VACATED by California State Employees' Assn. v. Public Employment Relations Bd. (1996) 51 Cal.App.4th 923

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION, CSU DIVISION, SEIU LOCAL 1000, AFL-CIO,	)	
Charging Party,	)	Case No. LA-CE-328-H
v.	)	PERB Decision No. 1093-H
CALIFORNIA STATE UNIVERSITY,	)	April 5, 1995
Respondent.	)	

Appearances: Claire Iandoli, Attorney, for California State Employees' Association, CSU Division, SEIU Local 1000, AFL-CIO; William G. Knight, Attorney, for California State University.

Before Caffrey, Carlyle and Garcia, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California State University (CSU) to a proposed decision by an administrative law judge (ALJ) in which the ALJ found that CSU had violated section 3571(a) and (c) of the Higher Education Employer-Employee Relations Act (HEERA or Act).[1] After reviewing the entire

[1]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3571(a) and (c) provide that it is unlawful for the higher education employer 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. . . .
>
> (c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

record, including the parties' exceptions and responses, the Board reverses the ALJ's proposed decision.

JURISDICTION

PERB has jurisdiction over this case for the following reasons: CSU is an employer under HEERA. The California State Employees' Association, CSU Division, SEIU Local 1000, AFL-CIO (CSEA) at all times relevant has been the exclusive representative of bargaining units 2, 5, 7 and 9, under HEERA.[2] The matter is not subject to any grievance agreement between CSU and CSEA. Charges were timely filed.

PROCEDURAL BACKGROUND

CSEA filed an unfair practice charge on July 6, 1992. On January 11, 1993, after an investigation, the PERB General Counsel issued a complaint against CSU. The complaint alleged that before June 1, 1992, merit salary adjustments (MSAs) were paid based on merit and effective performance. It was alleged that on or about June 1, 1992, CSU changed this policy by suspending payment of MSAs. This action was taken without affording CSEA an opportunity to meet and confer over both the decision and the effects of the change in policy, in violation of HEERA section 3571(a) and (c).

CSU filed its answer on January 29, 1993, admitting that it suspended MSA payments on June 1, 1992, but denying a violation of HEERA.

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[2]Unit 2 consists of health care support; Unit 5 is operations support; Unit 7 is clerical/administrative support; and Unit 9 is technical support.

A PERB-conducted settlement conference failed to resolve the dispute.

A formal hearing was held on June 16, 1993, in Los Angeles, California. With the filing of post-hearing briefs on July 30, 1993, the matter was submitted for a proposed decision.

FACTUAL BACKGROUND

The record shows that the parties have negotiated several agreements of various duration which included a provision for MSAs based on performance. The collective bargaining agreement (CBA or contract) covering the period of 1985 to 1988 contained a provision that read: "Merit salary adjustments shall be subject to funds being appropriated by the Legislature and made available to the CSU specifically for merit salary adjustments."[3]

CSU suspended MSAs during the year 1988-89, thereby increasing CSEA's effort to safeguard MSAs in the successor agreement. In negotiations for the 1989-92 contract, the parties

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[3]The 1989-92 contract contains the following language:

> Any term of this Agreement which is deemed by the Employer to carry an economic cost shall not be implemented until the Employer determines that the amount required therefor[] has been appropriated and makes such amount available for expenditure for such purpose. If the Employer determines that less than the amount needed to implement this Agreement or any provision herein has been appropriated to implement this Agreement or any provision herein, the term(s) of this Agreement deemed by the CSU to carry economic cost shall automatically be subject to the meet and confer process.

agreed that MSAs would be paid for the term of the agreement. Section 20.19 of the agreement provided:

> Merit Salary Adjustments shall be paid effective July 1, 1989, and for the duration of this agreement, subject to provisions 20.18 and 25.2.[4]

As agreed, the parties began negotiations on a successor contract during the spring of 1992. CSEA's proposal was presented to CSU on March 1, 1992, and CSU's proposal reached CSEA on April 14, 1992.. Before bargaining began, the parties agreed on ground rules, including a commitment not to resolve economic items (including wages) until non-economic matters were resolved. Robert Plankers (Plankers) represented CSEA in the negotiations in the spring of 1992 and Kent Porter (Porter) represented CSU. Between April 6 and May 30, 1992, the parties met 15 times.

