**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| ACADEMIC PROFESSIONALS OF CALIFORNIA,<br><br>Charging Party,<br><br>v.<br><br>TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,<br><br>Respondent. | Case No. LA-CE-843-H<br><br>PERB Decision No. 1949-H<br><br>March 24, 2008 |

Appearances: Rothner, Segall & Greenstone by Bernard Rohrbacher, Attorney, for Academic Professionals of California; Donald A. Newman, Attorney, for Trustees of the California State University.

Before McKeag, Wesley and Rystrom, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the Academic Professionals of California (APC) of a proposed decision by an administrative law judge (ALJ). The charge alleged that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] when it paid an arbitration award to APC members in the form of a "one-time" payment rather than an increase in base pay. APC alleged this conduct violated HEERA 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.

## BACKGROUND

This case dates back to 1999 when APC grieved a contract dispute to binding arbitration.[2] On August 12, 2003, after almost four years of litigation, which included three separate arbitration proceedings, the arbitrator awarded $100,771 to the members of Bargaining Unit 4. Relevant to this discussion, APC argued throughout the course of the arbitration that any monies due its constituents should be in the form of a general salary increase. CSU, on the other hand, contended that such monies, if due, should be in the form of a one-time payment.

Subsequent to the issuance of the arbitration award, the parties continued to dispute whether it should be paid as a salary increase or as a one-time payment. On March 17, 2004, APC petitioned the Los Angeles County Superior Court (Superior Court) for an order to confirm the arbitration award. CSU did not oppose the petition. The court's order required CSU to immediately pay Bargaining Unit 4 employees $100,771. CSU later paid the $100,771 as a one-time payment. Without challenging the propriety of CSU's one-time payment, APC filed an "Acknowledgement of Satisfaction of Judgment" with the court on October 29, 2004.

APC filed the instant unfair practice charge alleging CSU committed an unlawful unilateral change when it paid the $100,771 on a one-time basis. CSU, on the other hand, argued that the doctrines of collateral estoppel and res judicata barred further litigation of this

[2]In summary, APC alleged in the grievance that the salaries negotiated for Bargaining Unit 4 members were based on a four percent increase in the bargaining unit "compensation pool" for the year in question. The calculation of money available in this pool was based on certain assumptions regarding costs of, among other things, Public Employees' Retirement System (PERS) contributions. The instant dispute arose when the cost of PERS contributions that year was lower than anticipated. In its grievance, APC argued the compensation pool increased in light of the lower cost of PERS contributions. Therefore, when CSU did not increase the agreed-upon compensation in light of the enhanced compensation pool, it under-compensated APC members.

issue. Alternatively, CSU argued even if such doctrines do not apply, APC failed to prove the elements of an unlawful unilateral change.

Based on our review of the record, we find the the doctrine of judicial estoppel bars further litigation of this issue. Accordingly, for the reasons set forth below, we dismiss the case.

## FACTS

The facts in this case are virtually undisputed. CSU is a higher education employer within the meaning of HEERA section 3562(g). APC is an employee organization within the meaning of Section 3562(f)(1) and is the exclusive representative, within the meaning of Section 3562(i), for a bargaining unit of CSU academic support employees.

CSU and APC have been parties to a succession of collective bargaining agreements. The instant dispute arose under the agreement in effect from July 1, 1998 through June 30, 2000 (Agreement). Article 23 contained the salary provisions. It included a salary schedule with an upper and lower range for each unit classification, and certain merit pay programs. The merit pay programs included Article 23, section 23.8, which provided for performance pay "in the form of a permanent increase in the base salary of the individual" or in the form of a one-time bonus for those individuals who had reached the top of their salary range, and Article 23, section 23.4, which provided for service salary increases (SSI), defined as "upward movement on a salary range." In addition, Article 23, section 23.9 provided:

> If the final gross General Fund budget of the CSU has increased by at least $160 million (including both General Fund and student fee revenue) from fiscal year 1998/99 to fiscal year 1999/2000, then the total compensation increase to Unit 4 employees for 1999/2000 shall be a four percent (4%) compensation pool which shall be distributed as follows: (a) forty percent (40%) of the increases shall be for performance increases, including SSIs,

including associated benefit costs, and (b) the remaining sixty percent (60%) shall be for the general salary increase.

