STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY (SAN MARCOS), Respondent.	Case No. LA-CE-619-H PERB Decision No. 1635-H June 4, 2004

Appearances: Brian Young, Labor Relations Representative, for California State Employees Association; Marc D. Mootchnik, University Counsel, for Trustees of the California State University (San Marcos).

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Trustees of the California State University (San Marcos) (CSU) to a proposed decision (attached) of an administrative law judge (ALJ). The proposed decision found that CSU violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by unilaterally changing its procedures for determining employee performance evaluation ratings without providing the California State Employees Association (CSEA) an opportunity to bargain.

[1]HEERA is codified at Government Code section 3560, et seq. Unless otherwise noted, all statutory references are to the Government Code.

The Board has reviewed the entire record, including the ALJ's proposed decision, CSU's exceptions and CSEA's response. The Board finds the ALJ's findings of fact to be free of prejudicial error and adopts them as its own. The Board's conclusions of law are provided below.

DISCUSSION

Unilateral Change

In determining whether a party has violated its bargaining obligations by unilaterally changing employees' terms and conditions of employment, PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy; (2) the change concerns a matter within the scope of representation; (3) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations; and (4) the change has a "generalized effect or continuing impact" on the terms and conditions of employment of bargaining unit members. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

It is undisputed in this matter that employee evaluations and merit systems are matters within the scope of representation. (Modesto City Schools (1983) PERB Decision No. 347; Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District (1984) PERB Decision No. 375; see also, NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177] (merit increases).) It is also undisputed that in early 2001, CSU changed the performance evaluation (PE) and overall rating (OR) procedures, thereby changing the way

merit salary increases are determined, without giving CSEA prior notice or opportunity to request bargaining. Specifically, CSU's new procedures changed the PE form to include two above-satisfactory rating categories. CSU also changed the OR procedures to allow different weights to be given to the various PE performance criteria instead of averaging the various scores as was done previously.

CSU argues that it did not change any policy, as the OR procedures implemented in late 2000 were intended to be temporary. However, CSU's argument misses the mark since the facts established that the new PE and OR procedures implemented in early 2001 differ from any system previously in existence at CSU San Marcos. Thus, it is irrelevant whether the procedures implemented in late 2000 were intended to be permanent or only temporary. The relevant point is that the new procedures constituted a change from any system that existed previously.

Accordingly, the Board finds that CSEA has established a prima facie case of a per se unlawful unilateral change.

Waiver

Since CSEA has established a prima facie case, the burden now falls upon CSU to establish an affirmative defense. In this regard, CSU contends that CSEA waived its right to bargain. It is well settled that an employer may take unilateral action if the exclusive representative waived its right to bargain. But any waiver of this right will not be lightly inferred. (Oakland Unified School District (1982) PERB Decision No. 236.) To show that an exclusive representative has waived its right to negotiate, there must be evidence of either "clear and unmistakable" language (Amador Valley Joint Union High School District (1978) PERB Decision No. 74), or of "demonstrable behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer." (San Mateo County

Community College District (1979) PERB Decision No. 94.) A waiver can be shown by inaction on the part of the exclusive representative (Los Angeles Community College District (1982) PERB Decision No. 252), but the evidence must indicate an intentional relinquishment of the union's right to bargain. (San Francisco Community College District (1979) PERB Decision No. 105.)

Here, CSU argues that both Article 10 of the collective bargaining agreement (CBA) and Section 20.21 of the addendum support its contention that CSEA waived its right to bargain. The Board disagrees. Article 10 of the CBA provides that employees shall be subject to periodic performance evaluations. However, this is not in dispute. Indeed, the evidence establishes that employees at CSU San Marcos have been subject to performance evaluations for some time. What is in dispute is whether CSEA waived its right to bargain over changes to the PE and OR procedures. Nothing in Article 10 demonstrates such a waiver.

Section 20.21 of the addendum is more on point. That section provides for the system-wide implementation of OR procedures. On this issue, Section 20.21 provides, in part:

> This procedure does not require campuses to modify existing performance evaluation forms unless existing forms do not have an overall rating. In such cases an overall rating must be determined and added or attached to the performance evaluation form.

