STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA FACULTY ASSOCIATION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	Case No. LA-CE-779-H PERB Decision No. 1926-H October 31, 2007

Appearances: Rothner, Segall & Greenstone by Bernard Rohrbacher, Attorney, for California Faculty Association; Christine Helwick, Janette Redd Williams and Marc Mootchnik, University Counsel, for Trustees of the California State University.

Before Neuwald, Chair; McKeag and Rystrom, Members.

DECISION

NEUWALD, Chair: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the California Faculty Association (CFA) of an administrative law judge's (ALJ) proposed decision.[1] The complaint alleged that CSU violated the Higher Education Employer-Employee Relations Act (HEERA)[2] by unilaterally implementing a computer use policy at its Monterey Bay campus and that CSU bypassed the union and dealt

[1]It should be noted that the ALJ consolidated two cases: LA-CE-616-H, filed by the Academic Professionals of California (APC), and LA-CE-779-H, filed by CFA. After the ALJ issued the proposed decision, APC filed exceptions on October 18, 2004. By letter, dated November 8, 2005, both APC and the Trustees of the California State University (CSU) petitioned the Board to withdraw without prejudice their exceptions to the proposed decision because the parties developed a mutually satisfactory resolution of the issues. The Board granted the withdrawal in Trustees of the California State University (2005) PERB Decision No. 1788-H. As such, we do not address APC's exceptions and those portions of the proposed decision pertaining to APC are non-precedential.

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

directly with unit employees in implementing the computer use policy at Monterey Bay. CFA alleged that this conduct constituted a violation of HEERA section 3571 (a) and (c).

The ALJ found that CSU breached its duty to negotiate in good faith with CFA when it unilaterally implemented the computer use policy without providing CFA with prior notice and an opportunity to bargain the decision and effects of the decision in violation of HEERA section 3571(c). The ALJ further found that by said conduct, CSU interfered with the right of employees to be represented by an employee organization of their choice in violation of Section 3571(a). The ALJ dismissed CFA's allegation that CSU dealt directly with unit employees in implementing the computer use policy at Monterey Bay.[3]

The Board reviewed the entire record in this matter, including the complaint, the ALJ's proposed decision, the statement of exceptions filed by CSU, the response filed by CFA, the hearing transcript and exhibits, and the briefs of the parties. The Board, disagrees with the ALJ's finding that CSU unilaterally implemented a computer use policy. The Board reverses that portion of the ALJ's proposed decision and, as such, dismisses the unfair practice charge and complaint alleging unilateral implementation of the computer use policy as discussed below.

BACKGROUND[4]

CSU is a higher education employer within the meaning of HEERA section 3562(g). CFA is an employee organization within the meaning of Section 3562(f) and an exclusive representative within the meaning of Section 3562(i). CFA represents a unit of approximately

[3]In regards to the allegation concerning CSU's direct dealing with unit employees, the Board affirms the ALJ's finding that the allegation is without merit and the parties remain bound.

[4]For the benefit of the parties, the Board summarizes those facts related solely to CFA.

2,100 academic support employees. All employees are assigned CSU computers and are considered authorized users.

CFA's main office is in Sacramento, and it maintains a chapter at each CSU campus with officers, grievance chairs and committees. Edward Purcell, CFA's director of representation, communicates daily with the various chapters by email and telephone from his home in Southern California regarding union-related matters.

Implementation of the Policy

On April 29, 2003, CSU notified CFA by letter of a proposed Interim Appropriate Use Policy for Information Technology (AUP) at the Monterey Bay campus to be implemented on May 29, 2003 and offered to meet with CFA.[5] CFA objected to the AUP. In a letter to CSU on May 27, 2003, CFA objected to the AUP. CFA stated, in part:

> Please be informed that the proposed campus 'Acceptable Use' policy contains a variety of matters within the mandatory scope of collective bargaining under HEERA. (Please see PERB Decision No. l507-H in that regard.) In light of this bargaining obligation, CFA is uninterested in 'discuss(ing)' the matter with Mr. Block as you suggest. Further, the Union is uninterested in opening the contract for renegotiation at this point as is its prerogative under Article 3 of the MOU.

CFA further stated that the matter should be deferred to statewide contract negotiations. CFA also stated that the AUP should not be implemented as to CFA unit employees.