A successor agreement, effective from July 1, 2000 through June 30, 2003, was reached in June 2001, containing similar wage provisions plus a bonus program. There is no evidence that CSU has not complied with those provisions. The evidence is undisputed that the parties' negotiated policy was that compensation increases were added to employees' base salaries, unless the parties specifically negotiated a one-time bonus payment.

In late 1999, pursuant to the grievance-arbitration procedures of the Agreement, APC filed a grievance against CSU for violating Article 23, section 23.9 of the Agreement by not giving unit employees the four percent compensation increase. CSU found the matter not arbitrable and denied the grievance. A hearing was held before neutral Arbitrator, Mark Burstein (Burstein). On February 14, 2001, Burstein found the matter arbitrable.

A second arbitration hearing was held on the merits. In its post-hearing brief, APC sought a remedy which included, "[a]ppropriate adjustments to the Unit wage rate schedules ... and retroactive wage adjustments paid to employees." In addition, APC contended that, "subsequent wage adjustments be compounded on the adjusted 1999-2000 rates and appropriate amounts derived therefrom included in the required retroactive payments."

Burstein issued a decision and award on June 7, 2002, in favor of APC. In that decision, Burstein stated, "the dollar figures that resulted from applying the 40% and 60% [in Article 23.9] to the compensation pool were not related to each other." He found that CSU had "met the requirement of Article 23.9 to pay 60% of the 4% compensation pool to the general salary increase," but that, "[t]he shortfall to Unit 4 employees was in the 40% for the 'performance increases, including SSIs, including associated benefit costs.'" Burstein concluded, "[a]lthough CSU was not required to increase the general salary increase as the

Union requested," it was, "not at liberty to merely ignore its contractual obligation to distribute the 4% compensation pool designated by Article 23.9 as the total compensation increase." Accordingly, Burstein found CSU violated Article 23.9 of the Agreement when it failed to expend or carry over the entirety of the four percent compensation and ordered that "the difference between the amount of the original 40% of the 4% compensation pool and the subsequent figure that resulted from the decrease in CSU's PERS contribution rate be added to the first fiscal year where it can be added to effectuate this remedy."

The parties discussed how to comply with the award, but could not reach agreement on either a total amount or a method of distribution. Consequently, the parties contacted Burstein. By letter dated September 27, 2002, Burstein attempted to clarify his award. In so doing, he criticized both sides and stated, in part:

> Despite your inability or unwillingness to resolve your dispute concerning the implementation of my remedy in the above-captioned case, the issue is rather clear. ... My remedy dictates that the difference between the 40% of the 4% compensation pool and the amount that the CSU actually paid Unit 4 employees for performance pay . . . would effectuate the remedy.

Nevertheless, the parties still could not resolve the matter, and a third arbitration hearing was held. On August 12, 2003, Burstein issued his decision and award. In that decision, Burstein noted that the parties agreed the differential in contribution rate was 7.05 percent, but disagreed on how it should be applied. Each party selected an amount to serve as the basis for the calculation. Burstein wrote:

> It appears that CSU chose the smallest of all possible figures and then reduced that amount to reach an even smaller number upon which it based its calculation. On the other hand, the Union started with the largest possible amount upon which it based its calculations.

Clearly frustrated with both sides, Burstein acknowledged his inability "to compute a remedy with any definiteness" based on the parties' failure to provide sufficient evidence to support their contentions. However, realizing that leaving to the parties any further attempt at resolution would be "futile," Burstein made the following calculation:

> . . . the 7.05% differential in the PERS contribution rate should be applied to the $1,429,380 that constituted the 60% general salary increases of the 4% compensation pool. Accordingly, I find that $100,771 is the differential that is due to Unit 4 employees.

