STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ACADEMIC PROFESSIONALS OF CALIFORNIA, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	Case No. LA-CE-821-H PERB Decision No. 1842-H May 18, 2006

Appearances: Rothner, Segall & Greenstone by Bernhard Rohrbacher, Attorney, for Academic Professionals of California; Darryl Hamm, University Counsel, for Trustees of the California State University.

Before Duncan, Chairman; Shek and McKeag, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (Board) on exceptions filed by the Academic Professionals of California (APC) to an administrative law judge's (ALJ) proposed decision (attached). The unfair practice charge alleged that the Trustees of the California State University (CSU) unilaterally changed the method for reporting sick leave and vacation credits from one hour increments to one-half hour increments. APC further alleged that this was a breach of CSU's duty to negotiate in good faith violating the Higher Education Employer-Employee Relations Act (HEERA),[1] section 3571(c) and (a), respectively.

The Board has reviewed the complete record, including the unfair practice charge and response, the stipulation of facts in lieu of a formal hearing, post-hearing briefs from both parties, the ALJ's proposed decision, the exceptions filed by APC, and response to exceptions

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

by CSU. We find the proposed decision of the ALJ to be free from prejudicial error and adopt it as the decision of the Board itself.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-821-H are hereby DISMISSED WITH PREJUDICE.

Members Shek and McKeag joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ACADEMIC PROFESSIONALS OF CALIFORNIA, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-821-H PROPOSED DECISION (April 19, 2005)

Appearances: Lee Norris, Labor Relations Representative, for Academic Professionals of California; Bruce Richardson and Darryl Hamm, University Counsel, for Trustees of the California State University.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

The Academic Professionals of California (APC) initiated this action on May 19, 2004, by filing an unfair practice charge against the Trustees of the California State University (CSU or University). The General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on August 4, 2004, alleging the University unilaterally changed the method for reporting sick leave and vacation credits from one hour increments to one-half hour increments. It is alleged that the University, by this conduct, breached its duty to negotiate in good faith, in violation of the Higher Education Employer-Employee Relations Act (HEERA), section 3571(c) and (a), respectively.[1]

[1] HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory reference are to the Government Code. In relevant part, section 3571 states:

It shall be unlawful for the higher education employer to do any of the following:

CSU submitted an answer on September 10, 2004, generally denying all allegations and asserting a number of affirmative defenses. Denials and defenses will be addressed below, as necessary.

A settlement conference was conducted by a Board agent on August 25, 2004, but the dispute was not resolved. The parties entered into a stipulation of facts in lieu of hearing, and filed it with PERB on November 24, 2004. With the receipt of the final brief on February 7, 2005, the matter was submitted for decision.

FINDINGS OF FACT

APC is an employee organization within the meaning of section 3562(f)(l) and the exclusive representative of an appropriate unit of academic support employees (Bargaining Unit 4) within the meaning of section 3562(i). CSU is a higher education employer within the meaning of section 3562(g).

The stipulation of facts agreed to by the parties is set forth immediately below almost verbatim.

1. In a letter dated December 1, 2003, addressed to APC, the University announced its intention to change the "reporting unit for sick leave and vacation credits from one hour to

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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> . . . . . .
>
> (c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

one-half hour increments" for Humboldt State University ("HSC") employees. This group of employees includes members of Bargaining Unit 4 represented by APC.

2. In a letter dated December 16, 2003, APC responded to the University. In its letter APC asserted the proposed change was within the scope of representation, and stated, "the CSU is encouraged to bring this matter to the successor agreement negotiations currently underway between the parties." APC also informed the University that it expected that no Unit 4 employees would be subject to the change until the University had discharged its collective bargaining obligation. The University received the letter on December 23, 2003.

3. The University did not send a letter, or otherwise respond to APC in January or February regarding this matter. APC and CSU engaged in bargaining sessions for a successor contract on February 17, 18, and 25, 2004. At those sessions, neither party raised this matter.

4. APC sent a letter to the University dated March 5, 2004. In this letter APC stated that in its December letter, APC had indicated that it wished to maintain the *status quo* until the parties had "engaged in the collective bargaining process." It suggested that the matter be brought "to the main bargaining table where the body authorized to negotiate on behalf of our bargaining unit members will be gathered."

