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

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| CALIFORNIA FACULTY ASSOCIATION,<br><br>Charging Party,<br><br>v.<br><br>TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,<br><br>Respondent. | Case No. LA-CE-1125-H<br><br>PERB Decision No. 2287-H<br><br>October 4, 2012 |

Appearances: Kathy Sheffield, Interim Director of Representation, for California Faculty Association; California State University Office of the General Counsel by Donald A. Newman and Marc D. Mootchnik, University Counsel, for Trustees of the California State University.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California Faculty Association (CFA) of the Office of General Counsel's dismissal of its unfair practice charge. The charge, as amended, alleged that the Trustees of the California State University (CSU) implemented an executive order regarding the provision of student mental health services without first bargaining over the effects of the executive order on terms and conditions of employment including workload. The charge alleged that by this conduct, CSU violated section 3571, subdivisions (a), (b) and (c), of the Higher Education Employer-Employee Relations Act (HEERA).[1] The Office of the General Counsel dismissed the charge for failure to state a prima facie case.

[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 in this matter and given its full consideration to the appeal and the response thereto. Based on our review, the Board reverses the dismissal of the charge and directs that a complaint be issued for the reasons discussed below.

## SUMMARY OF FACTUAL ALLEGATIONS

CFA is the exclusive representative of a bargaining unit of approximately 23,000 faculty employees employed by CSU at its 23 campuses. The unit includes counselors in the Student Services, Academic-Related (SSP, AR) classification series (counselors).

In early 2009, the CSU Office of the Chancellor created a Select Committee on Mental Health to report on the appropriate level of mental health services necessary to address student needs and to review and identify the resources necessary to provide those services. The Select Committee presented its findings and recommendations to the CSU Board of Trustees at its meeting of May 12, 2010. Subsequently, the CSU Office of the Chancellor formulated the executive order discussed below.

### Executive Order 1053: Policy on Student Mental Health

By e-mail of October 25, 2010, CSU Senior Director of Collective Bargaining Bill Candella (Candella) informed CFA Director of Representation Bernhard Rohrbacher (Rohrbacher) that CSU desired to finalize an executive order concerning mental health services for students within 30 days.[2] Attached to the e-mail was the draft of the executive order entitled "Draft Policy, Student Mental Health Services, California State University." It states in pertinent part:

[2] According to CSU's position statement of January 12, 2011, "Mr. Candella did not consider the subject matter of the Executive Order to be a mandatory subject of bargaining and did not send the communication as an invitation to meet and confer." (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M [PERB may consider undisputed factual assertions provided by respondent].)

## I. Purpose

This policy governs the provision of mental health services to matriculated students in the California State University (CSU) System. Regardless of where or how these services are provided, the provision of services must comply with the policies contained in this Executive Order (EO). . . .

## II. Required Basic Services

. . . At a minimum, CSU campuses shall offer the following basic services:

A. Counseling/Psychotherapy

. . . . . .

B. Suicide and Personal Violence Services

. . . . . .

C. Emergency/Crisis Services

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D. Outreach

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E. Mental Health Consultation

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F. Referral Resources

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## III. Delivery of Basic Services

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## IV. Augmented Services

Campuses may offer augmented mental health services beyond the scope of basic services. . . .

A. The augmented services a campus may offer include but are not limited to the following:

1. Specialty care appropriate to the mental health needs of students.
2. Services to partners or family members of eligible students.
3. Services to students of non-state-supported programs of the university, such as those offered through continuing education.

. . . . . .

## V. Training Programs

Campuses may provide practicum, internship, and postdoctoral training programs. . . .

. . . . . .

## VI. Expectations and Qualifications of Mental Health Professionals at CSU Campuses

A. Mental Health Clinicians

1. The CSU expects that mental health clinicians shall spend at least 60% to 65% of their base time providing direct services, which for the purposes of this recommendation, shall include individual/group counseling, intakes, assessment, crisis intervention, and other clinical services assigned.

   Although these recommendations establish a baseline or benchmark, adjustments to a mental health clinician's direct clinical service expectations may be necessary to accommodate additional responsibilities, assignments, and the academic calendar.

   These recommendations are not meant to supersede the assignment provisions of Article 20 of the collective bargaining agreement, *which provide that final assignments shall be made by the appropriate administrator after consultation with the Counselor Faculty Unit Employee.*

. . . . . .