On June 4, 2003, CSU responded to CFA contending that the AUP was not within the scope of representation. CSU stated, however, that it would be wiling to meet and discuss the policy's impact on unit employees. CFA responded on June 12, 2003, cautioning that if CSU persisted in implementing the AUP as to its unit employees, CFA would fie an unfair practice charge. Despite said warning, CSU implemented the AUP in July. Subsequently, on July 28, 2003, CFA filed an unfair practice charge in Case No. LA-CE-779-H alleging that CSU

[5]Previously, CSU did not have a computer policy at the Monterey Bay campus.

unilaterally implemented a computer use policy at its Monterey Bay campus on June 15, 2003. On October 21, 2003, the PERB General Counsel issued a complaint.

ALJ's DECISION

The ALJ found that CSU unlawfully unilaterally implemented the AUP. The ALJ first determined the policy to be within the scope of representation. In reaching this conclusion, the ALJ relied on Trustees of the California State University (2003) PERB Decision No. 1507-H (Trustees) noting that:

> In affirming the (ALJ's) conclusion that CSU's implementation of both computer policies violated its duty to bargain, PERB held that although portions of the policies concerned matters of management prerogative, 'other issues, involving ill-defined criteria for discipline, internal monitoring of employee e-mail, and training employees to comply with copyright and other licensing restrictions, clearly are negotiable items'.

The ALJ found that that the Monterey Bay computer policy provided for employee discipline. The ALJ noted that even if the policy did not provide for employee discipline, it still fell within the scope of representation because:

> ... all of the campus policies prohibit spam, mass mailings, or any other use which could impede the network, restrict usage to University business except for incidental, personal use, and permit CSU monitoring and access, not only under subpoena or court order, but as CSU deems necessary to keep the system viable. Some of these terms are not well-defined. And a violation of any of the terms could result in loss of the user's authorization. Thus, each of the campus policies creates a statement of incompatible activities and effects a change in the status quo.

The ALJ rejected CSU's argument that the policies were not amenable to collective bargaining because negotiating with seven unions and enforcing potentially different policies for each of ten bargaining units creates an undue burden. The ALJ stated that there was evidence that bargaining could be drastically streamlined as evidenced by Assistant Vice Chairman,

Chancellor's Office, Sam Strafaci's, admission that there could be one overall university policy instead of separate campus policies.

The ALJ further found that while CSU provided notice regarding negotiating the effects of the policies, CFA did not waive its right to bargain. The ALJ agreed with the union that, as was its right, it could rely on the zipper clause of the agreement. The ALJ stated:

> It does not take into account well-settled principles that a zipper clause may not be construed as a waiver of bargaining rights (Ohio Power Company (1995) 317 NLRB 135 (150 LRRM 1098)), and that while a union may use it as a shield to resist the employer's efforts to change the status quo, the employer may not use it as a sword to make unilateral changes over a union's refusal to bargain (CBS Corporation (1998) 326 NLRB 861 (160 LRRM 1021), citing (GTE Automatic Electric (1982) 261 NLRB 1491 (110 LRRM 1193))). In these cases as well as in (NLRB v. Challenge-Cook Bros. of Ohio (6th Cir. 1988) 843 F.2d 230 (127 NLRB 3181)), the employer was prevented from using a zipper clause to change the status quo during the life of the contract without the union's consent. It should follow, then, that while an employer may be privileged mid-contract to unilaterally decide on a matter of management prerogative, a union's refusal to bargain the effects of that decision based on a zipper clause would indeed serve to prevent the employer from implementing that decision and changing the status quo.

Thus, the ALJ found "that CSU unlawfully deprived the unions of notice and an opportunity to bargain both the decision and the effects of the (Monterey Bay computer policy)."

CSU'S EXCEPTIONS

CSU excepts to the ALJ's conclusion that it unilaterally implemented the computer policies in violation of HEERA. Specifically, CSU asserts the ALJ erred in finding that the AUP was negotiable and not within management's prerogative. CSU argues that the policies fall within managerial prerogative, and thus are not within scope, because:

1. CSU campuses must have AUPs as a requirement established by the service providers from which they receive their Internet connection.

2. The primary purpose for providing computing resources is to serve CSU's educational mission as computing resources support virtually every facet of their operations, including student admissions, registration, advisement, instruction, health care services, library services, research, communications, fund-raising, business and finance, plant operations, human resources, and public safety.