Burstein ordered CSU to immediately distribute that amount to unit employees.

By letter to CSU dated August 23, 2003, APC claimed that the above language made it "apparent that all Unit 4 members are to benefit from a distribution of the amount ordered to their base pay as part of a 'general salary increase.'" In its response dated October 20, 2003, CSU stated that it "cannot agree with the analysis and conclusions" regarding a general salary increase, but offered to meet and confer to resolve the dispute. By letter dated January 13, 2004,[3] APC stated, in part:

> As yet there has been no information from you as to why the award has not been implement[ed] or the nature of any 'dispute' as you see it. Moreover, we fail to see what there is to 'negotiate' concerning the Arbitrator's award.
>
> Never-the-less[sic], APC is willing to discuss with you whatever problem is holding up implementation of the award as soon as you can detail for us what the nature of the alleged 'dispute' is or what CSU's view of the situation is.

CSU responded on January 15 and explained that the "dispute" was over the difference between performance pay and a general salary increase, and offered to pay pro-rata shares of

[3]All dates hereafter refer to the year 2004 unless otherwise specified.

the award to employees who received performance awards in fiscal year 1999-2000,[4] in the form of one-time bonus payments. The record does not reveal whether APC responded to this letter. Regardless, the dispute was not resolved.

On March 17, APC petitioned the Superior Court for an order to confirm the arbitration award. CSU did not oppose the petition. During the month of June, the parties exchanged drafts of settlement agreements to resolve the matter, which included proposals for additional union leave time for two additional union officers in lieu of money, as well as terms for a successor contract to the 2000-2003 agreement, but no agreement was reached.

The court's order, which was drafted by APC, was issued on June 25. It confirmed Burstein's award in its entirety and required that CSU "immediately distribute to Unit 4 employees, employed by Respondent as of the entry of this order, the amount of $100,771 plus prejudgment interest for the period from August 12, 2003, to the date of this order." Inexplicably, APC did not specify in its proposed order how that distribution was to be made or what provision of the Agreement it was to satisfy.

By letter of June 29, APC requested information from CSU showing a roster of current employees, the total amount to be distributed, including interest, the amount to be paid to each employee, and the date by which all employees should receive their portion of the award. CSU provided the information by letter dated July 9, stating that the total amount owed was $107,825 and that it intended to pay each unit employee the sum of $53.17. Attached was a document entitled "APC – Arbitration Ruling Award (Lump Sum Bonus Payment)," showing CSU's mathematical calculations resulting in a payment of $53.17 per employee. By letter dated July 15, APC stated, in part:

[4]There is no record evidence as to which employees, or how many, in which classifications, received performance awards in 1999-2000.

> APC is pleased that initial payment to Unit 4 employees will be made by the middle of August. . . . These initial payments will cover the one-year period from the date of the final arbitration award through mid-August 2004. Then, of course, the appropriately pro-rated portion of each employee's initial payment will need to be added to the employee's base monthly salary.

CSU, in its response dated July 19, stated, in part:

> . . . neither the Award as written, nor the Order requested by APC and fashioned on that Award, directs CSU to make continuing payments of any amount beyond $100,771, or to add any amount to any recurring base salary.
>
> Based on the clear language of the Order (and Award), CSU is implementing a one-time immediate distribution as directed in the Order, and is not amenable to continuing APC attempts to delay the process, particularly since APC chose to argue for pre-judgment interest. That being said, if you feel that a further discussion to attempt to resolve whatever dispute may still exist is appropriate, please contact me[5] within the next few days. CSU has already begun the implementation process.

The parties exchanged some further correspondence but nothing was resolved. APC continued to take the position that CSU should give permanent salary increases, while CSU continued to claim that the arbitration award did not require it to make more than a one-time payment.