As noted in the findings of fact, the PE procedures at CSU San Marcos did not include assigning an OR score at the time Section 20.21 of the addendum was signed. Accordingly, CSU San Marcos was one of the campuses required to develop procedures for the assignment of an OR score. Absent a waiver, CSU San Marcos would be required to bargain with CSEA over the development of these OR procedures. The issue then is whether CSEA waived its right to bargain by agreeing to Section 20.21.

On its face, Section 20.21 is silent on this issue. Indeed, nothing in Section 20.21 meets the standard of a clear and unmistakable waiver. Section 20.21 merely provides that an OR system "must be determined" but makes no mention that CSU could unilaterally implement such a system. In the absence of such a clear and unmistakable waiver, CSU has failed to meet its burden of proof.

The conclusion that CSU has failed to establish a waiver holds true even considering the extrinsic evidence offered at hearing. CSU's Labor Relations Manager and Chief Negotiator, Freya A. Foley (Foley), testified about the negotiations surrounding Section 20.21. Foley testified that the parties could not reach agreement at the main bargaining table over how OR scores were to be calculated. According to Foley, CSEA wanted to use a linear model where, as an example, the PE categories would be averaged to reach an OR score. CSU steadfastly refused, arguing that since the job duties differ, the various PE categories should be given different weights. Because no agreement could be reached, the parties only agreed, "That there would be an overall score, but we wouldn't agree to how the overall score was derived." Instead, the parties agreed that the five campuses which did not have OR scores in place would determine such procedures themselves. Thus, based on Foley's testimony, "the only agreement at the table, then, was that each campus would decide on its own."

Based on Foley's testimony, it is clear that during bargaining CSEA refused to agree to an OR system whereby different PE categories could be given different weights in the OR score. Yet, despite this fact, CSU asserts in this proceeding that CSEA knowingly waived its right to bargain by agreeing to Section 20.21. CSU provides no explanation why CSEA, after refusing to accede to CSU's demands at the bargaining table, would simply agree to waive its right to further negotiations.

Indeed, the Board finds that Foley's testimony actually undercuts CSU's position. Assuming, arguendo, that Section 20.21 was controlling, it requires that the performance evaluation be performed in accordance with Article 10's job-related criteria basis. CSU San Marcos does not explain why its new procedure diverts from the system-wide format. If the parties did not agree on a system-wide OR system, then CSEA's contention that Section 20.21 deferred the issue to subsequent negotiations is supported. Thus, the Board finds that Section 20.21 does not constitute a waiver of CSEA's right to bargain.

Admission of Evidence

Finally, CSU argues that the ALJ erred by refusing to admit into evidence a document authored by Brian Young (Young). CSU argues that the document constitutes an admission against party interest and/or that the statements contained in the document impeach Young's testimony. The Board agrees that the document should have been admitted into evidence. The fact that the document was intended as a draft and constitutes hearsay affects the weight given the evidence, not its admissibility. However, even if admitted, the document does not affect the Board's decision.

CONCLUSION

Based on all of the foregoing, the Board finds that CSU unilaterally changed its merit salary increase policy by changing the OR system at CSU San Marcos, and that by this conduct CSU failed its duty to meet and confer in good faith with CSEA, in violation of HEERA section 3571(c), and interfered with the rights of unit employees to be represented by CSEA, in violation of HEERA section 3571(a).

REMEDY

Section 3563.3 of HEERA provides:

> The board shall have 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.

Pursuant to this authority, PERB has broad authority to remedy unfair practices and fashion remedies to effectuate the purposes and policies of HEERA. Here, CSU unilaterally changed the system for calculating ORs for employees employed at CSU San Marcos, without giving CSEA prior notice and an opportunity to bargain regarding these changes, in violation of HEERA section 3571(a) and (c). The ordinary remedy in unilateral change cases is an order directing the respondent to cease and desist from continuing to promulgate or implement the unlawful change, to rescind the change and return to the status quo, and to meet and confer in good faith with the employee organization, upon its request, regarding matters within the scope of representation.

