

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ASSOCIATION OF CALIFORNIA STATE)	
ATTORNEYS AND ADMINISTRATIVE LAW)	
JUDGES,)	
)	
Charging Party,)	Case No. S-CE-184-S
)	
v.)	PERB Decision No. 569-S
)	
STATE OF CALIFORNIA (DEPARTMENT)	April 30, 1986
OF PERSONNEL ADMINISTRATION),)	
)	
Respondent.)	

Appearances: Ernest F. Schulzke, Attorney for Association of California State Attorneys and Administrative Law Judges; Christopher W. Waddell, Attorney for State of California (Department of Personnel Administration).

Before Hesse, Chairperson; Morgenstern and Burt, Members.

DECISION

MORGENSTERN, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions taken by the Association of California State Attorneys and Administrative Law judges (ACSA) to a proposed decision, attached hereto, issued by a PERB administrative law judge (ALJ). In that decision, the ALJ dismissed ACSA's charge that the State of California (Department of Personnel Administration) (DPA) negotiated in bad faith in violation of section 3519(b) and (c) of the State Employer-Employee Relations Act (SEERA or

Act).¹ In accordance with our discussion as set forth below, we affirm the ALJ's proposed decision to dismiss the instant charge.

FACTUAL SUMMARY

The findings of fact set forth in the ALJ's proposed decision are free from prejudicial error and are adopted as the factual findings of the Board itself. In summary, the instant dispute arose in the spring of 1983 when, pursuant to a clause in the memorandum of understanding (MOU) between ACSA and the State, ACSA initiated reopener negotiations concerning economic matters.² Although certain proposals and counterproposals

¹SEERA is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Section 3519 provides, in pertinent part:

It shall be unlawful for the state to:

.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and confer in good faith with a recognized employee organization.

²Section 49 of the MOU provided, in part:

At any time after January 1, 1983, either party shall be entitled to open negotiations to modify the following provisions of the Agreement: Bar Dues, salary, Health, Dental, MSA, Travel Expense, Education and Training, Overtime, Pension plan, Vacation, Sick Leave, Holidays, and up to three additional items. Negotiations shall commence not earlier than 10 work days after

were exchanged between ACSA and DPA, it is undisputed that, until June 30, 1983, DPA made no counteroffers on economic matters. DPA's chief negotiator, James Mosman, advised ACSA representatives that the Governor was determined to stay within a \$22 billion budget limit and that, while \$337 million had been allocated in the Governor's budget for state employees' total compensation,³ that figure was not considered firm nor was it an offer. Mosman testified, "[t]he amount could go up or down depending on negotiations with the legislative process and with the Governor."

During May and June, ACSA continued to put forth specific economic proposals. Mosman's position was that he was not able to negotiate economic items because such discussions were dependent on the amount of money that would be available. By mid-June, while Mosman continued to assert that he could not talk hard economics until after the Legislature had passed the budget, he asked that ACSA prioritize its economic demands should the final budget allocate a three-percent increase. However, by the end of June, the parties had reached no agreement. Mosman stood ready to discuss economic proposals

receipt of written notice by the opening party respecting the matters upon which negotiations are requested.

³ACSA takes exception to the ALJ's factual finding that the \$337 million was allocated for employees' "salaries." ACSA correctly notes that that figure reflected the total amount of employee compensation.

subject to the availability of funding, and ACSA awaited specific economic proposals prior to the adoption of the budget.

In the meantime, the matter of State employees' compensation was working its way through the legislative budget process. The final version was presented to the Governor. Believing that continued negotiations with the Legislature would not be forthcoming, DPA settled on a figure for employee compensation. Thus, when the parties met on June 30, DPA made its proposal concerning economic offers. Although various offers and counteroffers were exchanged by the parties during the first three weeks of July, no final agreement was reached.

The State budget was adopted by the Legislature on July 19 and, on July 21, the Governor took final action on the budget, cutting employee compensation to the original \$337 million figure.

Subsequently, the Board ordered mediation and agreement was reached.

DISCUSSION

Section 3517 of SEERA sets forth the Governor's obligation to meet and confer in good faith. It requires the Governor to meet with representatives of recognized employee organizations and consider fully the representatives' presentations "prior to arriving at a determination of policy or course of action." Section 3517 further directs that the Governor and the employee organizations "endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of

its final budget for the ensuing year." That process, according to SEERA, "should include adequate time for the resolution of impasses."⁴

Interpretation of this statutory provision lies at the root of the parties' dispute. ACSA contends that DPA acted unlawfully by failing to meet and confer with ACSA until negotiations between the Governor and the Legislature had been completed. Relying on Article IV, section 12(c), of the California Constitution⁵

⁴In its totality, section 3517 reads as follows:

The Governor, or his representative as may be properly designated by law, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

"Meet and confer in good faith" means that the Governor or such representatives as the Governor may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses.

⁵Section 12(c) of the California Constitution reads:

The budget shall be accompanied by a budget bill itemizing recommended expenditures. The bill shall be introduced immediately in

that requires the Legislature to submit its budget bill to the Governor by June 15, good faith bargaining mandates that economic proposals be initiated and exchanged before June 15. In the instant case, ACSA contends that DPA engaged in a per se violation of its duty to negotiate in good faith by refusing to negotiate wages until June 30 and further avers that the "feverish bargaining activity" that occurred thereafter did not cure DPA's previous unlawful conduct. Alternatively, ACSA asserts that the totality of circumstances surrounding DPA's bargaining conduct supports a finding of bad faith bargaining.

DPA urges adoption of the ALJ's position declining to read section 3517 as imposing any fixed timeline and argues that, so long as the parties exchange proposals prior to final adoption of the State budget, whenever that occurs, the good faith negotiating standard has been met.

The statutory interpretation put forth by ACSA finds some support in the language of section 3517. Clearly, that provision discusses the duty to meet and confer in good faith with certain

each house by the persons chairing the committees that consider appropriations. The Legislature shall pass the budget bill by midnight on June 15 of each year. Until the budget bill has been enacted, the Legislature shall not send to the Governor for consideration any bill appropriating funds for expenditure during the fiscal year for which the budget bill is to be enacted, except emergency bills recommended by the Governor or appropriations for the salaries and expenses of the Legislature.

time limitations in mind. The Governor must meet "prior to arriving at a determination of policy or course of action," must "meet and confer promptly upon request" and "for a reasonable period of time." These phrases convey the Legislature's clear directive that discussions proceed expeditiously and without delay. Notably, this instruction makes specific reference to adoption of the final budget and directs the parties "to endeavor to reach agreement . . . prior to" final budget adoption.

In our view, while this language uses the final budget as a point of reference, it cannot be read to support ACSA's assertion that, under all circumstances, failure to negotiate before June 15 equates with a per se refusal to bargain. First, the constitutional requirement directs the Legislature to pass the budget bill by the June 15 deadline. It orders no party over whom PERB's jurisdiction extends to perform any task. Rather, it is SEERA section 3517 that imposes a good faith bargaining obligation on the State employer and from which PERB's jurisdiction derives. As noted above, that section requires action "prior to the adoption by the state of its final budget" As the ALJ noted, if adoption of the final budget refers to the date on which the Governor completes final action on the budget sent to him by the Legislature, the state satisfied its obligation because it met and conferred with ACSA for three weeks before final budget action was taken by the Governor on July 21. If, on the other hand, the State's final budget action refers to the date when the Legislature sends its

final version to the Governor, DPA similarly satisfied its SEERA obligation by meeting and conferring with ACSA prior to passage of the Budget Act on July 19. In either event, nothing in SEERA prohibits the Governor from entertaining a legitimate doubt that the budget bill would not precede the June 15 date. Thus, the State may base its bargaining strategy on a good faith judgment that budget finalization will not scrupulously honor the constitutional deadline without violating SEERA. As the ALJ noted, the language of section 3517 imposing an obligation "to endeavor" exhorts the parties to attempt or to strive in earnest to attain a certain end. Thus, the statutory mandate is violated where either party's conduct fails to demonstrate such effort. However, the statutorily imposed obligation "to endeavor" can by no means be interpreted to create an absolute standard pursuant to which a failure to present proposals by June 15 must be judged a per se violation.

