Office employees spend on the various tasks related to collecting this data. [Emphasis supplied.]

(4) Purcell also wrote to Strafaci, stating in part:

> This will serve as the CFA response to your April 25 letter to Mr. Lyons concerning the costs of providing CFA with various pieces of information relevant to the current bargaining effort.
>
> Although we understand that the costs cited by you are only estimates, these estimates appear exorbitant to us and not reflective of real costs. Never-the-less, CFA is prepared to reimburse the CSU for its actual costs in producing all information requested previously by the Union. ...
>
> Noting that your estimates are itemized according to each individual Union request, we will expected [sic] from you an itemized bill for each piece of data or document provided which should include the name of the person(s) performing the work in question, said employee's wage rate ... and the number of hours required. We will also expect to receive the detail of any other costs which you seek to assess such as the "associated benefit" costs referenced in your letter. Please also provide detail[s] substantiating your statement that photo copying costs are $.25 per page. ...
>
> Please continue to work with Mr. Lyons concerning any of the specifics of the information request or your response. Based on this confirmation of the Union's desire to proceed, we will expect the data requested to be transmitted to the Union on the schedule previously referenced by you. [Emphasis supplied.]

By letter of May 16, Strafaci questioned the basis for Purcell's statements that the CSU estimates appeared "exorbitant" and "not reflective of real costs." He assured CFA that CSU

would provide the total number of hours, as well as the salary and benefit cost, of each employee gathering each item of data, and that the $.25 per page was "consistent" with the Public Records Act. Strafaci also stated, in the last paragraph:

> Therefore, I believe that we have an agreement on the manner in which the CSU will bill the CFA for the actual cost of producing this data. If the CFA is willing to reimburse the CSU when we present the billings to the Union as noted above, then we will provide the information that has been gathered. Please be advised that if the Union is not willing to provide payment upon receipt of the billing, then we will not provide the information. We will now begin the production of the data pursuant to these conditions. (Emphasis supplied.)

Purcell responded on May 27, stating in part:

> We apparently disagree about your cost estimates, but CFA has conceded that they are only estimates. The proof here will be in the pudding as is sometimes said. We trust that your billing will contain the detail requested so that CFA can verify the charges in question.
>
> If the last paragraph of your letter is, in fact, its purpose, there may be a problem. Much, if not all, of the information sought by the Union is information to which it is entitled under HEERA and not subject to legitimate charge. Never-the-less, the Union in good faith has indicated a willingness to pay subject to a verification of the billing. That verification will not be possible until both the material sought and the billing is received. (Emphasis supplied.)

On May 30, Strafaci presented Purcell with a detailed "billing breakdown" of several other items requested by CFA on May 7, not including item 21, for a total cost of approximately $3,300. Responding by letter of the same date, Purcell stated that the billing "does not meet previously established standards for verification," principally because it did not contain employee names or a "substantiation" of their wage rates, which CFA required. Purcell accused Strafaci of "hold[ing] this data hostage" to CFA's prior payment without CFA

first receiving the required billing details or verification that the data "is what was requested or has produced usable results." In closing, Purcell stated:

> In addition to the detail requested above, I request that Mr. Lyons be allowed to review the material which has been generated to verify its contents and usefulness. Upon this verification and the billing details previously referenced, CFA will pay the appropriate amount. [Emphasis supplied.]

In turn, Strafaci, by letter of June 5, accused Purcell of raising new conditions, i.e., that CFA would not pay for the data until the billing was verified, that the billing could not be verified until after CFA received the data, and that CSU provide the names of the employees who compiled the data. Strafaci stated that he would not provide the employees' names; however, in order to resolve the matter, he would allow Lyons to review the data. After this review, and after a modified request consolidating certain items, CFA paid the bill and received the data.

By letter of August 1, Strafaci provided a "sample" of the FMI data showing the form in which it would be provided. The letter also contained the first cost breakdown for item 21 in an attachment entitled "Cost Estimate To Provide FMI Data To CFA,"[10] showing job classifications, hourly salaries, hours worked, and totals for each campus, for a grand total of over $39,000, which, the letter noted, would be increased to $45,000 with the addition of fringe benefit costs.[11] It is undisputed that CFA understood that filling its request would be costly, as CFA wanted it in a form different from that which had been historically used to

[10] Strafaci testified the attachment was mistitled, as it showed not estimates but actual costs already incurred. And in its post-hearing brief, CSU noted that the body of the August 1 letter referred to the attachment as "actual salary costs." I agree with CSU, and I find that the attachment, read along with the letter itself, showed actual costs, not merely estimates.