The Board is aware, however, of the potential disruption caused by an order to return to the status quo. (See Rialto Unified School District (1982) PERB Decision No. 209; Ventura County Community College District (2003) PERB Decision No. 1547.) Accordingly, the Board will stay its order to return to the status quo ante for 60 days so that the parties can negotiate over possible alternative remedies.[2] If the parties fail to agree to an alternative remedy after 60 days, CSU shall be required to return to the status quo ante.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the California State University (San Marcos) (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a) and (c) by unilaterally changing its policy concerning Merit Salary Increases (MSI) and by

[2]The Board believes that 60 days is ample time to complete negotiations. If for some unforeseen reason it is not, the stay may be extended by the Office of the General Counsel for good cause.

changing the system for calculating Overall Ratings (OR) for employees employed at its CSU San Marcos campus, without giving the California State Employees Association (CSEA) prior notice and opportunity to meet and confer regarding these changes.

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 CSEA regarding changes in policy affecting matters within the scope of representation;

2. Unilaterally changing its MSI policy and changing the system of calculating ORs for employees employed at CSU San Marcos, without giving CSEA prior notice and opportunity to meet and confer regarding these changes;

3. Promulgating the OR system unilaterally implemented at CSU San Marcos on April 1, 2001.

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

1. Rescind the OR system unilaterally implemented at CSU San Marcos on April 1, 2001. This order shall be stayed for 60 days to provide CSU and CSEA an opportunity to meet and negotiate over possible alternative remedies. If the parties cannot agree to an alternative remedy after 60 days, this order shall take effect.

2. Meet and confer in good faith with CSEA, upon its request, regarding changes in policy affecting matters within the scope of representation, including any changes to the OR system at CSU San Marcos;

3. 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. The Notice must be signed by an authorized agent of

CSU, indicating CSU 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 the Notice is not reduced in size, altered, defaced or covered with any other material.

4. 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 CSEA.

Chairman Duncan and Member Whitehead 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-619-H, California State Employees Association v. Trustees of the California State University (San Marcos), in which all parties had the right to participate, it has been found that the Trustees of the California State University (San Marcos) (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560, et seq. CSU violated HEERA section 3571(a) and (c) by unilaterally changing its policy concerning Merit Salary Increases (MSI) and by changing the system for calculating Overall Ratings (OR) for employees employed at its CSU San Marcos campus, without giving the California State Employees Association (CSEA) prior notice and opportunity to meet and confer regarding these changes.

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 CSEA regarding changes in policy affecting matters within the scope of representation;

2. Unilaterally changing its MSI policy and changing the system of calculating ORs for employees employed at CSU San Marcos, without giving CSEA prior notice and opportunity to meet and confer regarding these changes;

3. Promulgating the OR system unilaterally implemented at CSU San Marcos on April 1, 2001.

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

1. Rescind the OR system unilaterally implemented at CSU San Marcos on April 1, 2001. This order shall be stayed for 60 days to provide CSU and CSEA an opportunity to meet and negotiate over possible alternative remedies. If the parties cannot agree to an alternative remedy after 60 days, this order shall take effect.

2. Meet and confer in good faith with CSEA, upon its request, regarding changes in policy affecting matters within the scope of representation, including any changes to the OR system at CSU San Marcos.

Dated: _____

TRUSTEES OF THE THE CALIFORNIA STATE UNIVERSITY (SAN MARCOS)

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 STATE EMPLOYEES ASSOCIATION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY (SAN MARCOS), Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-619-H PROPOSED DECISION (10/21/02)

Appearances: Brian Young and Virginia Watts, Labor Relations Representatives, for California State Employees Association; Marc D. Mootchnik, Esq., University Counsel, for California State University.

Before Ann L. Weinman, Administrative Law Judge.

PROCEDURAL HISTORY

A union has alleged that a university campus unilaterally changed policies and practices of employee performance evaluations. In its answer, the university denies any wrongdoing.