In accord is Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services District (1975) 45 Cal.App.3d 116, where the court interpreted similar statutory language found in the Meyers-Milias-Brown Act (MMB) applicable to local government employees and employers.⁶ There, the court addressed the

⁶The MMB is codified at section 3500 et seq. Section 3505 sets forth the obligation to meet and confer and provides:

The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such

Valley Community Services District's contention that statutory reference to the adoption of the budget implies that a request to meet and confer is ineffective if it is not made prior to the adoption of the budget. The court rejected that argument stating:

The construction proposed by the district is not correct; the obligation, in proper cases, to "meet and confer promptly upon request" is absolute, while the statutory admonition to "reach agreement" before the adoption of the budget is only hortatory. Agreement may not be reached at all, as the statute recognizes in stating that the negotiators

governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

"Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

should "endeavor" to reach agreement before the budget is adopted.

While the factual circumstances surrounding the Dublin case are not identical to those here at issue, the court's interpretation of statutory language similar to section 3517 is instructive. indeed, the court offers pertinent guidance when it observes that the obligation to meet and confer in good faith is absolute. Regardless of the date contract proposals are first conveyed, whether far in advance of final budget action or just prior to final action, the Governor violates the Act if his bargaining conduct during the course of the process runs afoul of traditional standards used to determine whether a party has acted in bad faith. In our view, the Act imposes no automatic sanctions on parties that fail to reach agreement prior to budget passage.

In so concluding, we reject ACSA's assertion that we should adopt its interpretation of 3517 because section 3517.6 requires approval of expenditures in the annual Budget Act.⁷ First, that section merely states that a provision requiring the expenditure of funds cannot become effective without legislative approval. Moreover, section 3517.7 specifically permits either

⁷In pertinent part, section 3517.6 provides:

. . . If any provision of the memorandum of understanding requires the expenditure of funds, those provisions of the memorandum of understanding shall not become effective unless approved by the Legislature in the annual Budget Act. . . .

party to reopen negotiations on all or part of their MOU in those situations where the Legislature does not approve or fully fund any provision of the MOU.⁸ Thus, reading section 3517.6 together with section 3517.7, the conclusion finding no statutory deadline is more compelling.

We turn next to ACSA's contention that by seeking to delay bargaining until the legislative budgetary process was completed, DPA's conduct should be viewed as an outright refusal to bargain and a per se violation of SEERA.

As the ALJ correctly noted in his proposed decision, this Board has considered certain bargaining conduct so obstructive of the negotiating process that it warrants a finding of a per se violation. Pajaro Valley Unified School District (1978) PERB Decision No. 51; Stockton Unified School District (1980) PERB Decision No. 143; San Mateo County Community College District (1979) PERB Decision No. 94; Sierra Joint Community College District (1981) PERB Decision No. 179; Ross school District (1978) PERB Decision No. 48; Modesto City Schools (1983) PERB Decision No. 291. Here, however, we do not view DPA's determination to defer negotiations until the legislative

⁸In pertinent part, section 3517.7 reads:

If the Legislature does not approve or fully fund any provision of the memorandum of understanding which requires the expenditure of funds, either party may reopen negotiations on all or part of the memorandum of understanding.

process was completed as an outright refusal to bargain with ACSA. In situations best exemplified by the instant case, an uncertain financial picture may pose a serious impediment to fruitful negotiations and thus present a legitimate basis for postponing the inception of negotiations with the employee organization. Awaiting final budget action from the Legislature, under such circumstances, cannot be said to contravene SEERA's mandate.

This is not to say, however, that we accept DPA's insistence that it could not negotiate on wages until an agreement was reached with the Legislature. The Governor is free to negotiate with employee organizations while making it clear that the agreed-upon provisions require legislative approval. In sum, SEERA's statutory provisions do not specifically mandate that negotiations with the employee organization must precede or follow final legislative action. Negotiations with the employees' representative and with the Legislature may and often do occur simultaneously. What is imperative to statutory compliance is that negotiations be conducted in such a manner that, based on the totality of circumstances, it is apparent that the party possessed the subjective intent to reach an agreement. Mt. Diablo Unified School District (1983) PERB Decision No. 373. Delay of negotiations until legislative budget action does not lead to the conclusion that DPA lacked the requisite intent to reach an agreement with ACSA.

Finally, ACSA disputes the ALJ's conclusion that, under the totality of conduct test, DPA did not engage in conduct that failed to satisfy its statutory obligation to meet and discuss in good faith. Again, we disagree and would affirm the ALJ's analysis. In sum, we do not find that DPA summarily rejected ACSA's proposals, adopted a take-it-or-leave-it approach, or demonstrated such intransigence that good faith bargaining was thwarted. DPA responded to ACSA's proposals and, as noted above, acted within the requirements of the law when it took the position that it wished to defer or delay its presentation of economic proposals until the State's financial picture became more clear. We also cannot conclude, as ACSA asks, that Mosman lacked sufficient authority to bind the employer. Here, the bargaining process progressed as it did because of DPA's concerns regarding the State's fiscal uncertainties. Mosman's conduct on DPA's behalf did no more than effectuate the employer's legitimate bargaining plan and in no way demonstrated bad faith bargaining.⁹

ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this matter, unfair practice charge S-CE-184-S filed by the Association of California state Attorneys

⁹Finding no evidence of bad faith bargaining, we need not address the ALJ's conclusion that DPA's conduct beginning on June 30 "cured" bad faith bargaining that preceded it.

and Administrative Law Judges against the State of California
(Department of Personnel Administration) and the companion PERB
complaint are hereby DISMISSED.

Chairperson Hesse and Member Burt joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



ASSOCIATION OF CALIFORNIA STATE)
ATTORNEYS AND ADMINISTRATIVE LAW)
JUDGES,)
)
Charging Party,) Unfair Practice
) Case No. S-CE-184-S
)
v.) PROPOSED DECISION
) (5/30/84)
STATE OF CALIFORNIA (DEPARTMENT OF)
PERSONNEL ADMINISTRATION),)
)
Respondent.)
_____)

Appearances: Ernest Schulzke, attorney, for Association of California State Attorneys and Hearing Officers; Christopher Waddell, attorney, for respondent State of California (Department of Personnel Administration).

Before Gary M. Gallery, Administrative Law Judge.

DISCUSSION

In this case the employer is charged with violation of the State Employer-Employee Relations Act by delaying negotiations on economic matters.

On June 3, 1983, the Association of California State Attorneys and Administrative Law Judges (ACSA)¹ filed an Unfair Practice Charge against the State of California (Department of Personnel Administration) alleging violation of

¹PERB certification of the exclusive representative for Unit 2 (March 30, 1982) is to the Association of California State Attorneys and Hearing Officers. The current contract between the parties list the same designation. The underlying

This Board agent decision has been appealed to the Board itself and is not final. Only to the extent the Board itself adopts this decision and rationale may it be cited as precedent.

Government Code subsections 3519(b), (c) and section 3517. A Complaint was issued on July 13, 1983, charging that from April 1983 through June 1983, the parties met approximately six times pursuant to Government Code section 3517 and that during this time the Respondent 1) refused to bargain over matters requiring expenditures of funds, and 2) failed to invest its negotiators with sufficient authority to address and consider employee demands. This conduct was stated to violate Government Code subsection 3519(c) and derivatively, subsections 3519(a) and (b).² The Respondent (State or DPA) filed an Answer on August 2, 1983, denying violations of the HEERA. An Amendment to the Unfair Practice Charge was filed on September 2, 1983. An Amended Complaint was issued on September 6, 1983. An Answer to the Amended Complaint was

unfair practice charge, and the complaint issued thereon, list the Charging Party as the Association of California State Attorneys and Administrative Law Judges.

²Government subsections 3519(a), (b) and (c) provide that it is unlawful for the state to:

(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.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and confer in good faith with a recognized employee organization.

filed on September 14, 1983, denying violations and raising defenses that will be discussed elsewhere in this proposed decision. A settlement conference was held on August 30, 1983, without success. The formal hearing was held on October 26, 1983. Post-hearing briefs were completed on February 7, 1984, and the matter submitted.