5. The University responded in a letter dated March 10, 2004, and noted that, "[t]he University stands ready and willing to meet and discuss the implications of such change and will arrange a meeting on campus where the principal parties and authorized representatives are located, rather than the systemwide bargaining table, to discuss your concerns." The University suggested meeting at HSU after an arbitration scheduled for April 1, 2004. The University's representative offered to stay over to Friday, April 2, to bargain the leave

accounting issues.[2] In the alternative, the University suggested arranging "a conference call in the next two weeks."

6. In a letter dated March 13, 2004, APC informed the University it did wish to bargain about the proposed change and the APC informed the University that "the only group authorized to negotiate on behalf of our unit members is the team assembled to conduct successor contract negotiations that are presently underway." APC noted that "[w]hile your offer to meet at the Humboldt campus is appreciated, our team is unavailable to meet on the offered dates," and mentioned the March 22 and 23 dates, the next dates set for successor contract negotiations. APC offered two other possibilities: a conference call involving Humboldt State University at the March 22 and 23 successor contract bargaining sessions or scheduling a successor contract bargaining session at Humboldt State.

7. The University did not send a letter or otherwise respond to APC's March 13 letter.

8. The University and APC engaged in successor contract negotiations on March 22 and 23 and April 13 and 14, 2004. At those sessions, neither party raised this matter.

9. On May 10, 2004, APC sent the University an email asking "if there will be a proposal on this matter in the immediate future or if we should proceed with litigation."

10. The University did not respond to APC's May 10 email before APC filed its unfair practice charge on May 18.

11. On May 18, 2004, the Charging party filed Unfair Practice Charge LA-CE-821-H with the Public Employment Relations Board ("PERB"). The Charging Party fulfilled all of its statutory obligations in relation to this filing (as an example, the charge was filed within the period required by PERB regulations).

[2] No discussion on this occurred on April 1, 2004 because the Charging Party's bargaining team was unavailable to meet at the Humboldt campus on that date, and because the parties, who traveled to HSU, had to catch their scheduled flights.

12. The Charging Party alleged in its charge that Humboldt State University ("HSU") had unilaterally altered the *status quo* by changing the increments in which it would require members of the bargaining unit to report the use of their accrued sick and vacation leave from hourly increments to half-hour increments.

13. On August 4, 2004, the General Counsel for the Public Employment Relations Board issued a complaint in this case.

14. The parties participated in an informal settlement conference on August 25, 2004, in PERB's Los Angeles Regional Office, but were unable to reach agreement on the terms of settlement.

15. On September 9, 2004, the University submitted its answer to the complaint.

16. The most recent collective bargaining agreement between the Parties expired on June 30, 2003. The bargaining teams for the Parties have met on the following dates to engage in successor contract negotiations:[3] February 17, 18 and 25; March 22 and 23; April 13 and 14; May 19 and 20; June 22 and 23; and September 13, 2004

17. Neither party brought forward a proposal on this topic at any bargaining session.

18. On September 16, 2004, the University filed a declaration of impasse with PERB.

19. On September 21, 2004, PERB found the existence of an impasse and assigned a mediator.

20. The first mediation session between the parties was held on November 10, 2004.

21. The parties agree that on January 1, 2004, the University began to require members of the bargaining unit at HSU to report the use of their accrued leave in half-hour increments.

[3] This is not an exhaustive list of dates upon which the parties' bargaining teams have met during the period successor contract talks have been underway: It is only a list of those dates on which they met subsequent to the University's December 1, 2003 letter.

Prior to this change, the University required members of the bargaining unit report leave in hourly increments.

22. The University has not provided notice to APC about any changes to the increments in which its bargaining unit members report the use of their accrued sick or vacation leave at any member institution of the California State University other than HSU.

23. The parties agree that leave reporting increments are a topic within the scope of representation.

24. None of the exhibits attached to the charge in Appendix A are in dispute.[4]

ISSUE

Did the University unilaterally change the method of reporting sick leave and vacation credits at its Humboldt campus, in violation of its duty to bargain in good faith?

CONCLUSIONS OF LAW

APC argues that CSU unilaterally changed the method for reporting sick leave and vacation benefits, a matter within the scope of representation, without providing notice and an opportunity to bargain prior to implementation of the decision. APC asserts that the University's action was a fait accompli and put the union in a position of having to bargain back to the status quo, despite its "belated" willingness to meet and discuss the implications of the change. APC contends, in addition, that the University's willingness to "meet and discuss" the matter was merely an offer to negotiate effects of an action that was subject to decision-bargaining.