The California State Employees Association (CSEA) filed an unfair practice charge against the Trustees of the California State University (San Marcos) (CSU) on May 11, 2001, and an amended charge on August 16, 2001. The Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint on September 12, 2001, alleging that CSU unilaterally changed its policy concerning Merit Salary Increases (MSI) by, in essence, changing the procedures by which employee performance evaluations are rated, in violation of the Higher Education Employer-Employee Relations Act (HEERA) [1] section 3571(a) and (c).

[1] HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

An informal settlement conference, held in the PERB offices on November 13, 2001, failed to resolve the matter.

A formal hearing was conducted in PERB's Los Angeles office on August 13, 2002, before the undersigned. After the filing of post-hearing briefs, the matter was submitted for decision on September 23, 2002.

FINDINGS OF FACT

CSU is a higher education employer as defined in HEERA section 3562(g). CSEA is an employee organization as defined in section 3562(f) and at all times relevant has been the recognized organization, as defined in section 3562(p), serving as the exclusive representative of the following units of CSU's classified employees: Unit 2, Health Care Support Services; Unit 5, Operations Support Services; Unit 7, Clerical/Administrative Support Services; and Unit 9, Technical Support Services. All four units are covered by the same collective bargaining agreement (Agreement).

Article 10 of the Agreement reads in part as follows:

> Employee Performance
>
> 10.1 Employees shall be subject to periodic performance evaluations. Such evaluations should be a review of the employee's performance and should be based upon job-related criteria.
>
> 10.9 The term "evaluator" as used in this Article refers to the appropriate administrator or the person designated by the appropriate administrator to conduct the performance evaluation of an employee. The evaluator shall be familiar with the regular duties of the employee.
>
> 10.10 Performance evaluations shall not be subject to Article 7, Grievance Procedure, unless the grievant alleges the terms of this Agreement have been violated, misinterpreted, or misapplied.

Historically at CSU's San Marcos campus (CSUSM), an employee received an annual performance evaluation (PE) on his/her anniversary date. It was usually written by the employee's direct supervisor, but often by a designated leadperson, who, although a unit member, had the most familiarity with the employee's regular duties. It was signed by the "evaluator," the Department Head, and the employee. The PE form listed several criteria of performance, each containing a hierarchy of standards from, e.g., "fails to meet the minimum requirements" to "exceeds reasonable expectations" for the evaluator to choose from, as well as space for the evaluator's comments. The form also provided a box for the evaluator's recommendation as to whether or not an employee was "eligible" for a Service Based Salary Increase (SBSI). SBSIs were merit increases which employees could receive in addition to contractual across-the-board wage increases, market adjustments, and shift differentials. Notwithstanding the evaluator's recommendation, SBSIs were totally within the discretion of management, there was no uniformity to their being granted, and there was no necessary relationship to the PEs.

At some time after the Agreement became effective, the parties engaged in formal bargaining and agreed upon an Addendum to the Agreement (Addendum), effective July 1, 2000 through June 30, 2001. At issue in this case is section 20.21 of the Addendum, which replaced the SBSI with a MSI. Its intent was to provide uniformity by ensuring that merit increases would be tied to PEs. Section 20.21 reads in part as follows:

> Merit Salary Increase
>
> a. A Merit Salary Increase is movement within a salary range based upon an overall annual job performance rating of satisfactory, its equivalent, or better. An overall rating is a comprehensive rating based on a review of all performance categories.

> c. Each employee shall receive a performance evaluation in accordance with Article 10, Employee Performance. This procedure does not require campuses to modify existing performance evaluation forms unless existing forms do not have an overall rating. In such cases an overall rating must be determined and added or attached to the performance evaluation form.
>
> h. The decision of the President, the president's designee, or other appropriate administrator as to who is to receive an MSI and the percent amount for each performance rating level of the MSI shall not be subject to Article 7, Grievance Procedure, unless the employee alleges that he or she did not receive the same percent increase...as other employees at the same performance rating level, or if the employee alleges that an existing overall rating was changed for the sole and express purpose of denying an MSI. Performance evaluations shall not be subject to Article 7, Grievance Procedure, unless the grievant alleges the procedures in the provisions of Article 10 or this Section have been violated, misinterpreted, or misapplied. [Emphasis added.]