On April 27, Porter announced that it was CSU's intent to delete MSAs and not pay them if they were not expressly funded by the Legislature. Plankers pointed out that there had never been specific funding, but Porter's position was that if there was no specific funding, there would be no MSAs. Other than the April 27 discussion, there were no other discussions of MSAs prior to the contract's expiration date of May 31, 1992.

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[4]Section 20.18 provides that "[m]ovement between steps on the salary range shall be based on merit and effective performance." Section 25.2 pertains to reopeners for the 1991-92 fiscal year. By its terms, the agreement was to expire on May 31, 1992.

On June 1, 1992, Plankers spoke with Porter about the contract. According to Plankers, Porter stated, "We're willing to extend as long as progress is being made." He also stated, "Nothing will be suspended for the time being." As a result of this conversation, Planker's impression was that the whole contract, without exception, had been extended.

The parties then met on June 9. CSU's position, as stated by Porter, was that the contract was extended, except for MSAs. Porter said he had been advised of this position only that morning. MSAs were suspended as of June 1, 1992, even for those who had merited a step increase.[5] No other items of cost, including health benefits, were suspended.[6] According to Plankers, the June 9 notice was the first notice that CSU was suspending the MSAs.

Prior to the suspension of MSAs, neither party had requested PERB to declare impasse. In late June CSEA requested impasse, which was opposed by CSU. CSEA withdrew the request on August 10. CSU requested impasse on November 20, 1992; it was withdrawn later. The parties continued negotiations and in April 1993 reached a successor agreement.

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[5]On June 1.2, 1992, Samuel Strafaci, director of employee relations, wrote to the State Controller's Office concerning the suspension of MSAs for CSEA employees. Strafaci noted that CSU's commitment to pay MSAs expired with the contract expiration date. Strafaci cited the contract provision on cost items as well as section 3572 of the Government Code (discussed below).

[6]At the time the MSAs were suspended, the parties had not discussed any economic items, including payment of health care costs, dental, or vision.

ALJ'S PROPOSED DECISION

The ALJ found that CSU's suspension of MSAs was inconsistent with the past practice of paying MSAs every year. The single suspension that occurred in 1988 was an "aberration" and did not represent a pattern of conduct to establish a past practice of unilateral suspension of MSAs. Thus, CSU violated HEERA section 3571(a) and (c) by unilaterally suspending MSAs prior to completion of the statutory impasse procedures. The ALJ found that since the statute expressly requires legislative funding for payment of MSAs, he did not have the authority to order payment of the MSAs, but instead he ordered as a remedy that CSU cease and desist from "taking unilateral action and failing to meet and confer in good faith with [CSEA] about suspension of merit salary adjustments." Furthermore, he ordered CSU to, upon request, meet and confer with CSEA on the suspension of MSAs.

As a secondary issue, the ALJ examined CSEA's allegations of bad faith bargaining by CSU and found insufficient evidence of a violation.

CSEA'S EXCEPTIONS[7]

CSEA agreed with the ALJ that CSU had committed an unlawful unilateral suspension of MSAs, but argues on appeal that the ALJ erred by failing to remedy the unilateral change. CSEA is entitled to a return to the status quo ante of awarding MSAs based on merit and effective performance.

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[7]Both sides filed exceptions in this case. Although CSEA "won" according to the result in the proposed decision, they filed exceptions to the remedy, since the ALJ did not order monetary relief. CSU in turn filed exceptions that respond to CSEA's exceptions, and requested oral argument. Oral argument was held before the Board on November 8, 1994.

CSEA further argues that the ALJ erred by relying on HEERA section 3572 as dispositive of the status quo ante remedy.[8] The appropriate remedy under existing PERB precedent is for CSU to maintain the status quo during negotiations by paying MSAs.

CSU'S EXCEPTIONS

In general, CSU's exceptions seek a determination by PERB that the meet and confer process required under its CBA with CSEA and under HEERA section 3572 is an after-the-fact bargaining of a similar nature to "effects of layoff" bargaining. CSU fully supports the ALJ's determination in the proposed decision that no award of monetary relief is appropriate in this case.

CSU's first exception challenged the ALJ's statement that "salary savings were . . . the source of funds for MSAs," since there is no specified source of funding for MSAs. CSU argues that this issue is important because it helps support the statutory scheme of HEERA that "there can be no binding commitment of matters which require funding without a supporting appropriation."