FINDINGS OF FACT

Respondent is the employer within the meaning of section 3513 (i).³ ACSA is a recognized employee organization within the meaning of Government Code section 3513(b).⁴

The parties have a memorandum of understanding covering July 1, 1982, through June 30, 1984. Reopeners on all money matters as well as a limited number of additional topics are provided. Section 49 of the contract provides, in part:

At any time after January 1, 1983, either party shall be entitled to open negotiations to modify the following provisions of the Agreement: Bar Dues, Salary, Health, Dental, MSA, Travel Expense, Education and Training, Overtime, Pension Plan, Vacation, Sick Leave, Holidays, and up to three additional items. Negotiations shall commence not earlier than 10 work days after receipt of written notice by the opening party respecting the matters upon which negotiations are requested.

3DPA is the Governor's representative on all matters pertaining to meeting and conferring under the SEERA. See Government Code section 19819.7.

⁴ACSA represents all attorneys and administrative law judges employed by various state agencies except exempt employees.

In the spring of 1983 ACSA wished to reopen many of the money items for negotiations. The parties first met on March 11, 1983.⁵ Ground rules were discussed and agreed upon.⁶ Staffing ratios, a dispute from the prior year (DPA had taken the position it was non-negotiable), was discussed and the parties agreed to set up a separate committee to address that issue. No proposals were advanced by ASCA at this meeting.

Bruce Blanning, a private consultant, served as spokesperson for ACSA. At the first meeting and for a short time thereafter, Robert Bark represented DPA. Thereafter, James Mosman, chief negotiator for DPA, represented that office at all times pertinent hereto.

On March 15 ACSA advanced its initial reopener proposal to DPA. Dennis Egan, Chairperson of the ACSA negotiating team, advised Bark that it understood "the 'sunshine' process would be initiated on March 18 and completed by April 15, so that negotiations could begin immediately thereafter." ACSA's proposal was a blanket request of section 49, cited above, plus:

Item 1. Working conditions, including office space, size, and location; and support staff.

⁵All dates hereafter refer to calendar year 1983 unless otherwise stated.

⁶Agreement was reached on the number of employee representatives, amount of time off and the number of meetings,

Item 2. Employee rights, including loss of bargaining unit work, grievance procedure, leave of absence (right of return, maternity/paternity leave, etc.), and layoff and recall.

Item 3. Rights of the parties to the MOU, including State rights, unfair practice prohibition, grievance procedure, agency shop/fair share, entire agreement, payroll deduction, and ground rules for future negotiations.

Mosman responded in writing on April 1 enclosing the State's counterproposal stating that "Following the Public Comment Meeting, DPA would meet and confer⁷ in good faith on all of the proposals contained herein, in the context of a total compensation package."

⁷DPA's counterproposal was as follows:

1. The State believes the current language in the MOU concerning office space is adequate. Support staff is a management prerogative covered by the State Rights clause in the present MOU.
2. ACSA must specify which item is to be an actual topic of bargaining. The State would be willing to meet and confer in good faith on the grievance procedure or leaves of absence or layoff and recall. The loss of bargaining unit work per se is a management prerogative covered by the State Rights clause in the present MOU.
3. ACSA must specify which item is to be an actual topic of bargaining. The State would be willing to meet and confer in good faith on State Rights or unfair practice prohibition or grievance procedure or agency shop/fair share or entire agreement or payroll deduction or ground rules for future negotiations.

It is undisputed that until June 30, DPA did not and indeed refused to make counter offers on economic matters. At the formal hearing Mosman described the Governor's perceived fiscal predicament and DPA's strategy at the bargaining table. In his first year of office, the Governor inherited an \$800 million deficit from the 1982-83 year. Determined to avoid any tax increase, the Governor negotiated an agreement with the Legislature to spread the deficit over a two-year period. To obtain this he had to agree to an automatic sales tax increase if the revenues did not meet expenditures and payment of the deficit over the following two years. Within his proposed 1983-84 budget, submitted to the Legislature in early January 1983,⁸ were items with fixed amounts, such as state employees compensation, education and welfare assistance. State salaries were set at \$337 million (approximately a 5 percent increase for employees of the state, the University and the State University). The overall budget was \$22 billion, an amount which would avoid triggering the sales tax increase authorized by the Legislature.⁹ During the spring, testified Mosman,

⁸Section 12 of Article IV of the California Constitution requires the Governor to submit a budget to the Legislature, for the ensuing fiscal year, within the first 10 days of the calendar year.

⁹The Governor was, as a matter of policy, said Mosman, "very much opposed to a tax increase and made it clear to his negotiator that he wished to avoid the tax increase."

the Governor's Office was negotiating with the Legislature on amounts for education and welfare. Existing legislation provided for an automatic 4 percent cost-of-living increase for welfare assistance which was not included in the Governor's budget. Also looming as a possible expense was the proposed Sebastiani Initiative, which if approved by the Governor, would require a fall election at state expense. Because of the Governor's determination to stay within \$22 billion, the \$337 million allocated for salaries was not considered firm. Mosman told ACSA, as early as May 10, the 5 percent was not an offer. "The amount could go up or down," he said, "depending on negotiations with the legislative process and with the Governor."

At a meeting on April 19 ACSA made more specific and detailed proposals which were discussed. Notably, ACSA proposed that salaries be increased effective July 1, 1983, by 30 percent, with an additional 1 percent increase for those at the top of their salary level. Salary negotiations for future MOU's were to use as criteria only the prevailing compensation for similar employees in other public agencies and private employers in California which employ a large number of employees. ACSA proposed state and local bar dues be paid up to \$200. It was also proposed that the state pay 100 percent of health and dental coverage with alternatives to be paid by state at ACSA's option. Vision care was to be an option.

Vacation was to be increased by (40 hours) five days per year and maximum carryover for employees with over 10 years service to be increased to 360 hours. On working conditions ACSA requested adequate support be provided. On employees' rights, ACSA requested retention of bargaining unit employees' assignments (it was noted that negotiations regarding staffing ratios were being conducted separately). ACSA requested agency shop/fair share and deletion of state rights and the no strike provisions in the existing MOU.¹⁰

At the meeting Blanning explained the rationale for the salary increase. Blanning testified that Mosman expressed the view that the Governor had been generous to include 5 percent in the budget and was uncertain whether any more money was going to be available. Mosman also questioned whether the proposed health plan was negotiable.

On May 9 Egan forwarded to Mosman revisions of its April 19 package.¹¹ These revisions, said Blanning, were responsive

¹⁰ACSA also proposed that travel was to be determined; merit salary adjustments were to be continued; state to pay all but one percent of employees' pensions; employees be granted option to be paid for excess vacation; employee have option to have 50 percent of accumulated sick leave compensated in cash and at termination all accumulated sick leave purchased by state; and holidays to be continued plus three extra days.

¹¹ACSA stated that they would be submitting specific proposals for layoff justification and new or revised language implementing layoff; agency shop/fair share to be applied to unit employees and further specific proposals on the obligation to meet and confer.

to DPA's concern about the number of non-money items requested for reopeners. At a meet and confer session on May 10 ACSA's May 9 and the State's counterproposal were discussed.¹²

Blanning testified that Mosman said at this meeting that his [Mosman's] role was to provide input to the Governor's

¹²The State's May 9 counterproposal (to ACSA's April 19 proposal) included the following:

1. Salaries

Any increase in salaries, if agreed to, will be considered as a part of the total compensation package. In negotiating salaries, the State employer is willing to consider:

- 1) Duties and responsibilities of the classification
- 2) Salaries paid for comparable service in other public and private employment
- 3) The State's financial condition

Merit salary adjustments and longevity pay will also be considered in the context of the total compensation package.

2. Bar Dues

The State employer is willing to consider payment of bar dues in the context of the total compensation package.

3. Health Benefits

The State employer will negotiate the rate of contribution to health benefits as a part of the total compensation package. The selection of health plans

office, and that only Mike Frost, director of DPA, had authority to make money offers and Mosman's role was to understand the proposals and channel them to the Governor's office, not to negotiate. He was there to discuss. Mosman could not recall having made a statement about his authority and was not asked about Frost's authority. Blanning testified that he complained about the failure of DPA to make proposals on economic matters. Mosman said that at a time in the future the Legislature would establish "a pile of money," and at that point Mosman would offer total compensation for unit 2. Blanning asked when money would be negotiable and Mosman didn't know, but it would not occur before June 1. The parties reviewed the criteria on salaries set forth in DPA's proposal of May 9.

is not covered by SEERA and remains in the jurisdiction of the Public Employees' Retirement System.