**VII. Program Evaluation**

A. Internal Program Evaluation and Review

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B. External Program Review

> Each campus mental health service program shall undergo regular external review at least every five years. This can be accomplished by maintaining accreditation by the International Association of Counseling Services (IACS), Accreditation Association of Ambulatory Health Care (AAAHC), or another external accrediting group. . . .

**VIII. Mental Health Records**

. . . . . .

(Draft Policy, Student Mental Health Services, California State University; italics added in third paragraph under heading VI(A)(1) for point of comparison as discussed below.)

By e-mail of November 8, 2010, Rohrbacher requested to meet and confer regarding the impact of the executive order on the counselors' terms and conditions of employment including workload. The e-mail states:

> CFA request [sic] to meet and confer about the impact on this policy on the terms and conditions of counselors, including, but not limited to, workload.
>
> In this context, I note that while the policy pays lip-service to Article 20, Workload, of the CBA, it also states that 'The CSU expects that mental health clinicians shall spend **at least** 60% to 65% of their base time providing direct services, which for the purposes of this recommendation, shall include individual/group counseling, intakes, assessment, crisis intervention, and other clinical services assigned' (emphasis supplied). By contrast, the 'ACCREDITATION STANDARDS FOR UNIVERSITY AND COLLEGE COUNSELING CENTERS' of the International Association of Counseling Services, Inc, available at [website URL omitted], state: 'Staff members should have a balanced workload that affords time for all aspects of their professional functioning. Direct service responsibilities such as intake,

> individual and group counseling, and crisis intervention **should not exceed** 65% of the workload on a continuing basis' (emphasis supplied).

(Rohrbacher e-mail, Re: Mental Health Services, November 8, 2010 [bold in original].)

Without responding to CFA's request to meet and confer, CSU Chancellor Charles B. Reed implemented Executive Order 1053 entitled Policy on Student Mental Health by sending a memorandum to CSU Presidents on December 6, 2010.[3] On December 10, 2010, Candella sent Rohrbacher an e-mail asking "when would you be available to discuss these issues?" On the same date, Rohrbacher responded by e-mail that CFA had filed an unfair practice charge with PERB because CSU implemented the executive order without responding to a timely request for effects bargaining. On December 20, 2010, Candella sent Rohrbacher an e-mail acknowledging the PERB charge and expressing willingness to "discuss any concerns that CFA may have in respect of this policy." On the same date, Rohrbacher responded by e-mail that "CFA will be happy to bargain over the policy once the administration rescinds it to allow for meaningful bargaining."

Article 20 of the Collective Bargaining Agreement: Workload

CFA and CSU are parties to a collective bargaining agreement (CBA), which provides in pertinent part:

> Counselor Faculty Unit Employees: Assignment of Responsibility
>
> 20.11
>
> The assignment of a CFUE may include but shall not be limited to individual counseling, group counseling, consultation and referral, intern training and supervision, teaching, service on systemwide and campus committees and task forces, and activities that foster professional growth including creative activity and research. The

[3] The executive order implemented on December 6, 2010, varies in substance from the portions of the prior draft quoted above in one way. The executive order does not contain the text shown in italics.

> nature of such assignments shall correlate closely with activities expected of CFUEs in order to qualify for retention, tenure/permanency, and promotion, and after tenure/permanency, activities expected of counselor employees in order to maintain their roles as contributing members of the campus community. Such assignments shall be made by the appropriate administrator after consultation with the CFUE.

> 20.15
>
> The Assignment/Schedule of a full-time librarian or counselor employee shall be an average of forty (40) hours in a seven (7) day period. . . .

As alleged by CFA, for each hour of direct counseling services, counselors spend at least 30 minutes on case management duties including assessment writing and completion of other paperwork. On average, a full eight-hour day of work includes at most five one-hour sessions of direct counseling services, as the remaining three hours are reserved for case management. In addition to direct counseling services and related case management, in order to obtain tenure or promotion, counselors are required to engage in professional activities and perform university and/or community service.[4] In a typical week, these activities and services break down as follows: (1) supervision of trainees and post-doctorals (one to four hours); (2) practicum trainee teaching (one hour); (3) research and review of literature (one hour); (4) mandatory team and individual case consultation (one to three hours); (5) mandatory staff meetings (one to two hours); (6) committee work (one to three hours); campus outreach (one to