In July/August, CSU paid $53.43[6] to each unit employee. On August 6, APC filed a grievance alleging that CSU had failed to abide by Burstein's award and failed to add the $53.43 to base pay. CSU rejected the grievance on the basis that it was non-grievable and non-arbitrable, as the contract under which the dispute arose had expired, as well as on the merits.

[5]The letter was written by Violet Fiacco, University Counsel.

[6]The increase from $53.17 was apparently due to additional interest.

APC appealed the denial and CSU rejected the appeal. APC did not to file a court action to compel arbitration and the grievance has not proceeded further.

On September 12, CSU filed with the Superior Court a Notice of Satisfaction of Judgment of its June 25 order. On September 15, APC opposed the notice on the basis that it had no evidence that CSU actually made the $53.43 payments. However, on October 29, APC filed an Acknowledgement of Satisfaction of Judgment which states, inter alia, "The judgment is satisfied in full."

Apparently not satisfied, APC filed the instant unfair practice charge. The ALJ held that although the elements of collateral estoppel (issue preclusion) were not met, the elements of res judicata (claim preclusion) were. The ALJ further held that APC failed to prove that CSU's conduct amounted to a change in policy. Accordingly, the ALJ dismissed the charge based on both the doctrine of res judicata and APC's failure to establish all the elements of an unlawful unilateral change.

## DISCUSSION

### Judicial Estoppel

Judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, prevents a party from advocating a position in a legal proceeding that is contrary to a position taken previously in the same or some earlier proceeding. (M. Perez Co., Inc. v. Base Camp Condominiums Assn. No. One (2003) 111 Cal.App.4th 456, 463 [3 Cal.Rptr.3d 563] (M. Perez).) The doctrine is invoked to prevent a party from changing its position over the course of litigation when such positional changes have an adverse impact on the judicial process. As stated by the court in M. Perez, the doctrine is intended to prevent litigants from

playing "fast and loose with the courts." (Ibid., quoting Jackson v. County of Los Angeles (1997) 60 Cal.App.4th 171, 181 [70 Cal.Rptr.2d 96] (Jackson).)

In California, judicial estoppel may be applied when: (1) the same party has taken two positions; (2) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (3) the two positions are totally inconsistent; (4) the positions were taken in judicial or quasi-judicial administrative proceedings; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. (Aguilar v. Lerner (2004) 32 Cal.4th 974, 986–987 [12 Cal.Rptr.3d 287], quoting Jackson .)

APC Asserted Separate Positions Before The Court And Before PERB

From the outset of this litigation, APC argued that any money awarded to employees in Bargaining Unit 4 should be paid in the form of an increase to the employees' salaries, and not as a one-time payment. After three arbitration proceedings, the arbitrator ordered CSU to pay Bargaining Unit 4 employees $100,771. Notwithstanding this award, APC and CSU continued to dispute the distribution of the award.

Although it could have sought clarification of the award from the arbitrator, APC instead petitioned the Superior Court to confirm the arbitration award as a judgment. Shortly thereafter, CSU distributed the arbitration award as a one-time payment. However, rather than arguing CSU failed to comply with the recently confirmed judgment by making a one-time payment, APC filed an Acknowledgement of Satisfaction of Judgment (Acknowledgment) with the Superior Court which stated "The judgment is satisfied in full."

An Acknowledgment of Satisfaction of Judgment has the effect of discharging a judgment's obligations. (See McCall v. Four Star Music Co. (1996) 51 Cal.App. 4th 1394, 1399 [59 Cal.Rptr.2d 829] (McCall).) In this case, however, APC characterizes its

Acknowledgment as only acknowledging that $53.43 had been paid to all employees in Unit 4. In our opinion, this characterization is inconsistent with the express language of the Acknowledgment which stated, "The judgment is satisfied in full."