CSU argues in response that it provided APC with sufficient notice and opportunity to negotiate one month prior to the anticipated implementation date. Rather than accept the offer

[4] The attachments to the stipulated facts include correspondence between the parties, the collective bargaining agreement and documents filed with PERB. They will be referred to later as necessary.

to negotiate the matter at HSU, the University argues, APC attempted to fold the issue into successor bargaining that was underway at the time. In the University's view, APC missed an opportunity to negotiate the change and instead insisted that the matter be bargained at a later date as part of successor negotiations. Under relevant PERB precedent, CSU concludes, APC had no right to insist on the setting to negotiate the change and thus APC has failed to establish that the University breached its duty to bargain.

To prevail on a complaint of unilateral change, charging party must establish by a preponderance of the evidence that (1) the employer implemented a change in policy; (2) the change concerned a matter within the scope of representation; (3) the change was implemented without giving the exclusive representative adequate notice and an opportunity to negotiate; and (4) the change is not merely an isolated incident, but rather amounts to a change in policy or contract that has a generalized effect on bargaining unit members' terms and conditions of employment. (Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant); See also Walnut Valley Unified School District (1981) PERB Decision No. 160.)

In this case, there is no dispute that CSU implemented a change and the subject of the change involved a matter within the scope of representation. Under section 3562(r)(l), the scope of representation includes "wages, hours of employment, and other terms and conditions of employment." The decision to change the method of reporting sick leave and vacation credits from one hour increments to thirty-minute increments relates to wages and hours and is therefore negotiable. The change is not rendered non-negotiable because it arguably benefited employees. (Trustees of the California State University (2003) PERB Decision No. 1507-H, p. 9.) In addition, the change had a generalized effect on unit employees, including all unit employees at the HSU campus. The remaining question under Grant is whether CSU provided adequate notice and an opportunity to bargain.

I find that CSU provided adequate notice of the change to APC. There is no hard and fast rule to determine the adequacy of notice, and what constitutes a reasonable amount of time necessarily depends on the individual circumstances of each case. (See Victor Valley Union High School District (1986) PERB Decision No. 565, p. 5.) In this instance, CSU's December 1, 2003, letter that it was planning a change in reporting increments that would become effective January 1, 2004, satisfied its duty to provide notice. I recognize that the notice was issued at the beginning of the holiday season. However, the notice announced what appears to be a relatively uncomplicated change in substance and scope; both parties suggested during the process that the matter could be handled through a conference call and the change applied only to employees at the HSU campus. This was not a matter that required extended talks. Therefore, I find the notice was adequate for the parties to address the issue. (See e.g., State of California (Board of Equalization) (1997) PERB Decision No. 1235-S (Board of Equalization) [thirty-day notice of intent to relocate office, provided during holiday season, deemed sufficient where union made no substantive proposal and instead responded with information requests and demand that issue be negotiated at main bargaining table]; State of California (Board of Equalization) (1998) PERB Decision No. 1258-S [six-week formal notice prior to implementing automated management system to process files by computer deemed sufficient].)

Even if the notice created an unreasonably tight schedule to adequately negotiate about the planned change before January 1, 2004, that fact alone would not compel a conclusion that CSU breached its duty to bargain. As APC points out, an employer ordinarily may not implement a change, confront the union with a fait accompli and expect the union to bargain back to the status quo. (See, e.g., (Regents of the University of California (2004) PERB Decision No. 1689-H, adopting proposed decision of administrative law judge at p. 46 [announced change presented as fait accompli that rendered meaningful negotiations

impossible]; see also Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802, 823 [165 Cal.Rptr. 908].) However, the stipulated record does not describe an ordinary situation, and meaningful negotiations were possible. APC's response to the December 1 notice did not expressly claim the notice was deficient. Rather, APC made no proposal. It asserted that the matter was within the scope of representation, "encouraged" CSU to bring the issue to the successor negotiations and informed CSU that it "expects" no unit employees will be subject to the proposed change until the completion of bargaining. CSU was at all times prepared to negotiate, and the subject matter of the change was such that it benefited employees and could have been negotiated after implementation began. Indeed, there were many opportunities to engage in meaningful negotiations and APC notes in its brief that it was willing to engage in bargaining over the change despite the University's action at the HSC campus. Negotiations did not stall because CSU unlawfully refused to bargain. Negotiations stalled primarily due to a disagreement about the setting of the talks. APC wanted the negotiations to take place as part of the systemwide successor bargaining; CSU wanted to negotiate at the campus level. If APC had a right to insist that the change in reporting requirements at the HSU campus be negotiated as part of the successor negotiations, the outcome here arguably would be different. However, as more fully explained below, no such right existed under current Board case law.