The counterproposal also expressed DPA's willingness to negotiate as part of the total compensation package:

. . . bar dues; dental benefits, merit salary adjustments, travel expenses, overtime, contribution rate to PERS (noting that changes to the formula for calculating retirement allowances were not within the scope of bargaining), vacation increase, sick leave, and holidays.

DPA made no counterproposals on the working conditions; rejected ACSA's Employees' Rights proposal, and requested specification of the Rights of Parties proposal advanced by ACSA.

There was also heated discussion on the health and PERS issues. The parties discussed a separate health plan. Another unit had negotiated a separate health plan the previous year said Blanning, but he said Mosman would not agree to the same for unit 2. They discussed DPA's position that retirement systems were not negotiable because they were not supersedable under SEERA. ACSA requested and Mosman agreed to put that position in writing.¹³

¹³On May 23 Mosman advised ACSA, in writing, of the State's position regarding negotiability of the health and retirement benefits and supersession. Stated Mosman:

Government Code section 3517.6 delineates a series of statutes which may be superseded if they are in conflict with the provisions of a memorandum of understanding. It further provides that any provision of an MOU requiring the expenditure of funds shall not become effective unless approved by the Legislature in the annual Budget Act. Section 3517.6 then provides that "If any provision of the memorandum of understanding requires legislative action to permit its implementation by amendment of any section not cited above, those provisions of the memorandum of understanding shall not become effective unless approved by the Legislature."

It is the State's position that, in accordance with section 3517.6, changes to statutes not specified in the supersession clause require legislative approval. The MOU ratification process that occurs as a part of the enactment of the Budget Act is not sufficient for a MOU provisions to supersede a statute not specified in section 3517.6. Approval of MOU provisions affecting a statute not subject to the

Mosman suggested they meet again on June 2. While that was three weeks away, and ACSA wanted to meet sooner to negotiate, Blanning said ACSA agreed to meet under protest, less it lose the opportunity to meet.

Mosman called Blanning on May 27 and warned him that they might not be able to negotiate at the next meeting. The parties met on June 1 anyway. ACSA proposed a detailed proposal on travel expenses. DPA gave ACSA data from the controller's office of classes within unit 2. The parties further discussed DPA's position on negotiability of health and retirement and ACSA's frustration with Mosman's May 23 letter.¹⁴ Mosman announced that his position was that other than the amount of money contributed by the State, other features were out of scope. Mosman said he would check with his attorneys and get back to ACSA.

Blanning testified that Mosman again stated that he was not there to negotiate money items and Mosman confirmed this. The compelling criteria would be whatever money was available. He

supersession clause requires additional legislation. This is the State's position relative to retirement and health benefits provisions not subject to section 3517.6. If the Legislature had intended these provisions to be subject to the supersession clause, it would have included their statutory basis in section 3517.6.

¹⁴ACSA complained that Mosman's letter was not responsive to the issue: whether, in DPA's judgment, an item not included in the supersedable section was or was not negotiable.

hoped to have some economic proposals by the next week. The money in the Governor's budget was not an offer.

The parties met again on June 2. Mosman told Blanning that he was still waiting for the Department of Finance to provide data on costing out fringe benefits for Unit 2. Mosman hoped to receive it any day and Blanning expressed fear of the fact that it was June and they were still without that data.

The parties agreed to next meet on June 13. Again ACSA was concerned about the timing, but Mosman told them that he would not have funding authority until then.

Blanning and Mosman spoke by telephone on June 9. Mosman told Blanning that DPA's position after conferring with their attorneys was that other than money, revisions to health or retirement benefits were out of scope. During another telephone conversation that same day, Mosman told Blanning that he was still waiting for information from the Department of Finance on benefits costs but he would advance a hypothetical prioritizing of a 3 percent increase at the June 13 meeting. ACSA would be given the opportunity to express its preference of where money could be spent if it were available. Blanning asked about the 5 percent increase and Mosman told him DPA was concerned about the amount that might be in the budget for State salaries.

At the June 13 meeting ACSA wanted to meet and confer on money. Mosman said that based on information from the

controller, a 1 percent raise would cost \$900,000. The Legislature's version of the budget at that time was \$23.3 billion or 1.3 billion over the Governor's budget. The Governor was going to cut the budget to \$22 billion when passed by the Legislature. Mosman said he would not talk hard economics until after the Legislature passed the budget. Mosman then requested ACSA's priorities if 3 percent were available. Mosman did extend a proposal on staffing ratios, but Blanning said that item was not really negotiations.

Mosman then announced data setting forth the cost of four items. The items were: \$50 toward PERS (ACSA had requested it continue), continued State payment of medical plan, dental plan; salary adjustments and ingrade adjustments. Mosman said the cost of these four items was 4.2 percent. Mosman was not offering 4.2 percent but asked ACSA where it would like the three percent to go. Because of the need for the Governor to cut some items from the budget and not being able to cut others, State employees' salaries might be cut and for that reason, Mosman could not offer the 5 percent that was in the Governor's budget. Mosman said DPA would make a money offer after the budget conference committee had completed its work.

ACSA, said Blanning, tried to negotiate fringe benefits on the basis of salary savings realized by attrition in some departments because of layoffs. Mosman would not negotiate and rejected the proposal. ACSA asked about bar dues and overtime,

both of which Mosman refused to negotiate regardless of the source of funding. Mosman, said Blanning, asked for clarification of who ACSA was seeking bar dues reimbursement. It was decided that the parties would meet again when Mosman could make an initial economic proposal. Mosman's position for making an economic proposal then had shifted from finality of the conference committee's work to needing an agreement between the Legislature and the Governor.

On June 16 Blanning confirmed, in writing, ACSA's proposal that department savings as a result of the reduction of attorney positions be used for certain "money" items. Blanning also confirmed that ACSA was waiting for a call regarding a meeting for presentation of DPA's initial economic proposals.

On June 21, Mosman wrote to Blanning regarding ACSA's proposal on department savings.¹⁵ Mosman announced that he was "still willing to meet with you at any time to discuss an economic proposal which is subject to the availability of funding."

Blanning responded on June 27 stating:

15Calling the logic underlying the proposal a "fatal flaw," Mosman pointed out the department's "commensurate loss of funding" for positions reduced. No savings are realized unless the department leaves budgeted positions unfilled. Questioning ACSA's desire to have budgeted but vacant positions fund its economic proposals, Mosman pointed out that such a situation would make it almost impossible for the State to place attorneys facing layoff.

Your June 21 letter stated a willingness to "discuss an economic proposal which is subject to the availability of funding" with ACSA "at any time."

At our June 13 meeting, you asked ACSA to list its priorities for the expenditure of funds if a 3 percent compensation increase were available. You made it clear that you were willing to "discuss" but would not yet "meet and confer" as required by law.

You also made it clear on June 13 and in our subsequent conversations that you would not make an initial monetary proposal until after the Legislature adopts the budget and the Governor specifies his intentions regarding blue-penciling compensation increases (or maintenance of benefits) for state employees. As you know, ACSA's position is that the SEERA requires the state to "endeavor to reach agreement" on compensation "prior to the adoption" of the budget, subject of course to the possibility that the Legislature may not adopt the resultant MOU's.

Unless you inform us to the contrary, we interpret your June 21 letter to mean that your position on June 13 remains unchanged regarding your unwillingness to meet and confer on economic issues.

As stated in my June 16 letter, we are still anxiously awaiting your initial economic proposals. When you are prepared to meet and confer with ACSA on these items, we wish to begin immediately.

Prior to the end of June, said Mosman, the strategy was:

Q. Prior to June 30, did you offer to discuss economic proposals on a "subject to availability of funds basis" with ACSA?

A. Yes, I did. We had hoped, and I had told ACSA, you know, in our earlier sessions that I had hoped that, you know, by early June that the budget picture would have

sufficiently crystalized that we could begin to discuss, you know, economic proposals. As it turned out in early June things were still, you know, way up in the air. The amount of money that it appeared the Legislature was going to come up with far exceeded what the Governor felt he could live with. So, we knew at that time that we could not put, you know, a firm economic offer because we still didn't know whether the money would be there. But the approach that we took with all of the unions was basically to talk at least to get some dialogue going, just starting to talk in terms of figures like if there were 3 percent, 5 percent available, how would you want, you know, where would you want that money to go, what types of benefits are of priority to you, do you want it in salary, whatever, so that we could begin to get to some sense of where their priorities were on the part of the unions so that we knew when what money became available, you know, where their priorities would be. Now, as I understand it, you know, with some of the unions they were, that approach was utilized. With ACSA, they chose not to. They didn't want to discuss economics on those terms.