[11] The letter also stated that additional costs would be incurred by those few campuses which had not yet begun producing the data.

produce the FMI "tapes" under section 31.29 of the Agreement, thus a new template had to be developed, and as production of the data would require extensive work at each individual campus. However, Purcell testified, CFA had serious concerns about the cost breakdown in Strafaci's August 1 letter, to wit: it did not contain the names of the employees who produced the data; work hours appeared to be rounded off rather than calculated in fractions, as in, e.g., attorney billings; and there were large discrepancies in the amounts charged by the various campuses, with some larger campuses charging in the hundreds of dollars while some smaller campuses charged in the thousands.[12] There is no evidence that CFA communicated these concerns to Strafaci.

Strafaci testified, in general terms, to two conversations with CFA agents after his August 1 letter. One conversation was with CFA's general manager, who suggested that CSU split the cost; Strafaci rejected the suggestion. The other conversation was with Lyons, who also objected to the cost and claimed the parties were at impasse; Strafaci responded that they had already bargained the cost and reached agreement that CFA would pay actual costs. By letter of August 14, Lyons accused CSU of failing to bargain in good faith about the cost[13] for item 21, and stated as follows:

> It is clear that the parties will not be able to agree upon a reasonable charge for the FMI data. As such, CFA request [sic] access to records from which we can reasonably compile the incremental FMI data sought in request item #21. Specifically, the CFA requests access to the same records campus personnel used ... and access to any Chancellor's Office databanks or files. ...

[12] Strafaci testified that different campuses have different levels of technology, thus it may take a large, highly technical campus far less time to produce the data than a small campus without sophisticated technology.

[13] CFA has consistently taken the position in these proceedings that it is not contesting the reasonableness of CSU's cited costs.

> Please contact me with details as to how the CSU will make the appropriate records available to CFA and how CFA personnel may go about accessing such records. [Emphasis supplied.]

By August 15 letter to Lyons, Strafaci wrote that "we have already concluded our bargaining regarding whether or not the CFA will pay for the cost of producing the FMI data – and all the other data that you have requested." As evidence of the parties' cost agreement, Strafaci cited the May 7 letters of both Lyons and Purcell, as well as CFA's payment for, and receipt of, the other requested items on the same basis as the item 21 data was being offered. Strafaci noted that the law "does not require that the CSU provide unlimited access to our work files so that the CFA may engage in its own collection efforts," that CSU had gathered the item 21 data in reliance on the parties' agreement, and that CFA should now honor that agreement and reimburse CSU for its work.

CFA has not paid any costs for the production of the FMI data, and CSU has given CFA neither the data nor access to the underlying records.

ISSUES

1. Did CSU unlawfully fail to provide CFA with requested WTU information?
2. Did CSU unlawfully refuse CFA access to requested FMI information?

CONCLUSIONS OF LAW

WTU Information

The exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation, and failure to provide such information is a per se violation of the duty to bargain in good faith. (Chula Vista City School District (1990) PERB Decision No. 834; Stockton Unified School District (1980) PERB Decision No. 143 (Stockton).) PERB uses a liberal standard, similar to a discovery-type standard, to determine relevance of the requested information. Thus, in Stockton, PERB noted that:

> In defining the parameters of "necessary and relevant information" to which the representative is entitled, the courts have concluded that information pertaining immediately to mandatory subjects of bargaining is so intrinsic to the core of the employer-employee relationship that it is considered presumptively relevant and must be disclosed unless the employer can establish that the information is plainly irrelevant and can provide adequate reasons why it cannot furnish the information. [Citations; emphasis in original.]

And in Los Angeles Unified School District (1994) PERB Decision No. 1061, PERB stated:

> ... an exclusive representative is entitled to information sufficient to enable it to understand and intelligently discharge its duty to represent bargaining unit members. ...

Here, CSU never questioned CFA on the necessity or relevance of its request for the WTU data concerning voluntary work overload. However, in its post-hearing brief, CSU argues that the data was not necessary, as CFA never made a proposal regarding voluntary work overload, nor did it ever bring that issue to the table. CFA contends that its May 10, 2001, letter and its request for impasse determination show that it intended to bargain this issue, but that it was unable to make a legitimate proposal because CSU had not provided the requested WTU data.

In this regard, I do not agree with CSU's argument, as it is made only in hindsight; rather, I am persuaded by CFA's contention that, if the WTU data had been timely provided, CFA might very well have made a proposal to delete the voluntary work overload program. As to relevance, the request seeks information on compensation paid to bargaining unit employees, clearly a mandatory subject of bargaining. Thus, there is a presumption of relevance (Stockton; Compton Community College District (1990) PERB Decision No. 790 (Compton)), which CSU does not contest. Accordingly, I find the request for WTU data to be necessary and relevant to CFA's duty to bargain on behalf of its unit members, and thus entitled to the information.