[4] As alleged by CFA, these activities and services are required by campus policies and/or are necessary for the professional performance of direct counseling services. By way of example, CFA submitted the Procedures and Criteria for Performance Review and Period Evaluation for counselors at the San Bernardino campus. Under this policy, counselors are evaluated for promotion and tenure in three areas: professional assignments, professional growth, and service at the level of the academic rank to which the promotion is sought. To be promoted or awarded tenure, the counselor must be judged "superior" in one area and "competent" in the other two.

three hours); and (7) community service (one to three hours). Also in order to obtain tenure or promotion, counselors are required to disseminate their research through publication of journal articles or presentations at conferences, but the amount of time required to perform this activity is difficult to quantify; most probationary and tenured counselors perform this work outside their 40-hour work week.

As alleged by CFA, in terms of percentages, a counselor's typical 40-hour work week can be broken down as follows:

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| 50 percent: | 20 one-hour sessions of direct counseling services |
| 30 percent: | 12 hours related case management |
| 20 percent: | 8 hours additional professional activities and services |

To comply with the 60 to 65 percent baseline/benchmark set forth in the executive order, a counselor would be required to provide an additional four to six one-hour sessions of direct counseling services per week. The amount of time spent on other required tasks, activities and services cannot be reduced or eliminated to accommodate the increase in direct counseling sessions. Therefore, in order to accommodate the increase, a counselor's work week under the baseline/benchmark in the executive order would be extended from 40 hours per week to 44 to 46 hours per week.[5]

## THE DISMISSAL

The Office of the General Counsel determined that the charge, as amended, did not state a prima facie case because it did not allege facts demonstrating that the executive order has an actual impact on the counselors' work hours. The dismissal relied on language in the

[5] As factual support for these allegations, CFA submitted the declaration of Jeffrey Andreas Tan, a counselor at the San Bernardino campus since 2008 and Chair of the Counselor Caucus of the CFA. According to his declaration, as a counselor, he is familiar with the typical workload of counselors and with the expectations for tenure and promotion at the San Bernardino campus. As Chair, he is familiar with the typical workload of counselors and with the expectations for tenure and promotion at the other CSU campuses.

CBA, which provides that counselors' assignments are made by the appropriate administrator after consultation with the counselor and that counselors are not required to work more than 40–hours per week. The dismissal also relied on language in the executive order, which provides that adjustments to the counselors' direct counseling services may be necessary to accommodate the counselors' other responsibilities and that the executive order does not supersede the CBA. Based thereon, the Office of the General Counsel concluded that the charge is "speculative at best, and insufficient to support a violation."

CFA'S APPEAL

On appeal, CFA argues the following main points:

1. The Board needs to clarify the standard for determining what qualifies as a negotiable effect of a non-negotiable decision. The element of "actual" impact does not mean that the charging party has the burden to prove there has been a change, just that the impact on terms and conditions are "reasonably foreseeable" or "prospective" and "causally related" to the non-negotiable decision;

2. The Board must assume that the facts as alleged are true at this stage of the proceedings;

3. Counselors currently spend 50 percent of their 40-hour work week on direct counseling services. The executive order requires that they spend a minimum of 60-65 percent of their 40-hour work week on direct counseling services. Therefore, the executive order has an impact on workload, a negotiable subject, and is subject to effects bargaining; and

4. The effects of the executive order on workload are not rendered non-negotiable by language in the executive order that allows for individual adjustments in assignments. Nor are they rendered non-negotiable by language in the executive order stating that the executive order does not supersede the CBA.

## CSU'S RESPONSE

In response, CSU argues the following main points:

1. The executive order does not expressly mandate an increase in workload or hours, nor does it supersede the CBA;

2. CFA's allegation that workload would increase from 50 percent to 60-65 percent is legal argument, not fact, and need not be accepted by the Board as true; and

3. The Office of the General Counsel is correct that the effects of the executive order on workload as identified by CFA are "speculative at best."

## DISCUSSION

The sole issue in this case is whether CSU's decision to implement the executive order gave rise to a duty to engage in effects bargaining upon CFA's timely demand. The essential facts are not in dispute. CSU made a decision to implement the executive order governing mental health services for students. CFA made a timely demand to bargain the effects of the decision, specifically identifying workload as one such effect, prior to implementation. CSU implemented the executive order without bargaining because it did not consider the subject matter of the executive order to involve a mandatory subject of bargaining. For the reasons explained below, the Board concludes that CSU had a duty to negotiate potential effects on workload prior to implementation of the executive order.