Q. Did they express any reasons why?

A. They just basically said unless you can put, you know, a hard money offer on the table, we don't want to talk about. And we don't want to meet, you know, until you can.

According to Richard Baker, whose testimony was unrefuted, the Senate Finance Committee ended deliberations in late May after the Assembly had approved its version of a budget. The Assembly's version was \$100 million more for public employees' salaries than in the Governor's budget. The Senate version on employees' salaries was \$100 million more plus \$1,000 than in the Governor's budget. This difference required the matter of

state employees' salaries to go to a conference committee. Conference rules, explained Baker, prohibited the committee from passing a budget with figures either lower than the lowest or higher than the highest of either house's version. The conference committee started its deliberation on June 9. After a couple of conferences, a report was issued on June 23 which represented State employees' compensation in a final version, said Blanning.

The final joint conference committee report was, said Mosman, "totally unacceptable to the Governor. And I think that the Governor largely felt that there probably wasn't going to be a whole lot more negotiating going on with the Legislature, so he decided to go with a certain amount of money for employee compensation." DPA started with basically the same economic package for all the units.

Mosman explained why DPA did not place any economic proposals on the table before June 30.

Q. Mr. Mosman, why was the Department of Personnel Administration unwilling to put a firm economic proposal on the table prior to June 30, 1983?

A. As there has been testimony earlier in the day, this was an extremely difficult budget year for the State of California. In fact, we ended up with a budget deficit somewhere in the neighborhood of \$800 million going into the 83-84 fiscal year. As such, there was a need for some definite austerity on the part of the State of California in a variety of program areas. The State employee compensation is a very

large element of the State's total budget. And as such, it's a very important element in developing a total budget package for the State of California. In this particular year the Governor, frankly, was not able to make any final policy decisions relating to employee compensation until relatively late in the process, until all of the pieces began to fit together, and he had a better handle on exactly how much money could be made available.

The parties then met on June 30. That afternoon DPA conveyed a "counterproposal" to ACSA. It provided economic offers of: maintaining health benefits, state dental plan, MSA's and a 2 percent salary increase. DPA's offer further required ACSA to agree to DPA's proposals on bereavement leave, arbitration language, vacation and the entire agreement.

Around 7:00 p.m. ACSA countered with a salary increase of 20 percent. The bar dues issue was revised to request reimbursement of State bar dues only. The request for vision coverage and the alternative plan, the proposal on dental plan with retention of the first year provision were deleted. ACSA agreed to DPA's proposal (June 30) on merit salary increases and incorporated the tentative agreement on education and training reached May 10. ACSA retained as part of the counter offer the \$50 PERS contribution by the State during the 1983-84 year, and revised the three new items including layoff, agency shop and obligation to meet and confer.

At 7:30 p.m. the DPA countered with their afternoon proposal modified by revising the state dental plan, the

arbitration language and increasing salaries by 3 percent. Mosman told them the Governor was going to blue pencil \$1.2 billion from the budget and so the constraint was fiscal.

ACSA countered at 8:30 p.m. dropping their salary demand to 5 percent with an additional 15 percent to be effective in June 1984. The proposal included accepting DPA's June 30 proposal on health benefits and merit salary adjustments, giving department option of pay or time off for overtime; deleting technical adjustments to retirement credits and modifying the three new items.

DPA countered again at 10:30 p.m. Again it was the initial proposal but modified by giving a 5 percent salary increase effective January 1, 1984, granting extra per diem for certain zip code areas and required ACSA's agreement to the four items listed above.

ACSA perceived the DPA change in salary from 3 percent for the entire year to 5 percent for only half the year as "movement backward and game playing." Yet Blanning admitted that the 5 percent offer created a larger base pay for the beginning of the next year upon which negotiations would be addressed. The per diem item was not a big concession said Blanning.

Mosman asked if ACSA was threatening to walk out. ACSA said no - just thought that negotiations were not productive.

Around 11:00 p.m. the DPA made another counterproposal by giving a 6 percent salary increase effective January 1, 1984, extra per diem in specified zip code areas and revised the arbitration language.

Mosman and Blanning spoke in the hallway and Mosman informed Blanning that the Legislature would not pass a budget that evening. Blanning expressed the belief that DPA's proposal was the same as given to other bargaining units. They agreed to meet the next day.

At 1:15 p.m. the next day (July 1) ACSA extended a counterproposal. The salary increase was to be 10 percent effective January 1, 1984, with an additional 10 percent June 1, 1984.

DPA then countered offering a 6 percent salary increase effective January 1, 1984, extra travel expenses in specified zip code areas and to extend the \$50 retirement contribution to December 31, 1983. The non-economic items (ACSA must agree to) had the earlier proposal with "withdrawal of unfair practice charges" added. The instant unfair practice charge was among those on file by ACSA. Mosman told ACSA there was still no budget, and regarding dollars, this was the "bottom line" and that ACSA would not get any more by holding out. He suggested they meet again after a budget had been adopted.

The parties met again on July 12, at 1:00 p.m. Mosman told ACSA the DPA planned to go the Legislature the next day with a

bill to implement the MOU. The Legislature was going to adjourn on July 15 and Mosman made it clear that his offer was not going to change. He agreed to commit to reopen salary if CSEA was successful in getting a larger than 6 percent general increase or if there was more than \$337 million in the finalized budget for state employees' salaries.

ACSA conveyed a counterproposal calling for a 10 percent salary increase effective April 1, 1984, the \$50 contribution to PERS extended to April 1, 1984, paid bar dues, two days for professional education, fair share, and side letters on 30 percent staffing ratios and separately, ACSA might reopen if CSEA got more than 6 percent or state budget was over \$337 million for salaries.

Blanning said ACSA had learned that another unit had agreed to 6 percent salary increase in January plus 3 percent in April, and still another unit had agreed to 6 percent plus 4 percent. ACSA was reluctant to settle for less than what others got. Mosman told him that DPA would not revise the proposal. In the hallway discussion, Mosman indicated that he might be able to throw in bar dues if it meant that they had agreement. Blanning suggested that if Mosman kicked in agency shop, that they might get somewhere. At that point, said Mosman, things broke down and Mosman suggested they request a mediator. Mediation was discussed but the parties did not request it.

On July 22, Blanning wrote to Mosman confirming a meeting on August 4 and that Mosman had called the July 1 proposal his "last and final offer" and requesting mediation immediately.

A state budget was finally adopted by the Legislature on July 19. The Governor took final action on the budget on July 21. Employee compensation was cut to the original \$337 million. ACSA was active in attempting legislative override of the cut in proposed employees' salaries. The effort was not successful.

At the request of the DPA, mediation was ordered by PERB. The parties met on August 4 without a mediator but, said Mosman, they were deadlocked. At a session on September 7 the parties, working through the mediator, reached agreement in principle and memorialized it on September 7. The agreement between the parties included a 6 percent salary increase effective January 1, 1984, bar dues reimbursed up to \$200 per year, increased vacation hours earned per month and increased vacation carryover from 320 to 400 hours.

Summary

The following findings can be drawn from the evidence that foreshadow conclusions drawn hereafter.

1. Mosman did not have authority to offer economic proposals on any money items until June 30, 1983.

While Mosman testified that he had authority to negotiate on behalf of the Governor, he did not deny telling Blanning as

early as May 10 that he was not there to negotiate. He could not recall making such a statement. DPA offered no rebuttal to Blanning's testimony that only Mike Frost, the director of DPA, had money authority. In addition, Mosman's testimony confirms that the Governor's strategy was not to negotiate economic matters until the legislative process was complete. Finally, confirmation of lack of authority on Mosman's part is his telling testimony set forth on page 18, herein describing the Governor's reaction to the joint conference committee action in late June. The Governor, said Mosman, felt there wasn't going to be a lot of negotiating going on with the Legislature so he "decided to go with a certain amount of money for employee compensation."