3. Computing resources are constantly under attack from viruses or worms which could cause network outages both campus-wide and at individual buildings thereby severely impacting CSU's educational mission.

4. CSU faces potential liability for illegal use of the computer systems.

5. AUPs inform all users—students, faculty, administrators, and/or staff employees—about the correct use of computing resources and prevent illegal use or infiltration of worms or viruses which threaten the viability of the computer network.

6. Campus technicians must be able to immediately access infected machines. Multiple AUPs will delay access to machines because there will most likely be different notice issues.

7. CSU must have the flexibility to amend and revise AUPs as necessary to address ever-changing technological advancements.

CSU further argues that the ALJ erred in determining that the policies are amenable to bargaining because they were discussed at the statewide CSU-APC negotiating table. CSU states it only introduced the proposed policies to cover its bases in the event that PERB ruled against CSU. "(I)f CSU had not brought the policies to the table and PERB ruled in APC's

favor, CSU would be prevented from implementing a policy for several years, which it could not afford to do."

CSU also argues that in Trustees, "(t)he Board did not address and there was no evidence how the obligation to bargain entirely abridges CSU's freedom to exercise its managerial prerogative to protect university computing resources so they will be able to achieve that mission."

CSU excepts to the ALJ's conclusion that unions can prevent CSU from implementing a decision within management's prerogative by refusing to bargain effects based on a zipper clause. Such a conclusion, CSU argues:

> . . . essentially eviscerates the concept of management rights. It would extend the effect of a zipper clause to not only prevent management from unilaterally implementing changes within the scope of bargaining, but also from exercising management prerogatives that only have tangential effects on negotiable matters. The scope of bargaining is limited to wages, hours and other terms and conditions of employment. Core policy decisions, however, are management's right to make, and fall within the managerial prerogative. In such cases, employees have a limited right to bargain—that is, they are entitled to bargain only to the extent that the exercise of a managerial prerogative affects matters within the scope of representation. Allowing employees to use that limited right to altogether block the exercise of a managerial prerogative is like letting the tail wag the dog.

CSU notes that nothing in the language of the contract or evidence of negotiating history indicates a waiver of effects bargaining or managerial prerogative.

Lastly, CSU excepts to the ALJ's conclusion that the AUP contains terms that are not well-defined and "creates a statement of incompatible activities and effects a change in the status quo."

CFA'S RESPONSE

CFA argues that the ALJ properly concluded that the decision to implement the Monterey Bay policy was amenable to bargaining because the ALJ correctly followed Trustees. CFA directly responds to CSU's following arguments:

1. CFA argues that CSU's characterization of Trustees is incorrect in that "the Board did not conclude that computer use policies **'are largely** a matter of managerial right'." Rather, "(t)he Board merely entertained the possibility that **portions** of such policies **may** concern matters within management prerogative, without actually holding that any—let alone most—portions of such policies actually concern matters within management prerogative." (Bold in original.)
2. CFA states that the impact of the policies on managerial prerogatives was fully considered by the Board in Trustees.
3. The policies at issue here raise the same issues as those in Trustees, e.g., discipline, privacy rights of employees, etc.
4. CFA's contract with CSU demonstrates that the policies are amenable to negotiations.

Additionally, CFA argues that the zipper clause in its collective bargaining agreement (CBA) gives it the right to refuse to negotiate over the Monterey Bay policy.

DISCUSSION

In determining whether a party has violated HEERA section 3571(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy

concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No.160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

Under HEERA sections 3562(q) and (r) and 3562.2, the scope of representation is limited to wages, hours and other terms and conditions of employment. Whether enumerated items such as wages and hours are within the scope of representation is self-evident. In determining if non-enumerated matters fall within the scope of representation as a "term or condition of employment," however, PERB applies the three-part test. A subject is within the scope of representation if: (1) it involves the employment relationship; (2) the subject is of such concern to management and employees that conflict is likely to occur, and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer's mission. (Trustees; Trustees of the California State University (2001) PERB Decision No. 1451-H.) PERB has indicated a matter is outside the scope of bargaining if "imposing a bargaining obligation would significantly abridge the employer's managerial prerogatives." (Regents of the University of California (1987) PERB Decision No. 640-H.)