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[8]The ALJ relied on the second paragraph of HEERA section 3572(a) to conclude:

> The plain meaning of the first part of that section is that legislative budgetary action necessary for provisions of memorandums of understanding is a condition precedent to legal efficacy of an agreement which requires such action.

CSEA argues that the section is inapplicable because there was no "written memoranda reached pursuant to the provisions of this chapter which require[d] budgetary or curative action by the Legislature or other funding agencies."

CSU next takes exception to statements in the proposed decision that accuse CSU of failing to provide CSEA an opportunity to meet and confer on the MSA issue before the effective date of June 1. CSU suggested alternate language to clarify its position that there was no obligation to provide an opportunity to meet and confer under the facts in this case.

Thirdly, CSU excepts to the ALJ's description of the 1988 nonpayment of MSAs as an "aberration" from the consistent pattern of paying MSAs every year. This description misstates the past practice, the meaning of the contract, and the effect of the expiration of the contract.

CSU's fourth exception is to the statement that it violated its obligation under HEERA by unilaterally suspending MSAs prior to completion of the statutory impasse procedures. CSU argues that it had the right to withhold MSAs under the contract terms [citing to Article 25] at the time in question. The allegation of bad faith bargaining is outside the scope of this unfair labor practice charge, since CSEA filed the unfair on July 6, 1992, long before it brought the MSA issue to the table.

ISSUE

Did CSU violate HEERA when it suspended MSAs on June 1, 1992?

DISCUSSION

We agree with CSU that it did not violate HEERA by suspending MSAs on June 1, 1992, for the reasons explained below.

The main issue in this case is raised by CSU's third exception; CSU argued that describing the 1988 withholding of MSA payments as an "aberration" misstates the past practice, the meaning of the contract, and the effect of the expiration of the contract. As explained in the following paragraphs, we concur with CSU's analysis that the 1988 nonpayment of MSAs was consistent with the past practice, not an aberration from it.

HEERA Guidelines

CSU's statutory bargaining responsibility and authority is found in HEERA sections 3562(d), 3570 and 3572.

HEERA section 3562 provides, in pertinent part:

> As used in this chapter:
>
> (d) "Meet and confer" means the performance of the mutual obligation of the higher education employer and the exclusive representative of its employees to meet at reasonable times and to confer in good faith with respect to matters within the scope of representation and to endeavor to reach agreement on matters within the scope of representation. The process should include adequate time for the resolution of impasses. If agreement is reached between representatives of the higher education employer and the exclusive representative, they shall jointly prepare a written memorandum of such understanding which shall be presented to the higher education employer for concurrence. However, these obligations do not compel either party to agree to any proposal or require the making of a concession.

HEERA section 3570 provides that:

> Higher education employers, or such representatives as they may designate, shall engage in meeting and conferring with the employee organization selected as exclusive

representative of an appropriate unit on all matters within the scope of representation.

HEERA section 3572 provides that:

> This section shall apply only to the California State University.
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> (a) The duty to meet and confer in good faith requires the parties to begin negotiations prior to the adoption of the final budget for the ensuing year sufficiently in advance of the adoption date so that there is adequate time for agreement to be reached, or for the resolution of an impasse. The California State University shall maintain close liaison with the Department of Finance and the Legislature relative to the meeting and conferring on provisions of the written memoranda which have fiscal ramifications. The Governor shall appoint one representative to attend the meeting and conferring, including the impasse procedure, to advise the parties on the views of the Governor on matters which would require an appropriation or legislative action, and the Speaker of the Assembly and the Senate Rules Committee may each appoint one representative to attend the meeting and conferring to advise the parties on the views of the Legislature on matters which would require an appropriation or legislative action.
>
> No written memoranda reached pursuant to the provisions of this chapter which require budgetary or curative action by the Legislature or other funding agencies shall be effective unless and until such an action has been taken. Following execution of written memoranda of understanding, an appropriate request for financing or budgetary funding for all state-funded employees or for necessary legislation will be forwarded promptly to the Legislature and the Governor or other funding agencies. When memoranda require legislative action pursuant to this section, if the Legislature or the Governor fail to fully fund the memoranda or to take the requisite curative action, the entire memoranda shall be referred back to the parties for further meeting and

> conferring; provided, however, that the parties may agree that provisions of the memoranda which are nonbudgetary and do not require funding shall take effect whether or not the funding requests submitted to the Legislature are approved.