2. DPA did agree, prior to June 30, 1983, to:
 - a. Groundrules for negotiations,
 - b. Resolution of staffing ratios by committee referral,
 - c. Incorporation of training programs into the MOU (thereby making such matters subject to the grievance procedure).

3. DPA did place economic offers on the table on June 30 and in successive sessions moved from its initial bargaining position.

ISSUE

The issue in this case is whether the Department of Personnel Administration, as an agent of the Governor, violated

the provisions of the SEERA when it refused to negotiate economic items until June 30, 1983.¹⁶

16The Issue of Scope

At the formal hearing, DPA objected to evidence regarding its position on nonnegotiability of certain items. DPA's objection was based upon ACSA's amendment of the unfair practice charge. After argument by the parties on the issue, the undersigned requested the parties to address the issue in post-hearing briefs. ACSA did not brief either the underlying scope question or the question of the effect of its amended unfair practice charge. DPA did not brief the issue, but did note that ACSA waived the issue by failing to brief the matter.

A review of the documentation and evidence presented leads to the conclusion that ACSA has removed the scope question as a viable issue in this case. The original unfair practice charge cited various allegations of DPA's conduct as demonstration of bad faith bargaining. ACSA alleged that the DPA had unilaterally imposed a freeze on promotions, and refused

. . . to bargain about matters which clearly are within scope, including but not limited to promotions, the content of health benefits and retirement benefits, agency shop, and staffing ratios.

The Complaint issued on this charge, however, did not refer to questions of scope but rather framed the issues as refusal to bargain on "matters requiring the expenditure of funds" and "failure to invest the DPA negotiator with sufficient authority." ACSA's amendment to the charge, filed after the Complaint was issued, was precisely the same pleading as the original charge with identical supporting declarations, with the exception that reference to the freeze and to the scope questions were deleted. (Also deleted was a request by ACSA for injunctive relief.) The amended Complaint simply incorporated the amended unfair practice charge. Nowhere in the Complaint or the amended unfair practice charge or the amended complaint is the question of scope presented. In addition, ACSA requested a very limited remedy during the formal hearing (bargain in good faith before the constitutional deadline). Moreover, Charging Party objected to the introduction of evidence following July on the pretense that their case was a refusal to bargain case insofar as DPA's

DISCUSSION

Position of the Parties

ACSA argued violation of the SEERA under three theories. First, it argued that section 3517 requires meeting and conferring in good faith before a final decision is made by the Governor regarding the amount of money to be made available for employee compensation, and that SEERA contemplates good faith effort to reach agreement before adoption of the final budget with adequate time for resolution of impasse. Thus, agreement or impasse should have been reached long enough prior to June 15 to allow impasse procedures a "fair chance to work." Tracing ACSA efforts through the negotiating sessions and the failure of DPA to offer economic items until June 30, ACSA finds basis for a violation. Secondly, ACSA argued the refusal to bargain until after the limits set by Government Code section 3517 was a per se refusal to bargain. Finally, ACSA argued that the record supports a finding of bad faith bargaining on "totality of conduct."

DPA argued that fiscal necessity precluded the placing of economic proposals on the table. It contended that:

refusal to bargain prior to the deadline set forth in the Constitution. All of these circumstances justify a determination that ACSA has waived and/or abandoned the pursuit of the scope issue in this case. This conclusion is further justified by ACSA's failure to brief the question in response to DPA's objection to the evidence on the question.

. . . the severe economic situation facing the state in 1983, coupled with the dynamics in the Legislature concerning major segments of the proposed 1983-84 fiscal year budget made it impossible for the state to determine the amount of money that would be available to fund increased state employee benefits in the context of a \$22 billion budget. (Post-hearing Brief - page 21.)

DPA further argued that in fact it did place proposals on the table before the budget was adopted and did in fact make concessions in negotiations.

Under subsection 3519(c) it is an unlawful practice for the employer to refuse or fail to meet and confer in good faith with a recognized employee organization. Section 3517 requires the Governor, or his representative, to

. . . meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations, . . .

The Governor is required to

. . . consider fully such presentations as are made by the employee or organization on behalf of its members prior to arriving at a determination of policy or course of action.

Good faith is imposed upon both parties in meeting and conferring, and that means:

. . . the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final

budget for the ensuing year. The process should include adequate time for the resolution of impasses.

ACSA's posture is that the meet and confer obligation is fixed by the Constitutional mandate for budget adoption by the Legislature. Since the Legislature is mandated to adopt a budget by June 15 and the Governor by June 30,¹⁷ ACSA would require agreement or resolution of impasse by June 15. In the absence of either it would have a violation of SEERA.

The DPA argued that constitutional guidelines are not imposed by section 3517. It argued that section 3517 requires good faith before the "final decision" - that is, prior to adoption by the state of its final budget for the ensuing year. "Final decision" requires final adoption of the budget. In the context of the state's budget process this would be the date on which the Governor completes final action on the budget sent to him by the Legislature. Economic proposals were first placed on the table June 30. The budget was not submitted to the Governor until July 19. The Governor completed action on July 21. Thus, the State met and conferred three weeks before final action was taken. In addition, argued DPA, impasse could have been completed 21 days from the time an economic offer was made and final action was taken by the Governor.

¹⁷ACSA cited none and I find no authority on this latter contention.

I decline to read ACSA's mandate into section 3517. Imprimis, the statute imposes upon the parties the mutual obligation only to "endeavor" to reach agreement prior to adoption by the state, as opposed to the Legislature of its final budget. Endeavor means to try - not that agreement shall be reached.¹⁸ As was stated in Dublin Professional Fire Fighters, Local 1885 v. Valley Community Service District, C.19 45 CA.3d 116, interpreting similar language in section 3505¹⁹

¹⁸Funk and Wagnalls Standard College Dictionary defines "endeavor:" "An attempt or effort to do or attain something; earnest exertion for an end."

¹⁹Section 3505 provides in part:

"Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent.

This section is within the Meyers-Milias-Brown Act (MMB), applicable to local public agencies.

. . . the obligation in proper cases, to "meet and confer promptly upon request" is absolute, while the statutory admonition to "reach agreement" before the adoption of the budget is only hortatory.

The court noted that "agreement may not be reached at all" as the statute recognizes in stating that the negotiators should "endeavor" to reach agreement before the budget is adopted.²⁰

Secondly, the overture focuses upon "prior to the adoption by the state of its final budget for the ensuing year."

"State" is not defined in SEERA. Government Code section 18 provides that "State" is the "State of California, unless applied to the different parts of the United States. . . ."

"State" is not synonymous with "Legislature," or the

²⁰Additional provisions in SEERA, not found in the MMB, reveal contemplation that agreement might be reached before the Budget Act is adopted by the Legislature.

Section 3517.6 provides in pertinent part:

. . . if any provision of the memorandum of understanding requires the expenditure of funds, those provisions of the memorandum of understanding shall not become effective unless approved by the Legislature in the annual Budget Act.

Finally, section 3517.7 provides:

If the Legislature does not approve or fully fund any provision of the memorandum of understanding which requires the expenditure of funds, either party may reopen negotiations on all or part of the memorandum of understanding.

These provisions, however, do not require agreement before the budget act is adopted by the Legislature.

Legislature would have so stated. As a practical matter the Budget is finalized when the Governor takes final action in approving the Budget. That action finalizes the Budget unless the Legislature, by two-thirds majority, overrides his actions. Either interpretation of adoption of a budget, by the Legislature, or upon action of the Governor leads to the same result in this case. The Legislature passed the Budget Act on July 19. The Governor took action on July 21. On June 30, prior to either event, DPA was making firm economic offers at the negotiating table.

In sum, section 3517 requires the parties to try to reach agreement at a time early enough to precede the enactment of a budget. It does not appear that the legislative intent was to impose rigid dates by which agreement was to be reached or impasse completed, failure of which to observe would automatically result in violation of the SEERA. ACSA's first theory of violation is therefore rejected.

The Department's Negotiating Conduct

ACSA contends that DPA committed a per se violation and by the totality of its conduct violated the SEERA. DPA contended that it never refused to bargain but rather took the position that it could not negotiate until the state's financial position became more clear.