CFA argues that in Trustees, the Board held that computer resource policies fall within the mandatory scope of bargaining, and, therefore, the decision to adopt a computer policy is negotiable. As such, CSU was prohibited from implementing the AUP without first negotiating with CFA. CFA's interpretation and reliance on Trustees, however, is incorrect. In Trustees, the threshold question was "whether the subject matter contained in the CSU

Fresno and Bakersfield policies (fell) within the scope of representation under HEERA(,)" not whether the decision to implement the computer policy was negotiable.[6] The decision to implement a computer resource policy is a managerial prerogative and, therefore, not negotiable. Specifically, AUPs are necessary for CSU to provide its educational mission. "Computing resources support virtually every facet of (CSU's) operations, including student admissions, registration, advisement, instruction, health care services, library services, research, communications, fund-raising, business and finance, plant operations, human resources, and public safety." It is no secret that computer networks are constantly under attack from viruses and worms which have the potential to take down an entire computer

[6]In Trustees, there was never any dispute that the decision to implement a computer resource policy is a managerial prerogative. The ALJ's proposed decision, adopted by the Board, stated in pertinent part:

> APC does not seek to 'bootstrap' a minor non-negotiable work rule into a matter within the scope of representation or otherwise infringe on a managerial prerogative. APC points out that the union seeks to negotiate only about such matters as the impact of the policies on discipline, the practice of spamming, and the definition of terms such as 'excess' use of computer resources. APC recognizes in its brief that, 'the Union could not propose elimination of the CSU's right to establish a reasonable use policy under the Government Code because to so would, in essence, supersede the authority provided the CSU under the Code. No conflict would exist, however, concerning a whole variety of likely Union proposals which might seek to influence the content of a reasonable use policy involving such topics as the types of equipment which an employee can use, the amount of such permissible use, penalties for misuse, privacy concerns, union use of resources, etc.' Indeed, it is settled that use of computer resources is a matter about which the state employer must bargain under the Dills Act. ((State of California (Water Resources Control Board) (1999) PERB Decision No. 1337-S.) There is no reasonable basis for concluding that similar negotiations under HEERA would interfere with managerial prerogatives of higher education employers. (Emphasis added.)

While the Board found that certain subject matters of the policy fell within the scope of bargaining, the Board did not find the decision to implement the policy within the scope of representation.

network thereby preventing CSU from providing its educational mission. As a result, it is necessary, if not mandatory, for CSU to have a policy to not only prevent misuse, but to be able to react quickly to problems. Additionally, it is necessary to have a uniform policy for all users.

The decision to implement computer policies, therefore, implicates a fundamental managerial prerogative and falls outside the scope of representation. As such, CSU did not commit an unfair practice in implementing the AUPs because it did not have a duty to bargain said decision.

The Board notes that while the decision to implement a computer policy is within CSU's exercise of managerial prerogative, this action does not relieve CSU of the duty to negotiate the effects of this decision on bargaining unit members if it impacts matters within the scope of representation, e.g., discipline and union access rights. (Anaheim Union High School District (198i) PERB Decision No. i77; Newman-Crows Landing Unified School District (1982) PERB Decision No. 223.)

CFA argues the contractual zipper clause prohibits CSU from implementing the new policy. However, because there is no duty to bargain the decision to implement the policy, the zipper clause is inapplicable. (Trustees of the California State University (2004) PERB Decision No. l656-H.) Additionally, the zipper clause in the CBA does not preclude CSU from implementing the policy if CFA declines to negotiate the effects of the AUP. A contrary conclusion would lead to absurd results. For example, a union could delay the implementation of a non-negotiable layoff until after the expiration of the contract simply in reliance upon the zipper clause. Thus, we hold that exclusive representatives cannot properly refuse to bargain effects in reliance on a zipper clause when the decision to implement the policy is itself a managerial prerogative or else risk waiving the right to bargain the effects.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that those portions of the complaint and underlying unfair practice charge in Case No. LA-CE-779-H, California Faculty Association v. Trustees of the California State University, alleging that California State University (CSU) unlawfully implemented a computer use policy at its Monterey Bay campus and that CSU bypassed the California Faculty Association and dealt directly with employees by discussing the Monterey Bay Interim Appropriate Use Policy for Information Technology with the Academic Senate are without merit and are hereby DISMISSED.

Members McKeag and Rystrom joined in this Decision.