I now consider CSU's failure to provide the information. The National Labor Relations Board (NLRB), whose decisions PERB appropriately applies as precedent when analyzing bargaining obligations (San Mateo County Community College District (1979) PERB Decision No. 94), holds that if a union's request for information is ambiguous, the employer must seek clarification. (Keauhou Beach Hotel (1990) 298 NLRB 702 [134 LRRM 1245]; E.I.DuPont de Nemours & Company, Inc. (1988) 291 NLRB 759 [131 LRRM 1390].) Following that premise, PERB has held that once the employer asks for clarification, the union must clarify its request prior to the employer's obligation to fulfill it. (See, e.g., Oakland Unified School District (1982) PERB Decision No. 275.) However, the employer must respond promptly; it cannot simply ignore a request. (State of California (Department of Corrections) (2000) PERB Decision No. 1388-S.) Thus, a delay of six months (Azusa Unified School District (1983) PERB Decision No. 374) and even one as short as two months (Colonial Press, Inc. (1973) 204 NLRB 852 [83 LRRM 1648]), without employer explanation, have been held to be failures to negotiate in good faith.

CSU claims that it only caused one excusable delay, i.e., from CFA's letter of May 27 to CSU's response of September 27, and that all other delays were caused by CFA's failure to respond to its requests for clarification. In that regard, Compton is instructive. There, PERB held that the employer's delay of five months was unlawful, and discredited its defense:

> [T]he general statement by the District's personnel director that his department's workload was heavy does not explain why the clerical task of gathering all the information could not be completed for almost five months. ...
> (Compton at p. 5.)

Here, CSU's first delay lasted four months. CSU's claim that it was very busy filling other information requests and that it was at the "peak" of negotiations is not a sufficient excuse for making no response at all (Compton); at the very least, CSU could have explained its situation

to CFA and sought CFA's agreement to postpone producing the WTU data. Further, CSU caused another delay of over two months, from CFA's first clarification on November 9 to CSU's request for a second clarification on January 14, 2002. CSU offered no explanation for this second delay.

Accordingly, I find that CSU failed its duty to meet and confer in good faith with CFA by unlawfully delaying its first response to CFA's information request,[14] in violation of HEERA section 3571(c). I further find that by this conduct, CSU interfered with right of the unit employees to be represented by CFA, in violation of HEERA section 3571(a).

However, I do not find that CSU unlawfully failed to provide the information, as CFA has not responded to CSU's letter of August 20, 2002, confirming that it still wants CSU to proceed with gathering the WTU data and that it will pay the costs.

FMI Information

It is well-settled by PERB that if the employer demonstrates substantial cost involved in providing the information in the precise form requested, the parties must bargain in good faith as to who will bear those costs. (Los Rios Community College District (1988) PERB Decision No. 670.) Here, CSU contends that it bargained in good faith with CFA, the parties reached agreement that CFA would pay the cost, CSU compiled the data, but CFA has refused to pay for it. For its part, CFA does not question the high cost of producing the data. However, CFA contends that, while there was an agreement "in principle" that CFA would pay the actual costs, no agreement was reached "in practice" as to what cost details would be provided and

[14] "Delay" was not specifically alleged in the charge or complaint. However, PERB has held that an unalleged violation may be found by the trial judge provided it is intimately related to the subject matter of the complaint, part of the respondent's same course of conduct, and was fully litigated at the hearing, with respondent having the opportunity to examine and cross-examine witnesses. (Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.) I find that the instant hearing fulfills these requirements.

whether CFA would be able to review the data before paying for it. In its post-hearing brief, CFA characterized this failure to reach agreement as an impasse.[15] Alternatively, CFA contends that even assuming arguendo an agreement was reached, CFA's verification of the cost was a condition precedent to its paying for the data, and CSU has not provided sufficient details to do this, as CSU did not provide either the names of employees or a proper work log. CFA argues that under either theory, it should be given access to the underlying FMI records.