Section 20.21 also provides that all employees with an overall rating (OR) at the satisfactory level receive a 1.2 percent MSI, employees above the satisfactory level receive a higher percent MSI to be determined by management, and all employees at the same OR level receive the same percent MSI.

When the Addendum became effective in July 2000, most CSU campuses already had ORs in place. However, five campuses, including CSUSM, did not have ORs, therefore those campuses had to determine OR procedures. Nothing in the Agreement or the Addendum specified how the OR procedures were to be developed or calculated; this was left up to each of the five campuses. At CSUSM at that time, PEs for approximately 130 unit employees had already been completed for the year 2000; PEs for the remaining 70 unit employees had not yet been completed but were at various stages of the process. Thus, in order to comply with the Addendum, an OR procedure had to be developed as quickly as possible.

In September 2000, representatives of CSUSM and CSEA met to discuss the matter. CSUSM first proposed that an administrator review the 130 PE's already completed and unilaterally assign ORs; CSEA rejected it. CSEA proposed, and in November, 2000, the parties agreed, on a system which assigned specific numerical values to each of the standards in the various PE performance criteria, as follows:

0	NA, or not adequate categories[2]
1	consistently fails to meet [minimum requirements]
2	sometimes below [minimum requirements] (needs improvement)
3	consistently meets [minimum requirements] (satisfactory)
4	consistently exceeds [minimum requirements]

Each performance criteria would carry the same weight, and the average of all the scores would constitute the OR. Whoever wrote the evaluation, even if a non-supervisory leadperson, would also average the scores to arrive at the OR. The PE form was changed to add the numerical values to the performance categories, and the term "evaluator" was changed to "rater;" no other changes were made to the PE form or procedures.

CSEA contends that the parties' discussions were "meet and confer" sessions. In this regard, CSEA Representative Brian Young (Young) testified that local campuses had in the past engaged in formal bargaining on a number of issues of local concern, including layoffs. In disagreement, CSUSM Human Resources Officer Melody Kessler (Kessler) testified that she never meant to formally "meet and confer," as that can only be done by the chancellor or his designee. Kessler claimed that the OR discussions in 2000 were held in the context of the regular monthly "labor-management meetings" between CSUSM and CESA, and were "brainstorming" sessions rather than formal bargaining. Labor Relations Manager Freya Foley

[2] This rating would be chosen if the performance criteria had no relevance to the employee's job performance, and would not be included in the OR averaging.

(Foley), who served as CSU's chief negotiator for the Agreement and the Addendum but did not participate in the local OR discussions, testified that individual campuses have no authority to "meet and confer" except on certain issues, including layoffs, specified by the Agreement to be negotiated locally. Other local issues may be handled by an informal "meet and discuss" process, which is what the parties engaged in at CSUSM. Foley stated that if the Addendum negotiators wanted the five campuses to engage in formal bargaining, they would have written this into the Addendum. Further, Foley testified that, during Addendum negotiations, there was no discussion as to whether the local campuses were obligated to seek CSEA's input at all in determining the OR. CSEA did not contradict Foley's account: Young testified that in prior "meet and confer" sessions, the Chancellor had designated a representative, which did not occur in the OR discussions. And Young conceded that there is a difference between "meet and confer" and "meet and discuss." I find the greater weight of evidence lies with CSU's position, and conclude, accordingly, that the parties did not engage in formal "meet and confer" sessions in developing the OR system for CSUSM.[3]

In early 2001, CSUSM developed a new OR procedure without providing CSEA any prior notice, and without seeking its input. The new procedure changed the date of annual evaluations from employees' anniversaries to a uniform date, April 1, and provided for employees to voluntarily submit self-evaluations. The new procedure changed the PE form by designating two above-satisfactory ratings, i.e., "4. Commendable – performance frequently exceeds expected standards" and "5. Outstanding – performance consistently exceeds expected