PERB utilizes both the "per se" and "totality of the conduct" tests to ascertain whether a party's negotiating

conduct constitutes an unfair practice. Stockton Unified School District (11/3/80) PERB Decision No. 143. The distinctions between the two tests was delineated in Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51. Said the Board:

The National Labor Relations Board (hereafter NLRB) has long held that [a duty to bargain in good faith] requires that the employer negotiate with a bona fide intent to reach an agreement. In re Atlas Mills, Inc. (1937) 3 NLRB 10 [1 LRRM 60] The standard generally applied to determine whether good faith bargaining has occurred has been called the 'totality of conduct' test. See NLRB v. Stevenson Brick and Block Co. (4th Cir. 1968) 393 F.2d 234 [68 LRRM 2086] modifying (1966) 160 NLRB 198 [62 LRRM 1605]. This test looks to the entire course of negotiations to determine whether the employer has negotiated with the requisite subjective intention of reaching an agreement.

There are certain acts, however, which have such a potential to frustrate negotiations and to undermine the exclusivity of the bargaining agent that they are held unlawful without any determination of subjective bad faith on the part of the employer.

The latter violations are considered per se violations. NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]. Examples of per se violations are; unilateral changes in terms and conditions of employment otherwise subject to negotiations, NLRB v. Katz, supra, San Mateo County Community College District (6/8/79) PERB Decision No. 94; outright refusal to bargain a matter within the scope of representation, NLRB v. Katz, supra, Sierra Joint Community College District (11/5/81)

PERB Decision No. 179, John S. Swift & Co. (1959) 124 NLRB 394 [44 LRRM 1388]; unilateral insistence on public negotiations Ross School District (2/21/78) PERB Decision No. 48; or conditioning agreement upon the union's abandonment of its right of representation at the informal level of grievance processing, Modesto City Schools (5/5/83) PERB Decision No. 291.

1. The per se theory.

DPA cannot be said to have outright refused to bargain but rather sought to defer bargaining until the legislative process was completed. Deferring negotiations is permissible under some circumstances. In San Mateo Community College District (6/8/79) PERB Decision No. 94, the PERB noted ". . . a party may also defer negotiations, maintaining the status quo, until information is secured about the effects of a serious financial change," citing NLRB v. Minute Maid Corp. (5th Cir. 1960) 283 F.2d 705 [47 LRRM 2072]. There a citrus freeze prompted the employer to request deferral of negotiations until the financial aspects of damage from the freeze could be ascertained. Here, the Governor's position was to have an overall budget of \$22 billion dollars. His obligation to bargain with ASCA did not require him to yield this position. NLRB v. Herman Sausage (5th Cir. 1958) 275 F.2d 229 45 LRRM 2829; Oakland Unified School District (11/2/81) PERB Decision No. 178. Faced with other high cost items (education and welfare), in addition to employee compensation, the

administration sought resolution of those items with the Legislature, before firming offers to the employee representative. The SEERA statutory scheme would have provided the Governor ostensible relief from an agreement consummated before the Budget Act was passed (subsection 3517.6 provides that such agreement is not effective until the Legislature approves it, and subsection 3517.7 provides that if the Legislature does not approve then either party may reopen negotiations, see footnote 20, supra). Yet, determined to limit the budget to \$22 billion, and faced with other statutory mandates (e.g. welfare support and educational funding) he may have been in a position of having to blue pencil employee compensation if employee compensation was agreed to prior to the time the Legislature passed the Budget Act. This would have been reneging on his own prior agreement, possibly an unfair practice itself. Thus, seeking to resolve the big money items with the Legislature before offering firm economic offers to ACSA cannot be a per se refusal to bargain.

Moreover, the DPA did not in fact refuse to bargain until after the Legislature had passed the budget. Rather, DPA placed offers on the table on June 30, some 20 days before the budget was finally enacted by the Legislature. A different conclusion might result if there was an outright refusal to bargain until after the Legislature did in fact adopt the budget. DPA did negotiate ground rules at the first meeting, a

subject found by PERB to be within the scope of negotiations. See Stockton Unified School District (11/3/80) PERB Decision No. 143. The parties agreed to resolve the staff ratio issue by use of a committee. A tentative agreement was reached on May 10 regarding training programs. There was also expressed willingness by DPA to negotiate wages, etc., in the context of a total compensation package.

Thus, the record does not support a finding of flat refusal to bargain. Rather, amidst the fiscal uncertainty perceived by the Governor, his negotiations with the Legislature caused delay of negotiations on economic matters. As was said in Mount Diablo Unified School District (12/30/83) PERB Decision No. 373,

. . . where the parties engage in some negotiating, the determination of whether an employer has violated its duty to negotiate in good faith turns on whether there is sufficient evidence to establish, based upon the totality of the circumstances, that it lacked subjective intent to reach agreement with the exclusive representative.

2. The totality of conduct theory.

ACSA argued that under a totality of conduct test DPA may also be found to violate its duty to meet and confer. ACSA offers the following:

- 1) Rejecting summarily ACSA's proposals regarding economic items.

The post-hearing brief does not set forth specific examples of any summary rejection of ACSA's proposals. Save for one

proposal by ACSA, the evidence does not support this contention. DPA did reject ACSA's proposals for a separate health plan, to fund certain items out of departmental savings from attorney layoff or attrition, and asserted as out of scope aspects of ACSA's health and retirement proposals. But failure to agree, without more, is not unlawful. There is no requirement that the parties agree. NLRB v. Highland Park Mfg. (1940) 110 F.2d 632 [6 LRRM 786]; NLRB v. Reed and Prince Mfg. Co. (1941) 118 F.2d 874 [8 LRRM 478]. Mosman reduced to writing the basis of DPA's rejection of ACSA's proposal on finding items from salary savings. As Mosman correctly pointed out, savings in the 1982-83 fiscal year would have no lasting benefit in the 1983-84 fiscal year. Layoffs resulting from eliminating positions does not carry forward any departmental savings or funds to pay for other items. Even as to the scope issue, Mosman did not take a rigid posture but conferred with counsel, wrote to ACSA about the position and then agreed to confer with counsel again. DPA expressed in writing a willingness to discuss many of ACSA's proposals either in the context of a total "compensation package" and/or at such time as the final picture was more certain. DPA's position, openly, was to defer negotiations until the budget picture was resolved. In the context of negotiations only on reopener proposals, the majority of items of which had financial implications, this posture did not amount to summary rejection of ACSA's proposals.

2) Offering a wage proposal on a "take it or leave it approach and in fact the only offer on wages."

The facts do not bear ACSA's depiction of such intransigence by DPA. DPA started at 2 percent on June 30 and moved through successive incremental increases of 3 percent (at 7:30 p.m.), 5 percent increase effective January 1, 1984 (at 10:30 p.m.), and then revised the offer to 6 percent effective January 1, 1984 (at 11:00 p.m.). On July 1, DPA offered a 6 percent increase plus payment of the \$50 retirement contribution to December 31. While the span of time over which these changes were made was less than 24 hours, it does represent a change in offers by DPA and was not a "take it or leave it" offer. A party has the right to maintain, while in negotiating posture, that its last offer has been made, and that it will make no more concessions. Modesto City Schools (5/5/83) PERB Decision No. 291. Here, Mosman's July 1 statement was no more than just posturing. As the record shows, even on July 12 he was indicating further movement was possible on the chance that ACSA would move on some of their issues. Mosman then agreed to reopen salaries if CSEA in simultaneous negotiations with the State, obtained a larger compensation package or if there was more than \$337 million in the final budget. As the final agreement reflects, other features were added distinguishing that agreement from DPA's July 1 position. For example, reimbursement of bar dues and vacation carryover were added.

- 3) Failure to make economic counter offers - amounting to an insistence on unilateral control of wages and other economic matters.

It is not, by itself, a failure to bargain in good faith to fail to make a counterproposal. As was said in Oakland Unified School District (11/2/81) PERB Decision No. 178:

[The NLRB] . . . have also ruled that the failure to make a counterproposal is not, by itself, a violation of the National Labor Relations Act. In NLRB v. Arkansas Rice Growers Assn. (8th Cir. 1968) 400 F.2d 569 L69 LRRM 2119, p. 2123], the Court said:

Although as the company suggests, it may not be bound to make counterproposals, nevertheless, evidence of its failure to do so may be weighed with all other circumstances in considering good faith.