Thus, the first issue which must be decided is whether the parties reached an agreement on the cost of producing the FMI data. "[T]he essential question to be determined is whether the parties reached a meeting of the minds on all material and substantive terms." (Transit Service Corp. et al (1993) 312 NLRB 477, 481-482 [145 LRRM 1295] (Transit Service).) In the Transit Service case, the issue was whether the employer had unlawfully refused to execute a collective bargaining agreement. It was undisputed that the parties had agreed on all other terms; however, they each believed a different date had been chosen as the effective date of the agreement. Thus, while "technical rules of contract law do not necessarily control the formation of a collective-bargaining agreement," and an agreement may be inferred by other

[15] The NLRB has held that if the parties fail to reach agreement on the costs for providing requested information, the requesting party is entitled to access to the underlying records. (Safeway Stores, Inc. (1980) 252 NLRB 1323 [105 LRRM 1420], enf. (10th Cir. 1982) 691 F.2d 953 [111 LRRM 2745], citing Food Employer Council, Inc. (1972) 197 NLRB 651 [80 LRRM 1440].) PERB has not yet been presented with this issue, but I take note that in the Proposed Decision in Regents of the University of California (2001) PERB Decision No. HO-U-781-H [25 PERC 32051], the administrative law judge interpreted the NLRB cases as requiring access after impasse is reached. No exceptions were filed to this Proposed Decision, thus, it became final, but is non-precedential. Nevertheless, both parties cite the Proposed Decision in their post-hearing briefs, with CSU presenting an alternate theory that, assuming arguendo the parties did reach impasse, CFA did not seek the required impasse-resolution proceedings, thus it is not entitled to access to the records. However, in light of my final conclusion, supra, I need not reach the issue of what should happen under HEERA if the parties failed to reach agreement.

conduct of the parties, the NLRB utilized contract law principles in finding that the parties made a "mutual mistake" as to the effective date, and held that as there was no meeting of the minds, there was no contract. (See also, Intermountain Rural Electric Association (1992) 309 NLRB 1189, 1192-1194 [142 LRRM 1355].)

As to contract law, in Witkin, Summary of California Law, Ninth Edition (1987), Vol. I, Contracts, p. 172, the author quotes several cases for the proposition that the law will "liberally interpret...agreements and non-technical language" in upholding the existence of agreements:

> If the parties have concluded a transaction in which it appears that they intend to make a contract, the court shall not frustrate their intention, if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left.
> Rivers v. Beadle (1960) 183 Cal. App. 2d 691, 695.
>
> The law does not favor but leans against the destruction of contracts because of uncertainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable intentions of the parties if that can be ascertained.
> McIllmoil v. Frawley Motor Co. (1923) 190 Cal. 546, 549.
>
> The trial court properly refused ... an overly meticulous insistence on completeness and clarity of written expression.
> Masterson v. Sine (1968), 68 Cal. 2d 222, 224-225.

In support of its position that there was no cost agreement "in practice," CFA points to the following: Lyons' letter of May 7 asking for a work log; Purcell's letter of May 7 asking for the names of employees who compiled the data and a detailed substantiation of the $.25 per page copying cost; and Purcell's letter of May 27 stating that "verification [of cost] will not be possible until both the material sought and the billing is received." CSU failed to provide a work log or any detailed substantiation of copying cost, refused to provide employee names, and insisted CFA pay for the data before seeing it. Thus, CFA argues, there was no agreement

as to how CFA could verify the cost. Further, there could not have been agreement on the cost itself, as CSU did not present the first cost breakdown until August 1, 2001, after it had compiled the data.

For its part, in support of an agreement having been reached, CSU relies on Lyons' two May 7 letters, one of which told CSU to "proceed in processing the ... information request items," including item 21, the other of which stated that CFA "agrees to pay for the actual cost of the collection of data requested," and on Purcell's May 7 letter stating CFA's "confirmation of the Union's desire to proceed." Thus, in accordance with past practice, CSU gave CFA a cost breakdown and a sample of the data, gathered all the data, and billed CFA for it.

CSU further contends that it gave CFA sufficient information with which to verify the cost. According to CSU, the names of employees who compiled the data were unnecessary so long as their classifications and wage/benefit rates were provided. CSU argues that it is ludicrous to believe that CFA intended to contact each employee to verify their salaries and hours worked. As for work logs, CSU claims that most businesses, e.g., construction companies, do not provide these nor do they break work hours down into fractions; this is done only by attorneys. Further, CSU notes that CFA requested logs only for work done by employees of the Chancellor's office, none of whom did any of the work on item 21; all the work was done on the various campuses. And as for copying cost, CSU argues that its notification to CFA that $.25 was consistent with the Public Records Act was sufficient verification. CSU notes that neither employee names, nor work logs, nor further justification of copy costs had ever been requested or provided to verify any data which CFA paid for, including the data requested in its April 2 letter, other than item 21.