[3] In making this finding, I do not discredit CSEA's witnesses, but find that CSEA believed in good faith, albeit in error, that it was engaging in formal bargaining.

standards." The PE form also added a signature line for a fourth person, i.e., an administrator, who would not necessarily be the evaluator, but who would calculate the OR. But instead of averaging the uniform numerical scores, the administrator would have the discretion to assign weights to the various PE performance criteria according to the administrator's judgment of the individual employee and his job functions. Kessler distributed to employees a memorandum dated March 23, 2001,[4] explaining the new PE and OR procedures, which were unilaterally implemented on April 1. The memorandum stated in part:

> • *Who should complete the "overall rating"?*
> This can only be completed by the appropriate administrator regardless of who completes the evaluation.
>
> • *How is the "overall rating" calculated?*
> The overall rating is NOT an average of the rated areas of the evaluation. The overall rating should evaluate the employee's total performance including but not limited to how they have performed their duties, responsibilities, attitudes, interpersonal skills, contribution to the organization and relationship with others.

Young, who learned of the new system from unit employees, contacted Kessler by memo of April 19, contending that adding a non-evaluating administrator to the PE process was in violation of Article 10.9 of the Agreement which specifies only one "evaluator." Young also complained that, by giving an administrator the discretion to assign any weight to any performance category for any individual employee, CSUSM would in effect be able to arbitrarily decide which employees receive MSIs and which do not. In the memo, Young requested that CSUSM cease and desist from implementing the new system, and continue the original system until a different one was agreed upon in formal bargaining with CSEA. Kessler responded by letter of April 19, claiming that CSUSM's new procedures were "in total

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

compliance" with the Agreement, and that if Young disagreed with the Agreement he could contact the Chancellor's office "to initiate a formal meet and confer process." Kessler did not mention the parties' earlier OR meetings in 2000 or her contention that the meetings were informal. She noted that CSU would be forming a committee to discuss new forms and procedures for the following year, and would ask representatives from CSEA and other employee organizations to serve on it. Kessler also offered to be "more than available to talk with you regarding any issues." Young did not contact either the Chancellor's office or Kessler for further discussions.

CSEA contends that the original OR was intended to be a permanent system. CSU disagrees and argues, in its post-hearing brief, that it was "implicit" the OR would be in effect only for the year 2000. In that regard, Foley testified that in formal bargaining for the Addendum, the parties discussed the fact that the five campuses without ORs would have to quickly develop OR systems for those PEs already completed, but it would not necessarily be the same system as that developed for future PEs. Foley admitted, however, that there was no agreement between the parties on the content or tenure of the ORs, as that was left up to the five campuses. Kessler, in her testimony, contended that CSEA's concern, that leadpersons acting as evaluators would effectively be recommending MSIs for employees in the same bargaining unit, was evidence of CSEA's understanding that the OR was only temporary. However, beyond stating that during their meetings, the parties did not "focus" on anything beyond the year 2000, Kessler could not state that they actually discussed how long the OR would remain in effect, and she admitted there was no agreement on its duration. According to Young, the parties had no discussion at all on the duration of the OR. Thus, there is scant evidence to support either party's position on this issue, and there is scant evidence that the

parties had any mutual understanding of the duration of the original OR. Accordingly, I do not find that the parties had any agreement as to whether the original OR system was to be permanent, or was to apply only to the year 2000, and if so, how the next OR system would be developed.

Recently, CSU has been working with a labor-management committee, which includes CSEA, on developing new PE procedures and forms.

ISSUES

1. Did CSU unilaterally change the MSI policy by changing the OR procedures without giving CSEA prior notice or opportunity to meet and confer?

2. Did CSEA waive its right to meet and confer?

CONCLUSIONS OF LAW

Unilateral Change

In determining whether a party has violated its bargaining obligations by unilaterally changing employees' terms or conditions of employment, PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy; (2) the change concerns a matter within the scope of representation; (3) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations; and (4) the change has a "generalized effect or continuing impact" on the terms and conditions of employment of bargaining unit members. (Walnut Valley Unified School District (1981)

PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant).)