It is well established under federal law and PERB precedent that an employer's unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate and a violation of HEERA section 3571(c). (Regents of the University of California (1985) PERB Decision No. 520-H; Pajaro Valley Unified School District (1978) PERB Decision No. 51 (Pajaro).)

Whether a unilateral change has occurred is measured by comparing the action taken to the status quo established by a contract or the past practice. The decision in NLRB v. Cone Mills Corp. (1967) 323 F.2d 595 [64 LRRM 2536] (Cone Mills) explains the evolution of the status quo doctrine under federal labor law, which has generally been adopted by PERB.[9]

In Cone Mills the Court of Appeals explains that unilateral action by the employer after a contract expires is not an unfair labor practice per se under National Labor Relations Act (NLRA) section 8(a)(5); such action may be sufficient, standing alone, to support a finding of refusal to bargain, but it does not compel such a finding in disregard of the record as a whole. The court then described the origins of the status quo doctrine in

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[9]See, e.g., Pajaro discussed infra in the text of this Decision; see also, San Mateo County Community College District (1979) PERB Decision No. 94, where the Board discussed and adopted the federal status quo doctrine.

federal labor law to aid in identifying the extent of the employer's statutory obligation:

> It is axiomatic in contract law that parties to an agreement are relieved of their mutual obligations upon termination of the agreement. [citations to Restatement] A [CBA] is not, of course, an ordinary contract. . . .[citations omitted.] Since parties to a [CBA] normally contemplate a subsisting contractual relationship . . . with not infrequent renewals or renegotiations, and since the employment relationship generally continues beyond expiration or termination of the agreement, it has been said that some rights created by [CBAs] survive the termination of the agreement. It is necessary, however, to carefully define what is meant by "survive."
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> We think it conceptually correct to say that an employer is always free after termination of the contract to unilaterally change conditions previously established by the contract. In this sense there is no "survival." . . . the employer can institute unilaterally the working conditions which he desires once his contract with the Union has expired [citation].
>
> But the more important question is not whether the employer is free to abolish a contractually derived right after contract termination. Clearly he may do so. The question is <u>how</u> and <u>when</u> he may do so, i.e., whether he must give reasonable opportunity to bargain before he acts. The obligation, to the extent there is one, to give notice and opportunity to bargain derives not from the contract but from the National Labor Relations Act. That there may be such an obligation is what is meant by "survival." . . . the use of the term "survive" can be misleading. Rights that survive contract termination do not live forever and can be destroyed after affording the opportunity to bargain. [<u>Id.</u> at 562.]

As other federal cases illustrate, the employers' duty to continue the status quo after expiration of a contract is derived

from the parties' statutory obligation to bargain under NLRA section 8(a)(5). For example, in NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177] (Katz), the Court held that an employer cannot make changes in terms and conditions where an existing agreement has expired and negotiations on a new agreement have not yet been completed.[10] The rationale was the employer's statutory obligation to bargain under NLRA section 8(d). (Id. at 742.)

Another important aspect of the status quo doctrine is found in Marine & Shipbuilding Workers v. NLRB (1963) 320 F.2d. 615 [53 LRRM 2878]; cert. den. (1964) 375 U.S. 984 [55 LRRM 2134] (Marine). That case held that although mandatory subjects continue after expiration because the statute makes them bargainable, rights which existed only because of the contract do not survive and can be lawfully terminated by unilateral action.[11] Furthermore, it was inappropriate to continue to give life to the clauses at issue in that case, since the expired contract expressly provided that the language at issue should remain in effect only so long as the agreement was extant. (Id. at 617.) The case at bar contains a provision limiting the duration of the MSA language to the duration of the contract itself.

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[10]See also, Hinson v. NLRB (1970) 428 F.2d 133 [73 LRRM 2667] for a good discussion of the rules involved in applying the status quo doctrine.

[11]In the Marine case, the provisions at issue (union security measures) were wholly dependent upon existence of the contract. Since there was no contract in existence when the company discontinued the practices, the company's action was in conformity with the law.