I find that an agreement was reached. CFA had consistently given CSU the "go-ahead" to proceed with producing the all of the data requested on April 2, including item 21, and

assured CSU that it would pay the "actual costs," without suggesting that any cap be put on the total, and notwithstanding that it did not know what those costs would be and that neither its request for a work log or the names of employees had been confirmed by CSU. Further, CFA paid for the other items without receiving employee names or work logs. Thus, I do not find that CFA considered employee names and work logs to be essential elements of the agreement. Rather, I find that the agreement assumed CSU would provide a reasonable accounting.

Nor do I find the timing of CFA's obligation to pay vis-à-vis its receipt of the data to be an essential element of the agreement. In this regard, I note that when presented with the April 2 data other than item 21, CFA asked to review it before paying, was given that opportunity, and with one exception paid the billing. However, CFA did not request an opportunity to review the FMI data before paying for it. Nor did CFA raise any objection to the sample FMI data provided in CSU's August 1 letter. Thus, apparently CFA was satisfied that the data had been, or would be, produced in the requested format. Nor did CFA raise any objection, upon receipt of the August 1 letter, to the absence of employee names or work logs. What CFA did object to was the cost. However, long before the August 1 letter, CFA had confirmed that it would pay "actual costs," without knowing what those costs would be. Thus, apparently CFA was satisfied that CSU would charge a reasonable cost. Further, as noted supra, CFA does not now contest the reasonableness of the cost for item 21. Thus, I do not find that CFA had any obligation after August 1 to bargain regarding costs.

Accordingly, I find that the parties "reached a meeting of the minds on all material and substantive terms" of a cost agreement on item 21. (Transit Service.) The terms of that agreement were that CSU produce and present the information sought by CFA on April 2, including item 21, and that CFA would reimburse CSU for its actual costs, provided that CFA was given a detailed accounting from which it could verify the costs. I also find that CSU

fulfilled its part of the agreement, by providing an accounting which included employee classifications, hourly wages, hours worked, and totals for each campus. This accounting was both reasonable and sufficient to enable CFA to verify the costs. Even assuming arguendo that verification was a condition precedent, I find that this condition was satisfied. Thus, I cannot find that CSU violated its duty to meet and confer in good faith with CFA, or that, under any theory, CSU was obligated to allow CFA access to the FMI records.

REMEDY

HEERA section 3563.3 gives PERB:

> ... 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 ... as will effectuate the policies of this chapter.

CSU twice delayed responding to CFA's request for WTU information, in violation of HEERA section 3571(a) and (c). Thus, it is appropriate that CSU be directed to cease and desist from its unfair practice, and to affirm that it will meet and confer in good faith with CFA regarding its requests for necessary and relevant information. (Trustees of the California State University (1987) PERB Decision No. 613-H; Azusa Unified School District, supra, PERB Decision No. 374.)

It is also appropriate that CSU be required to post a notice incorporating the terms of the order, signed by an authorized agent of CSU. It effectuates the purposes of HEERA that employees be informed by a notice, signed by an authorized agent, that the respondent has acted unlawfully, is being required to cease and desist from its unlawful activity, and will comply with the order. (Ibid.)

CSU argues, on brief, that it should be awarded equitable relief, and that CFA should be ordered to pay as billed for the FMI data. However, there is no charge or complaint against CFA in these proceedings, and it not within PERB's authority under HEERA section 3563.3 to

order a remedy against a party who is not charged and found to have committed an unfair practice.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is hereby found that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a) and (c), by its delays in responding to a request for Weighted Teaching Unit (WTU) information made by the California Faculty Association (CFA).

However, those portions of the complaint alleging that CSU failed to provide CFA with the WTU information, and failed to provide CFA with access to underlying records regarding the Faculty Merit Increase program (FMI), are hereby dismissed.

Therefore, pursuant to HEERA section 3563.3, it is hereby ORDERED that CSU, its governing board and its representatives, shall:

A. CEASE AND DESIST FROM:

Failing to meet and confer in good faith with CFA regarding its requests for necessary and relevant information, by delaying responses to CFA requests for information.

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

1. Meet and confer in good faith with CFA regarding its requests for necessary and relevant information, by responding promptly to CFA's requests for information;

2. Within ten (10) working days after service of a final decision in this matter, post at all work locations where notices to unit employees employed at CSU customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must

be signed by an authorized agent of CSU, indicating that CSU will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive working days. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material;

3. Upon issuance of a final decision in this matter, make written notification of the actions taken to comply with this Order to the Sacramento Regional Director of PERB 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 Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover

Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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 Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Ann L. Weinman
Administrative Law Judge