Under HEERA, before implementing a non-negotiable decision, the parties must first negotiate over effects that have an impact on matters within the scope of bargaining. (*The Regents of the University of California (Lawrence Livermore National Laboratory* (1997) PERB Decision No. 1221-H; *Regents of the University of California* (1987) PERB No. 640-H (*UC Regents*).) The duty to bargain effects arises "when a firm decision is made." (*Ibid.*, emphasis omitted; *Mt. Diablo Unified School District* (1983) PERB Decision No. 373

(*Mt. Diablo*).) Once a firm decision is made, an employer must provide the exclusive representative with notice and a reasonable opportunity to negotiate prior to taking action that affects matters within the scope of representation. (*Mt. Diablo*; see also *County of Riverside* (2010) PERB Decision No. 2097-M (*County of Riverside*), citing *Trustees of the California State University* (2007) PERB Decision No. 1926-H and *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223 (*Newman-Crows Landing*) ["In dealing with effects bargaining, the employee organization is entitled to reasonable notice and an opportunity to bargain over the negotiable effects of a non-negotiable decision."].) Notice of an employer's decision to implement a non-negotiable decision must be given sufficiently in advance of implementation to allow the union a reasonable amount of time to decide whether to demand to negotiate any effects. (*Victor Valley Union High School District* (1986) PERB Decision No. 565; *Compton Community College District* (1989) PERB Decision No. 720 (*Compton*).) The determination of a reasonable amount of time depends on the circumstances of each case. (*County of Riverside; Newman-Crows Landing.*)

"[O]nce the decision is made the employer must respond to requests to negotiate in a manner consistent with its duty to bargain in good faith." (*UC Regents.*) In order to make a prima facie case for violation of the duty to bargain in good faith over effects, the employee organization must demonstrate that it made a valid request to bargain the negotiable effects of the employer's decision. (*County of Riverside*; *Sylvan Union Elementary School District* (1992) PERB Decision No. 919; *State of California (Department of Corrections)* (2006) PERB Decision No. 1848-S.).) Although the request need not be in any particular form nor use a particular verbiage, it must clearly identify negotiable areas of impact, and clearly indicate the employee organization's desire to bargain over the effects of the decision as opposed to the decision itself. (*County of Riverside; Newman-Crows Landing.*) Failure by the employee

organization to make a valid request to bargain the negotiable effects of the decision constitutes a waiver of the right to bargain regarding those effects. (*County of Riverside*.)

Only under certain circumstances may an employer implement a non-negotiable decision prior to the completion of the bargaining process. (*Compton* [implementation prior to completion of bargaining permissible where (1) implementation date based on immutable deadline or important managerial interest, (2) notice of decision and implementation date given sufficiently in advance of implementation date to allow for meaningful negotiations prior to implementation, and (3) the employer negotiates in good faith prior to implementation and continues to negotiate afterwards on unresolved issues].)

When claiming that an employer's non-negotiable decision will have an effect on a subject within the scope of bargaining, the charging party bears the burden of alleging facts demonstrating a reasonably foreseeable impact on employees' working conditions. (*Fremont Union High School District* (1987) PERB Decision No. 651 *(Fremont); Mt. Diablo*.) In order to find a violation, "it is not necessary to prove the occurrence of an actual change in employees' working conditions as a precondition to finding a duty on the part of management to negotiate the impact . . . the [charging party] need only produce sufficient evidence to establish that the [non-negotiable] decision . . . would have a reasonably foreseeable adverse impact on employees' working conditions and that its proposal is intended to address employee concerns generated by that anticipated impact." (*Fremont; Mt. Diablo*.)

The bargaining obligation does not attach to effects that are purely speculative. (*Fremont; Lake Elsinore School District* (1987) PERB Decision No. 646.) The Board decision in *Mt. Diablo* offers an example of a purely speculative effect. The non-negotiable decision involved a layoff. The effect of that non-negotiable decision found by the Board to be purely speculative was the "right to negotiate safeguards in case of a future layoff." Speculative

means "theoretical rather than demonstrable." (Merriam-Webster Online Dictionary http://www.merriam-webster.com/dictionary/speculative [as of June 15, 2012].) The Board's conclusion in *Mt. Diablo* is consistent with the definition of speculative in that a future layoff is only a theoretical possibility and not demonstrable by any present means. In other words, the alleged impact could not be expected or anticipated absent circumstances outside the parties' present ability to control and therefore the impact was not reasonably foreseeable.