Applying these criteria to the instant case, it is undisputed that employee evaluations and merit systems are matters within the scope of representation. (Modesto City Schools (1983) PERB Decision No. 347 (performance evaluations); Healdsburg Union High School District et al (1984) PERB Decision No. 375 (merit increases);[5] see also, NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177] (merit increases).) It is also undisputed that CSUSM changed the PE and OR procedures, thereby changing the way MSIs are determined, without giving CSEA prior notice or opportunity to request bargaining.

As to a change in policy, PERB has held that "established policy may be embodied in the terms of a collective agreement, or where the contract is silent or ambiguous as to a policy it may be ascertained by examining past practice or bargaining history." (Marysville Joint Unified School District (1983) PERB Decision No. 314 (Marysville); see also, Grant; Pajaro Valley Unified School District (1978) PERB Decision No. 51.)

CSU argues that it did not change any policy, as the original OR was only temporary, and the few months in 2000 during which it was implemented was too short a time to constitute a past practice. However, I have already found, above, that the parties had no agreement that the original OR would be only temporary. Thus, the question arises as to how long a process must remain in effect for it to become a past practice. In that regard, the National Labor Relations Board (NLRB) has held that a past practice becomes a "term or

[5] These cases were decided under the Educational Employment Relations Act (EERA), which, in section 3543.2, specifically enumerates the subjects included in the scope of representation. HEERA section 3562(r)(1) defines the scope of representation for CSU more broadly, i.e., "wages, hours of employment, and other terms and conditions of employment."

condition of employment" over which an employer must bargain when the employer must follow established guidelines which employees have a reasonable expectation will continue (NLRB v. Katz, supra, 369 U.S. 736; The Daily News of Los Angeles (1994) 315 NLRB 1236, [148 LRRM 1137] aff'd (D.C. Cir. 1996) 73 F.3d 406 [151 LRRM 2242]), or when a past practice can be inferred from the employer's anecdotal actions. (Dow Jones & Co., Inc. (1995) 318 NLRB 574 [150 LRRM 1089].)

In the instant case, the parties developed an OR system which, in effect, determined the MSIs of all employees in the year 2000. Notwithstanding that there was no agreement on how long this system would remain in effect, it established guidelines which CSU was required to follow and which neither CSEA nor the employees had any expectation would change, nor any apparent intent to change it. Thus, it can be inferred, and unit employees were entitled to reasonably expect, that the original OR system would remain in effect unless and until the parties agreed to change it.

Accordingly, I find that the original OR system itself constituted a policy upon which the MSI was to be based, and that by unilaterally changing the OR system, CSU unilaterally changed the MSI policy as well.

Waiver

CSU also contends that CSEA waived its right to bargain. It is well settled that an employer may take unilateral action if the exclusive representative waived its right to bargain. But any waiver of this right will not be lightly inferred. (Oakland Unified School District (1982) PERB Decision No. 236.) To show that an exclusive representative has waived its right to negotiate, there must be evidence of either "clear and unmistakable" language (Amador Valley Joint Union High School District (1978) PERB Decision No. 74), or of "demonstrable

behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer." (San Mateo County Community College District (1979) PERB Decision No. 94 (San Mateo).) A waiver can be shown by inaction on the part of the exclusive representative (Los Angeles Community College District (1982) PERB Decision No. 252), but the evidence must indicate an intentional relinquishment of the union's right to bargain. (San Francisco Community College District (1979) PERB Decision No. 105.)

In Marysville, cited by CSU in support of its position, the parties' collective bargaining agreement provided for lunch periods of "no less than 30 minutes." Notwithstanding that past practice had allowed employees to take longer lunches, PERB found that when the employer shortened lunch periods to 30 minutes, it acted within its discretion granted by the "clear language" of the contract, and that the union had waived further bargaining on that issue.