We agree with the ALJ that CSU did not breach or alter an existing written agreement when it suspended the MSAs on June 9, since the contract had expired on May 31, 1992. However, as the ALJ noted, certain terms of an expired agreement survive expiration and must be maintained by the employer until bargaining on a successor agreement is completed, either by reaching a successor agreement or attaining impasse. (See State of California (Department of Forestry and Fire Protection) (1993) PERB Decision No. 999-S.) That view is consistent with the explanation set forth in Cone Mills, supra. i.e., when a contract expires the obligations of the parties normally terminate, although the federal statute and interpretations thereunder obligate the parties to continue the status quo.

HEERA sections 3570 and 3562(d) impose essentially the same duty to bargain as does NLRA section 8(a)(5). However, section 3572 goes further and limits the obligations that may accrue and continue because of the statutory duty to meet and confer. In this case, the parties' contract expressly limited the duration of the MSA language and under HEERA section 3572 the employer has no authority to continue financial obligations that require funding by the Legislature. Therefore, although MSAs are within the scope of bargaining because they relate to wages,[12] the

[12]HEERA section 3562 (r) defines the scope of representation as:

> (r) For purposes of the California State University only, "scope of representation" means, and is limited to, wages, hours of employment, and other terms and conditions of employment.

specific contractual time limitation and the statutory restraint of HEERA section 3572 impose a more restricted duty to bargain than would exist under federal law.

At the time CSU discontinued payment of MSAs, the contractual commitment to MSAs had expired under the terms of the contract. As the ALJ construed the obligation, MSAs would be provided for the term of the agreement and after the contract expired because they had not been expressly identified as terminating with the contract. As the ALJ stated:

> The contract did not . . . express agreement that the provision on MSA's would not continue forward after expiration of the contract. It only expressed agreement that MSA's would be provided for the term of the agreement. All provisions of the contract had the same term limit of the contract. (Proposed decision, p. 11; emphasis added.)

The statement amounts to a ruling that a contract must affirmatively state which provisions do not survive expiration of the contract, and all provisions not specifically terminated must be given effect until impasse or a successor agreement is reached. No legal precedent is cited that compels this result, other than the proposition that "parties may limit post-contract vitality of terms and conditions of employment."[13]

Should we follow that view, all terms of an agreement survive its expiration, unless it is affirmatively stated that they do not; therefore, the agreement becomes the past practice

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[13]Citing State of California (Department of Forestry and Fire Protection), supra. PERB Decision No. 999-S.

and the status quo. That view is not consistent with California contract law.[14]

It appears that the ALJ relied on a labor law concept that a contract establishes a status quo and overlooked the parties' clear intent to limit the MSA provision to a specific time period. Furthermore, the concept grows out of the NLRA-imposed duty to bargain under NLRA section 8(a)(5) which does not contain the constraints of HEERA section 3572.

Since CSU committed no violation of an existing agreement, the remaining issue is to identify the past practice or status quo, to measure whether CSU's action violated HEERA.

Past Practice

In Pajaro. PERB recognized the "dynamic status quo" concept in federal labor law. That concept recognizes that change can be a normal part of the pattern of conduct between an employer and a union. As PERB noted in Pajaro:

> While Katz prohibits disturbance of the status quo during negotiations, the NLRB has held that the "status quo" against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment. The NLRB has held that changes consistent with such a pattern are not violations of the "status quo."

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[14]See, e.g., Sayble v. Feinman (1978) 76 Cal.App.3d 509 [142 Cal.Rptr. 895] citing California Code of Civil Procedure section 1858 (Court has neither power to make for parties a contractual arrangement which they themselves did not make nor to insert in agreement language that appealing party wishes were there).

Unfortunately, no objective test exists to fully define a past practice and the discretion or right to withhold or make additional payments under a policy is sometimes overlooked when it should be part of the definition. In 1988, CSU did not pay MSAs, an action that was permitted under the contract. Characterizing this event as an "aberration" from a pattern strips the parties of their power to set limitations on their contractual rights and obligations and may impose burdens inconsistent with HEERA section 3572.

The ALJ concluded that the "single suspension [in 1988] does not represent a pattern of conduct to establish a past practice of unilateral suspension of MSA's." Under that reasoning, the ALJ imposed on CSU the burden of establishing a past practice to suspend MSAs; whereby the more times it occurred, the more likely it would be found to constitute a past practice, which avoids a potential problem after the contract expires. That pattern of behavior would be repugnant to the purpose of HEERA.