As a general rule, the direction of the workforce is a managerial prerogative that is not subject to bargaining. (*Davis Joint Unified School District* (1984) PERB Decision No. 393 (*Davis*).) To the extent that a non-negotiable managerial decision concerning direction of the workforce has an effect on employee workload, however, such an effect would be negotiable. (*Ibid.* [under scope of representation test set forth in *Anaheim Union High School District* (1981) PERB Decision No. 177, Board held that given the caseload model upon which the job of counselor is structured, the number of cases assigned is a negotiable matter]; see also *State of California (Employment Development Department)* (1998) PERB Decision No. 1284-S [the issue of the number of interviews required to be conducted in a day is within the scope of representation and therefore negotiable because it is reasonably and logically related to hours]; *State of California (Department of Motor Vehicles)* (1988) PERB Decision No. 1291-S [the issue of performance standards is within the scope of representation and therefore negotiable because it relates to wages in that the existence of standards suggests the potential for rewards and discipline].)[6] As the Board stated in *Davis*, the subject of workload is at the core of the employment contract and "is plainly a subject of central concern to both management and

[6] In the latter two cases, the alleged violation at issue involved allegations of an unlawful unilateral change, not a failure to bargain effects. These cases are cited here only for the point that workload issues, whether they present in the form of number of assignments or performance standards, are within the scope of representation. They are not cited for any other point or rule of law.

employees which may appropriately be resolved via the process of collective negotiation." In the event an employer is unsure whether a particular subject is negotiable, "it is under an obligation to ask the union for its negotiability justification" (*State of California (Department of Corrections)* (2000) PERB Decision No. 1388-S); and inform the exclusive representative of the reasons for its belief that a matter is out of scope (*Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375 [decided on remand from the California Supreme Court]).

Because bargaining over effects contemplates that negotiations will occur prior to implementation of the non-negotiable decision, the parties must assess the effects of the decision *prospectively*, without the benefit of hindsight. The effects must be reasonably likely to occur, not proven to have already occurred. Where the employee organization has made a timely demand for bargaining on an issue within the scope of bargaining, like workload, the employer has the following three choices: (1) accede to the demand and address the employee organization's concerns in negotiations; (2) ask the employee organization for its negotiation justification; or (3) refuse the employee organization's demand. In choosing the third option, the employer does so at its peril if its refusal is later determined to be unjustified.

Before turning to our analysis of the disputed issue, we first address CFA's argument regarding Board precedent. CFA refers to a statement in the dismissal letter, which it asserts calls for a clarification in the standard for determining whether an effect of a non-negotiable decision is itself negotiable. Both the dismissal and warning letters cited the Board's decisions in *Beverly Hills Unified School District* (2008) PERB Decision No. 1969 (*Beverly Hills*) and *Salinas Union High School District* (2004) PERB Decision No. 1639 (*Salinas*) for the proposition that "the charging party bears the burden of alleging facts establishing an **actual impact** on employees' terms and conditions of employment." (Dismissal letter, May 10, 2011,

bold in original.) In concluding that the executive order has no "actual impact" on work hours, the dismissal letter states as follows:

> There is no evidence in the First Amended Charge that counselors have in fact worked more than 40 hours per week as a result of the Executive Order. On the contrary, the First Amended Charge provides that the counselors *currently* spend 50% of their time on direct counseling services. The First Amended Charge is speculative at best, and insufficient to support a violation.

(Dismissal letter, May 10, 2011, p. 3; italics in original.)

CFA is concerned that, by requiring the charging party to allege "actual impact," the Office of the General Counsel has eviscerated the "reasonably foreseeable" standard set forth in *Fremont*. CSU's view is that the word "actual" was not used by the Board in *Beverly Hills*, in describing the holding in *Salinas*, to limit the scope of negotiable "effects" to the exclusion of prospective effects, but rather to distinguish them from purely speculative effects.