See also West Hartford Education Assn. v. DeCourcy (1972) 80 LRRM 2422. And in NLRB v. Herman Sausage (5th Cir. 1958) 275 F.2d 229 [45 LRRM 2829], the Court said:

The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained.

A flat refusal to reconcile differences by failing to offer counterproposals could be construed to be in bad faith if no explanation or rationale supports the employer's position. As we stated in Jefferson School District (6/19/80) PERB Decision No. 133 at p. 11:

[the] obligation to negotiate includes expression of one's opposition in sufficient detail to permit the negotiating process to proceed on the basis of mutual understanding.

As the record shows, DPA did not refuse to make counter offers, but rather took the position that it wished to defer presenting economic offers until the financial picture became more clear. Even as early as May 10, DPA was responding to ACSA's proposals, indicating areas it would negotiate and areas about which it had concern with ACSA's proposals. On June 30, and again on July 1, DPA was making counter offers in response to the issues that ACSA had raised. Nor was there an insistence on unilateral control over wages or other economic matters. In Majure Transportation Co. v. NLRB (CA 5, 1952) 198 F.2d 735 [30 LRRM 2441], relied on by ACSA, the employer insisted on virtual retention of unilateral control over terms and conditions of employment in its counterproposal. All DPA did here was to defer negotiations, not retain absolute control to change terms and conditions of employment. DPA did not insist on an amount of wages or other cost items on or at any rate than what it offered. In the absence of acceptance of an offer by ACSA, the employer was obligated to carry forth the status quo. There is no indication that the employer intended anything differently.

4) Failure to invest its agent with sufficient authority.

As the findings indicate Mosman could make no offers on money items until authorized to do so by the Governor. This did not occur until June 30, when DPA placed its initial economic offer on the table. While on the one hand the absence

of direct final authority to bind the employer is some evidence of the lack of good faith (NLRB v. Coletti Color Prints, Inc. (2nd Cir. 1967) 387 F.2d 298 [66 LRRM 2776]; National Amusements, Inc. (1965) 155 NLRB No. 113 [60 LRRM 1485]; in San Ramon Valley Unified School District (11/20/79) PERB Decision No. 111, PERB noted the significance of such evidence citing NLRB v. Fitzgerald Mills;²¹

If in other respects good faith is found it is not enough to establish an unfair practice solely that the representative of the company was not empowered to enter into a binding agreement.

Discussing issues and making proposals that are subject to ratification does not violate the Act. Fry Roofing Company v. NLRB (9th Cir. 1954) 216 F.2d 273 [35 LRRM 2009]. Rather, it is the absence of that amount of authority which delays and thwarts the bargaining process that evidences bad faith bargaining. Oakland Unified School District (7/11/83) PERB Decision No. 326. Evidence that the negotiator's limited power was intended to or was used to foreclose the achievement of any agreement establishes such showing. Capitol Transit Co. (1953) 106 NLRB 169. Under these circumstances, it is concluded that the delay in negotiations did not reach an overall level of bad faith bargaining.

²¹(2nd Cir. 1963) 313 F.2d 260 [52 LRRM 2174] cert. denied (1963) 375 U.S. 834 [54 LRRM 2312].

As PERB noted in Oakland Unified School District, supra, citing NLRB v. Herman Sausage (5th Cir. 1958) 275 F.2d 229 [45 LRRM 2829], "the obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." In keeping with his responsibilities in budget submission and maintaining the fiscal affairs of the State,²² the Governor had the right to construct a \$22 billion dollar budget and, subject to his obligation to bargain in good faith with employee representatives, maintain that budget limitation. Toward that end, he could attempt to work with the Legislature in securing agreement on items within the budget. After the Budget Act was passed, he had the right to reduce appropriations to a level consistent with his budgetary ambitions and subject to legislative override. See Government Code sections 9511 and 9512. In this case, the Legislature was prone to provide for a larger budget than the Governor determined appropriate. In early May, both houses of the Legislature had approved employees compensation appropriations of \$1 million more than the amount proposed by the Governor. The Legislature's budget proposed overall expenditures of over a billion and a half dollars more than the Governor's budget. Unlike Minute Maid Corp., supra, where the employer's revenue

²²See for example Article V, section 1 of the California Constitution and generally, Government Code section 13000 et seq.

was in doubt because of the citrus freeze, here the uncertainty was whether the total cost of all legislatively approved programs could be contained within the Governor's imposed spending limit of \$22 billion. Hence the conundrum of SEERA. The SEERA requires the Governor to meet and negotiate in good faith with exclusive representatives on, among other things, wages. Yet the Legislature can adopt a budget appropriating a differing amount of employee compensation than that amount deemed acceptable by the Governor. Where the Legislature appropriates less compensation than is necessary to support a previously consummated memorandum of understanding, the memorandum is nullified. See footnote 20, supra. Where the Governor, however, adopts a position on the budget that is lower than the legislative version, no such enabling relief from an executed memorandum is provided. To renege on a previously consummated memorandum by blue penciling the amount for compensation would be an unfair practice in and of itself.

In the context of the issues faced by the administration in dealing with the Legislature regarding the budget (welfare and education) the conduct of DPA up to June 30 does not constitute bad faith bargaining. If it rose to that level at all, it was cured by the actions of DPA on June 30, when despite the absence of a budget or an agreement with the Legislature, DPA did place offers on the table and did attempt to reach agreement. Against the background of agreement on ground rules

for bargaining, tentative agreement on training and education, and the agreement to address staffing ratios by a committee approach, the delay in making an economic proposal is not found to be bad faith bargaining.

- 5) Failure to make meaningful concessions or compromises on wages and other economic issues.

While the record reflects frustration on ACSA's part because it did not get what it wanted out of the negotiations, such frustration does not translate into bad faith bargaining by DPA. ACSA wanted a 30 percent salary increase. DPA ultimately agreed to a six percent increase.²³ ACSA wanted bar dues paid by the employer. This was a significant item from the prior year's negotiations. DPA agreed to pay for bar dues, despite the unprecedented nature of such benefit. ACSA wanted the vacation accrual formula to be increased and a larger vacation carryover into the next successive calendar year. DPA agreed to both an increase in the accrual and the carryover. ACSA wanted staffing ratios to be addressed. DPA agreed to attempt to resolve the issue via a separate committee system and ultimately pursued it to the State Personnel Board for resolution. ACSA at least wanted the educational training provisions within the contract and DPA agreed to do so. Thus,

²³This amount was more than the amount placed in the budget proposal submitted by the Governor in January of 1983.

it cannot be concluded that DPA failed to make concessions or compromises with ACSA.

In Oakland Unified School District (11/2/81) PERB Decision No. 178 the PERB stated:

Nothing in EERA requires parties to reach agreement or make concessions on every proposal. The NLRB and the courts have consistently ruled that adamant insistence on a bargaining position is not necessarily a refusal to bargain in good faith. NLRB v. Wooster Division, Borg-Warner Corporation (1958) 356 U.S. 342 [42 LRRM 20345].

In summary, the employer was unwilling to negotiate economic matters until the Legislature had taken action. While this posture shifted, deferring negotiations to that time when the joint committee had completed its report to the time the Governor had reached agreement with the Legislature, it is in fact true, the DPA entered into negotiations on economic matters on June 30, 1983, before the Legislature adopted the Budget Act. Despite the legislative recognition of possible settlement of negotiations before the Budget Act is adopted, it is clear that there is not a requirement that settlement shall be reached before the Budget Act is adopted. Given the limited context of negotiations - economic matters, and the factors of education and welfare cost demands on the budget, it cannot be held that the Governor's deferral of negotiations on state employee compensation, a significant cost item, was bad faith bargaining. Hard bargaining, no doubt, inversion of the

perceived scheme no doubt, but not a violation of the SEERA overall. Accordingly, the charge is dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this matter, unfair practice charge S-CE-184-S filed by the Association of Attorneys and Hearing Officers against the State of California (Department of Personnel Administration) and the companion PERB complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on June 19, 1984, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board at its headquarters office in Sacramento before the close of business (5:00 p.m.) on June 19, 1984, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing

upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, section 32300 and 32305.

Dated: May 30, 1984

Gary M. Gallery
~~Admini~~ Law Judge