It is noteworthy that APC could have complied with CSU's demand for an acknowledgment by stating that the judgment was partially satisfied.[7] (Code of Civ. Proc. sec. 724.120.) Thus, pursuant to Code of Civil Procedure section 724.120, APC could have represented to the court that CSU partially complied with the judgment by paying all employees in Unit 4 $53.43 but CSU still owed the "salary component of the award." It did not. Rather, APC filed the Acknowledgment pursuant to Code of Civil Procedure sections 724.050 and 724.060 which stated the judgment was "satisfied in full."

APC now claims CSU committed an unlawful unilateral change by distributing the award as a lump-sum payment. However, by filing the Acknowledgement, APC admitted that CSU fully and properly complied with the award. APC had the opportunity to challenge CSU's compliance with either the arbitrator or the courts. Instead, APC choose to collaterally attack the CSU's compliance by filing the instant charge.

We find these two positions to be totally inconsistent. As such, we find the first and third elements of the judicial estoppel test met. Moreover, because APC's first position was taken in a judicial proceeding and its second position was taken in a quasi-judicial administrative proceeding, we also find the fourth element met.

As for the remaining two elements, APC filed the Acknowledgment. In so doing, APC represented to the court that the judgment was "satisfied in full." Accordingly, we conclude APC was successful in asserting the first position before the Superior Court.

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[7]A partial satisfaction of judgment has the effect of a discharge pro tanto. (McCall, at p. 1399.) "Pro tanto" means "for so much." (Id.)

Finally, the evidence presented in this case precludes any finding that APC's Acknowledgment was the result of ignorance, fraud, or mistake. Prior to APC's filing of the Acknowledgment on October 29, 2004, the following relevant correspondence had occurred:

> (1) CSU's letter dated June 29, 2004, informing APC that it would be paying each employee in Unit 4 $53.17 as a "lump sum bonus payment;"
>
> (2) APC's responding letter dated July 15, 2004, stating that the implementation of the award should not only be these initial payments but should also include the base salary component of the award; and
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> (3) CSU's responding letter dated July 19, 2004, stating that based on the clear language of the "Order (and Award)," CSU would be making a one time distribution and that neither the Award as written nor the Order drafted by APC direct CSU to make continuing payments of any amount beyond the $100,771.

This correspondence confirms that the Acknowledgment was not taken by APC as a result of ignorance, fraud, or mistake. Accordingly, we find the last two elements of the judicial estoppel test met.

The Application Of Judicial Estoppel Is Appropriate In This Case

It is important to note that judicial estoppel is an equitable doctrine. Consequently, the application of this doctrine, even when all the elements have been satisfied, is discretionary. (MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc. (2005) 36 Cal.4th 412, 422 [30 Cal.Rptr.3d 755].) It is an "extraordinary remed[y] to be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice." (Jogani v. Jogani (2006) 141 Cal.App.4th 158, 169 [45 Cal.Rptr.3d 792], quoting Daar & Newman v. VRL International (2005) 129 Cal.App.4th 482, 491 [28 Cal.Rptr.3d 566].) Due to its potentially harsh consequences, judicial estoppel should be applied with caution and limited to egregious circumstances. (Gottlieb v. Kest (2006) 141 Cal.App.4th 110, 131 [46 Cal.Rptr.3d 7].)

In this case, APC effectively ended the litigation when it signed the Acknowledgement. Consequently, APC should not be permitted to represent to the Superior Court that CSU properly complied with the award and later represent to PERB that CSU violated the law when it complied with the award. Said another way, CSU should not be penalized for its compliance with an arbitration award when such compliance was previously approved by APC. Under these circumstances, we find the application of judicial estoppel is appropriate in this case.

## CONCLUSION

Based on the foregoing, the Board finds APC is estopped by operation of judicial estoppel from asserting its unfair practice charge in this matter. Accordingly, we dismiss this case.

## ORDER

The unfair practice charge and complaint in Case No. LA-CE-843-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Wesley and Rystrom joined in this Decision.