Both *Beverly Hills* and *Salinas* involved the issue of whether the employer's decision to implement a non-negotiable management decision resulted in a unilateral change in employee workload, a matter clearly within the scope of representation.[7] Because one of the elements of a unilateral change violation is that the employer implemented a change in policy concerning a matter within the scope of representation (*Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Walnut Valley Unified School District* (1981) PERB Decision No. 160; *San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813; *Grant Joint Union High School District* (1982) PERB Decision No. 196), the charging party in such cases bears the burden of establishing that the alleged change actually occurred. In considering whether the charge in *Beverly Hills* alleged facts demonstrating that a policy requiring teachers to release tests to parents had an actual impact on work hours, the Board

[7] In addition, *Beverly Hills* involved an alleged refusal to bargain effects, but found that the charge failed to establish a valid demand to bargain the negotiable effects of a non-negotiable policy.

held that such an impact could not be presumed from the terms of the policy itself, where the policy did not lengthen instructional time, shorten preparation periods, or mandate that teachers create new examinations.[8]

Thus, the Board's use of the term "actual impact" in *Beverly Hills* was in the context of determining whether a unilateral change in working conditions had occurred, not whether the employer had breached its duty to negotiate over the effects of its decision prior to implementation. In contrast, this case involves the issue of whether CSU had an obligation to bargain over the effects of its non-negotiable decision upon timely request by CFA prior to implementation. As mentioned in footnote 6, *ante*, cases involving unilateral change allegations may provide useful discussion about whether a subject matter falls within the scope of representation. Apart from that common element, the standard for determining whether there has been an unlawful unilateral change is necessarily distinct from the standard for determining whether there has been a failure to bargain effects. The former entails a unilateral repudiation or *change* in the status quo as evidenced by the collective bargaining agreement or an established past practice. The latter entails a failure to negotiate the effects of a decision prior to any *actual change*. As the Board ruled in *Fremont*, in such cases, "it is not necessary to prove the occurrence of an actual change in employees' working conditions as a precondition to finding a duty on the part of management to negotiate the impact." So long as the immediate or prospective effect of a non-negotiable decision identified by charging party falls within the scope of representation and is reasonably foreseeable and causally related to

[8] Such a presumption was expressly rejected by the Board in *Beverly Hills* [overruling *San Bernardino City Unified School District* (1982) PERB Decision No. 255, which had found a negotiable effect based on a policy giving principals discretion to require lesson plans] and *Imperial Unified School District* (1990) PERB Decision No. 825 [overruling presumption expressed in *Moreno Valley Unified School District* (1982) PERB Decision No. 206 that effect on work hours could be presumed from decrease in length of teacher preparation time].

the non-negotiable decision, the bargaining obligation attaches. To require a showing of "actual impact" is at odds with the forward-looking nature of a foreseeability analysis.

Notwithstanding the Board's intent in *Beverly Hills*, however, the phrase "actual impact" and the notion of proving actual change as an element of the prima facie case has crept into PERB analyses in cases where the only unfair practice alleged is a failure or refusal to bargain the prospective potential negotiable effects of a non-negotiable decision upon a timely request. This case has brought to light not only a prima facie violation of CSU's duty to bargain in good faith over the effects on workload of the executive order, but as important, confusion over and/or misidentification of the appropriate standard to be used in evaluating such a charge. Accordingly, for purposes of clarification, we herein affirm that the foreseeability standard as articulated in *Mount Diablo* is, and always has been, the appropriate standard in cases involving the alleged failure to bargain the negotiable effects of a non-negotiable decision upon timely request prior to implementation. Also for purposes of clarification, we herein disavow any precedential statements of law or analyses imposing on the charging party the burden to establish that an "actual change" has occurred as an element of an unfair practice charge alleging a failure or refusal by the employer to bargain the negotiable effects of a non-negotiable decision upon a timely demand.

Applying the above-summarized Board precedent governing effects bargaining to the facts here, CFA has met its burden of establishing a prima facie case. In identifying workload as a potential prospective effect of CSU's executive order, CFA clearly identified an area of impact, which it believed to be within the scope of representation. By Rohrbacher's e-mail of November 8, 2010, CFA's desire to bargain over the effects on workload of the executive order, as opposed to the executive order itself, was clearly communicated to CSU.

Accordingly, we conclude that CFA alleged sufficient facts to demonstrate that it made a valid request to bargain the negotiable effects of CSU's decision.