In Board of Equalization a state agency gave a union of state employees 30-days notice that it planned to relocate its Ventura office, and offered to meet with the union. The parties were in successor contract negotiations at the time of the notice. The union requested to negotiate the relocation. As part of the request, the union demanded that the State refer the item to the main table for bargaining units impacted by the proposal. "As you know," the union asserted, "the parties are involved in successor collective bargaining agreements in all CSEA units and the state can make no changes on anything within the scope of representation

while the parties are continuing to bargain. " (Board of Equalization, adopting dismissal letter of regional attorney.) In addition to arguing that the State had failed to provide adequate notice, the union later informed the State that it would not entertain proposals and the State "should refer [proposals] to the main bargaining table for the appropriate CSEA bargaining unit." (Ibid.) The State eventually implemented the relocation decision without bargaining and the union filed an unfair practice charge claiming the State breached its duty to bargain in good faith.

Adopting a regional attorney's dismissal, the Board stated:

> CSEA also claims a right to have negotiations on this issue referred to the main bargaining table during negotiations over a successor collective bargaining agreement. However, CSEA offers no legal support for this assertion. [Citation omitted.] Under the Dills Act and PERB precedent, as discussed by the Board Agent, CSEA has the right to negotiate the effects of proposed decisions on matters within the scope of representation, upon request. We know of no authority which gives CSEA the right to dictate the setting in which such negotiations must occur. [Board of Equalization at p. 3; underlining in original.]

The same rationale applies here. APC had no right to dictate the setting to negotiate a new method for reporting sick leave and vacation credits. Under the reasoning of Board of Equalization, APC missed an opportunity to bargain when, in lieu of commencing negotiations about the change at the HSU campus, it insisted that the issue be part of the successor negotiations.

Granted, ground rules for bargaining are themselves negotiable matters. The parties must bargain collectively about the preliminary arrangements for negotiations in the same manner they must bargain about substantive terms or conditions of employment. Preliminary matters are just as much a part of the process of collective bargaining as negotiations over wages and hours. (Stockton Unified School District (1980) PERB Decision No. 143, p. 223.) The setting for negotiations may fairly be characterized as a ground rule.

However, it cannot be concluded on this record that CSU refused to negotiate about the location. Neither party impermissibly conditioned negotiations on agreement regarding its position or otherwise bargained in bad faith. The parties merely disagreed about where the negotiations should be held. On this point, it is worth reiterating the relevant events. In a December 16, 2003, letter, APC "encouraged" CSU to bring the matter to the successor negotiations. CSU did not receive the letter until December 23, and did not respond in January or February 2004. Although the parties met in successor negotiations three times in February, neither side raised the topic. On March 5, 2004, APC indicated it wanted to maintain the status quo until the parties participated in negotiations and again suggested the matter be brought to the main successor negotiations. APC noted in the letter that CSU's silence on the matter "has been eerie." CSU responded on March 10, indicating it was ready to meet and suggesting it would arrange a meeting at the HSU campus after an arbitration hearing that was set for April 1, or, alternatively, discuss the matter in a conference call within the next two weeks. Apparently, out-of-town representatives from both sides were at the HSU campus on April 1, and CSU representatives offered to remain at the HSU campus until the next day to discuss the matter. But that suggestion was not satisfactory to APC. APC followed with a March 13 letter, again indicating that it wanted to negotiate the matter in the context of the systemwide talks scheduled for March 22 and 23, or discuss the matter by speaker phone as part of the successor negotiations, or schedule future successor negotiations at the HSU campus and discuss the matter at that time. CSU did not respond. Although the parties met in successor negotiations on four occasions during the next month, neither party raised the matter, hi a May 10 email, APC asked CSU if it would submit a proposal or if APC should resort to litigation. Receiving no response, APC filed this unfair practice charge eight days later.