Here, CSU argues that the new OR system was created and implemented in the manner "contemplated" by, and is in "accord" with, both article 10 of the Agreement and section 20.21 of the Addendum, which give the president discretion to determine which employees receive MSIs and the percent amount for each performance rating level,[6] and which do not provide for local bargaining. Therefore, according to CSU, CSEA waived its right to bargain. CSU is correct that neither the Agreement nor the Addendum provide for local formal bargaining on the OR. However, CSEA believed, in good faith but in error, that it was engaging in formal

[6] CSU also claims that only management can legally determine wages, and if leadpersons were to calculate the ORs, they would effectively be setting wages, in violation of HEERA. I find no authority to support this claim.

bargaining in 2000, thus no waiver can be found in CSEA's participation in these informal meetings.[7] Nor can waiver be found in Young's failure to contact either the Chancellor or Kessler after Kessler's memo of April 19. By that date, the new OR had already been implemented; Kessler did not offer to meet and confer, but merely to "talk;" and CSEA had no desire to change the Agreement, thus there was no need to contact the Chancellor, as Kessler had suggested. Accordingly, I do not find that Young's inaction demonstrated behavior showing an intent to waive any "reasonable opportunity to bargain over a decision not already made." (San Mateo.)

Further, I see nothing in the Agreement or the Addendum to indicate CSEA's intentional relinquishment of its right to bargain. Unlike Marysville, neither the Agreement nor the Addendum specify how the OR is to be calculated, or by whom, notwithstanding the president's discretion as to what percent increase the MSIs would be and who would receive them. To paraphrase CSU negotiator Foley, if the parties meant to give the local campuses full discretion to develop their OR systems, the parties would have said so in the Addendum. Accordingly, I do not find that CSEA waived its right to bargain regarding the OR.

Conclusion

Based on all of the foregoing, I find that CSU unilaterally changed its MSI policy by changing the OR system at CSUSM, and that by this conduct CSU failed its duty to meet and confer in good faith with CSEA, in violation of HEERA section 3571(c), and interfered with

[7] In Goleta Union School District (1984) PERB Decision No. 391, PERB found no waiver in the union's failure to demand bargaining, where the union erroneously believed that the employer's conduct was already prohibited by the parties' collective agreement. I find this case analagous to the instant situation.

the rights of unit employees to be represented by CSEA, in violation of HEERA section 3571(a).

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.

Here, CSU unilaterally changed its MSI policy by changing the system for calculating ORs for employees employed at CSUSM, without giving CSEA prior notice and opportunity to bargain regarding these changes, in violation of HEERA section 3571(a) and (c). The ordinary remedy in unilateral change cases is an order directing the respondent to cease and desist from continuing to promulgate or implement the unlawful change, to rescind the change and return to the status quo, and to meet and confer in good faith with the employee organization, upon its request, regarding matters within the scope of representation. It is also the ordinary remedy that the respondent be ordered to post a notice incorporating the terms of the order. It effectuates the purposes of the 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.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that on or about April 1, 2001, and continuing thereafter, the Trustees of the California State University (San Marcos) (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a) and (c), by unilaterally changing its policy concerning Merit Salary Increases (MSIs) by changing the

system for calculating Overall Ratings (ORs) for employees employed at its San Marcos campus (CSUSM), without giving the California State Employees Association (CSEA) prior notice and opportunity to meet and confer regarding these changes. 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:

1. Failing to meet and confer in good faith with CSEA regarding changes in policy affecting matters within the scope of representation;

2. Unilaterally changing its MSI policy by changing the system of calculating ORs for employees employed at CSUSM, without giving CSEA prior notice and opportunity to meet and confer regarding these changes;

3. Promulgating the OR system unilaterally implemented at CSUSM on April 1, 2001.

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

1. Within ten (10) working days after service of a final decision in this matter, rescind the OR system unilaterally implemented at CSUSM on April 1, 2001;

2. Meet and confer in good faith with CSEA, upon its request, regarding changes in policy affecting matters within the scope of representation, including any changes to the original OR system implemented at CSUSM in November 2000;

3. 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 CSUSM 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;

4. Upon issuance of a final decision in this matter, make written notification of the actions taken to comply with this Order to the San Francisco Regional Director of the Public Employment Relations Board (PERB or 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 PERB 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