CSU's executive order establishes a minimum mandatory baseline/benchmark for time spent performing direct counseling services of 60 to 65 percent. CFA alleges that the counselors spend 50 percent of their collectively-bargained 40-hour work week performing direct counseling services, and that the remaining time spent on related case management and other required services and activities cannot be eliminated or reduced. Factual support for CFA's allegations was provided in the form of a declaration by an employee who is both a counselor and the CFA Chair of the Counselor Caucus and therefore familiar with workload demands both at the San Bernardino campus and system-wide.

In an unbroken line of precedential decisions, the Board has found that workload issues are within the scope of representation and therefore negotiable. An increase in direct counseling services unaccompanied by a decrease in other required workload demands implicates the 40-hour work week and therefore relates to hours. The establishment of a baseline/benchmark suggests the potential for rewards and discipline and therefore also relates to wages. The only issue is whether the alleged prospective impact identified by CFA is reasonably foreseeable, at the one end, or indirect and speculative, at the other. Assuming CFA's allegations to be true, based on mathematics alone, we conclude that the charge alleges sufficient facts to demonstrate that effects on workload are reasonably foreseeable so as to state a prima facie case of refusal to bargain. Whether or not such effects actually materialize is not the issue. So long as CFA identified a reasonably foreseeable impact on workload, CSU was obligated to meet and negotiate in good faith those potential impacts prior to implementation.

Contrary to CSU's assertion that CFA's estimates are merely legal argument, we find that CFA's estimates are specific, logical and fact-based. Just because the effects had not yet occurred as of the filing of the amended charge does not mean that they should be categorized as purely speculative in deciding whether CSU was under an obligation to bargain effects prior to implementation on a subject matter unquestionably within the scope of representation. The full implementation of the executive order could take years to materialize given the number of campuses and students involved and the size of the bargaining unit. Unlike the theoretical effect of a possible future layoff in *Mt. Diablo*, the alleged *prospective* effects here are demonstrable by projections based on current workload demands.

CSU also relies on two sentences in the executive order in support of its position that there are no negotiable effects. The executive order states that individual adjustments in expectations may be necessary to accommodate additional responsibilities, assignments and the academic calendar; and the executive order also states that it is not meant to supersede the assignment provisions of Article 20 of the CBA. The allowance for individual adjustments in expectations does not negate the overall impact on hours, wages and terms and conditions of employment of being required to work under a newly-established minimum performance standard. The language regarding supersession does not immunize CSU's non-negotiable decision from effects bargaining. If it did, then it would be too easy to avoid effects bargaining with the careful drafting of documents. CSU asserts that the supersession language is meant at least in part to indicate that the 40-hour work week prescribed by the CBA is not to be disturbed by the executive order. As the Board stated in *Fullerton Union High School District* (1978) PERB Decision No. 53, however:

> Negotiations on hours must include not only the stated length of the work day, but the ability of the employees to complete their assigned work within the work day. Setting the hours of the

> work day is meaningless if the work can never be performed within those hours.

(Fn. omitted.)

Therefore, CSU's refusal to bargain after CFA's timely demand constitutes a prima facie case of a per se refusal to negotiate in good faith over the effects of its non-negotiable decision to implement the executive order. CSU's duty to negotiate in good faith is not discharged by CSU's post-implementation willingness to "discuss" the executive order while steadfastly maintaining that it had no duty to bargain. A decision allowing the charge to proceed to complaint serves a fundamental purpose of HEERA to assure that higher education employers carry out their functions "in an atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them." (HEERA, section 3560, subd. (e).) As stated by the concurrence in *Davis*:

> The threshold question is whether the subject itself is negotiable or nonnegotiable and a test of negotiability does not depend on the submission of evidence as the needed wad to trigger negotiations. Employees certainly are not required to prove that their workday is too long, or that they cannot complete their work within the scheduled hours, in order to place an hours-proposal on the table. . . . [The dissenting members] seem to convert what may be the employees' arguments at the table into a test of whether they are entitled to sit there in the first place.

## ORDER

The unfair practice charge in Case No. LA-CE-1125-H is hereby REMANDED to the Office of the General Counsel for processing and issuance of a complaint in accordance with this Decision.

Members Dowdin Calvillo and Huguenin joined in this Decision.