There were many opportunities to discuss the change at issue here. However, the negotiations about the change in the method of reporting sick leave and vacation credits stalled (or, more accurately, never got started) for one key reason: the parties disagreed about where the negotiations should take place. APC wanted to negotiate the issue as part of the systemwide successor negotiations where its authorized negotiators were already bargaining. CSU wanted the negotiations to take place at the HSU campus, where the change occurred and where the main principals were located. It is unnecessary to determine which proposal makes more sense; both arguably have merit. I find that both sides advanced their positions in good faith, but there was no meeting of the minds as far as negotiation setting is concerned. It is well settled that adamant insistence on a bargaining position is not necessarily a refusal to bargain in good faith. The obligation to negotiate in good faith does not require yielding on a position fairly maintained. (Oakland Unified School District (1981) PERB Decision No. 178, pp. 7-8; see also Trustees of the California State University (1990) PERB Decision No. 799-H, adopting proposed decision of administrative law judge at p. 46.)

APC argues in its brief that any argument that APC waived its right to bargain when it failed to make an initial proposal is "completely alien in labor relations, and would shift the burden of writing a proposal from the party who desires the proposed change to the party who would rather maintain the status quo." It is unnecessary to determine who has the obligation to present the first proposal. Assuming for argument's sake that CSU had a duty to present the first proposal, I find it satisfied its duty. On December 1, 2003, the University informed APC that it would implement a change that would benefit employees in the way sick leave and vacation credits were recorded. The announcement was specific. It said that HSU

> ... is planning to change the reporting unit for sick leave and vacation credits from one hour to one-half hour. In this manner employees will not have to report absences in one hour increments, but now will have their time tracked by half-hour

> units to more accurately reflect the usage of sick and vacation credits.

Although the notice was not styled as a formal proposal of what CSU planned to do, for all intents and purposes that is precisely what it was. In response to APC's March 5, 2004, letter, CSU repeated its proposal verbatim five days later. This was not a complicated change and APC was given a detailed notice that was not unlike a formal proposal. If APC disagreed, it had the burden of presenting a counterproposal either rejecting or modifying what CSU had indicated it planned to do, or responding in some manner other than simply insisting the matter be made part of the successor negotiations. Unfortunately, substantive negotiations never got started for the reasons stated above. But it cannot be concluded on this record that CSU refused to negotiate or that its conduct otherwise violated its duty to bargain under HEERA.

APC next argues that "the University's letter of March 10, 2004, is evidence of the University's lack of understanding, or confusion, about whether it had an obligation to engage in decision or effects bargaining." According to APC, "while the University initially was willing to 'meet and discuss' the issue (effects bargaining), the terms of the stipulation make it clear the University either understood, or now understands, this to be a matter within the scope of representation; making it subject to decision bargaining." As I understand this argument, APC contends that CSU offered only to "meet and discuss" the planned change or negotiate only the "effects" of the change, and thereby refused to negotiate about the decision itself.

The terms "meet and discuss" and "effects bargaining" are terms of art. (See e.g., Regents of the University of California v PERB (1985) 168 Cal.App.3d 937, 941-945 [214 Cal.Rptr. 698] [after providing employee with notice of change and opportunity to discuss change with employee-designated non-exclusive representative, University may implement change]; Newman Crows Landing (1982) PERB Decision No. 223 ["decision" to lay off employees not within scope of representation, but "effects" of the decision subject to

bargaining].) It is true that CSU's March 10 letter states that "the University stands ready and willing to meet and discuss the implications of [the] change." However, I find this single statement, when read in the context of the stipulated record, insufficient to establish an attempt to avoid decision-bargaining. The parties have stipulated that "leave reporting increments are a topic within the scope of representation." There is no evidence that CSU took the position that the decision to change reporting increments was outside the scope of representation. If CSU had refused to bargain about the decision to change the reporting increments, we would have a different case here. However, that is not what happened. CSU provided a notice of its intent to change the reporting increments and the parties immediately fell into disagreement about the setting of the negotiations. The record contains no substantive proposal and no rejection of a proposal. There is no evidence that CSU claimed it had no duty to bargain about the subject matter in the notice. Therefore, it is concluded that APC has failed to prove by a preponderance of the evidence that CSU refused to bargain about the decision to change reporting increments for sick and vacation leave.

PROPOSED ORDER

Based on the above findings of fact and conclusions of law and the entire record in this matter, the complaint and the underlying unfair practice charge in Case No. LA-CE-821-H, Academic Professionals of California v Trustees of the California State University, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant

1031 18th Street
Sacramento, CA 95814-4174

FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (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).)

Fred D'Orazio
Administrative Law Judge