The parties' contract permitted non-payment of MSAs under certain conditions, which led to nonpayment of MSAs in 1988. The contractual history of the parties shows that CSU consistently protected itself against a permanent commitment to MSA payments. Although CSU only asserted that right once (in 1988), it had the right to not pay MSAs whenever it had no contractual obligation to do so.

While the evidence shows CSU policy was to pay MSAs whenever resources permitted, the evidence also shows that CSU never

abandoned its contractual and management right, consistent with its statutory duties, to not pay MSAs on a permanent basis. The contract obligated CSU to pay MSAs for a limited period, which is not the same as creating a "past practice" that established payment of MSAs as a status quo that could not be unilaterally discontinued after expiration of the prior contract and before completing negotiations on a successor contract.

Other CSU Exceptions

CSU's second exception challenges a statement in the proposed decision accusing CSU of failing to provide CSEA an opportunity to meet and confer on the MSA issue before the effective implementation date of June 1. In its statement of exceptions, CSU suggested alternate language to clarify its position that there was no obligation to provide an opportunity to meet and confer under the facts in this case. Since we find no unilateral suspension of an obligation created by contract or past practice, and since CSU gave adequate notice of its position in compliance with HEERA section 3572 and the parties continued to discuss their concerns, we find that CSU did not violate HEERA on the meet and confer issue.

It is not necessary to address the CSU exceptions that the allegation of bad faith bargaining is outside the scope of this unfair labor practice charge, or that it was an error on the part of the ALJ to find that "salary savings were . . . the source of funds for MSAs," since we find that CSU did not violate HEERA by discontinuing MSA payments after the CBA expired.

ORDER

The Board hereby reverses the ALJ's proposed decision and DISMISSES the complaint and unfair practice charge in Case No. LA-CE-328-H.

Member Carlyle joined in this Decision.

Member Caffrey's dissent begins on page 20.

CAFFREY, Member, dissenting: I dissent. The California State University (CSU) violated section 3571(a) and (c) of the Higher Education Employer-Employee Relations Act (HEERA) when it unilaterally suspended merit salary adjustments (MSAs) for employees represented by the California State Employees' Association, CSU Division, SEIU Local 1000, AFL-CIO (CSEA) on June 1, 1992, prior to the completion of bargaining with CSEA. Accordingly, I would affirm the proposed decision of the Public Employment Relations Board (PERB or Board) administrative law judge (ALJ). However, I would modify the remedy proposed by the ALJ to include a make whole provision, ordering backpay plus interest to be paid to the employees affected by CSU's unlawful MSA suspension.

I expressly reject the misguided analysis which leads the majority to the contrary conclusion. The majority opinion misapplies PERB and National Labor Relations Board (NLRB) precedent, and misinterprets HEERA section 3572 so severely, that it threatens a fundamental rule of collective bargaining.

DISCUSSION

It is a fundamental rule of collective bargaining that an employer must maintain certain terms and conditions of employment, including wages and benefits, following expiration of a Collective Bargaining Agreement (CBA) during the parties' negotiations over a successor agreement. An employer's unilateral change in these terms and conditions of employment is a per se violation of the statutory duty to bargain in good

faith. (State of California (Department of Forestry and Fire Protection) (1993) PERB Decision No. 999-S; Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]; Department of Personnel Administration v. Superior Court (1992)5 Cal.App.4th 155 [6 Cal.Rptr.2d 714].)

NLRB v. Cone Mills Corp. (1967) 323 F.2d 595 [64 LRRM 2536], a case cited by the majority, makes it clear that CBAs are not ordinary contracts, and that employers may change working conditions following the expiration of a CBA only after affording the opportunity to bargain over those changes. In that case, the court stated that this obligation "derives not from the contract but from the National Labor Relations Act."

Another case, Marine & Shipbuilding Workers v. NLRB (1963) 320 F.2d 615 [53 LRRM 2878], cited by the majority, holds that an employer could unilaterally discontinue a union shop and checkoff provision because it was dependent on the existence of the contract. However, the court's broader holding was that the employer could not unilaterally change fundamental conditions of employment such as seniority rights or the grievance procedure after expiration of the contract during negotiations over a successor agreement.

There are numerous policy considerations which have led PERB, the NLRB and the United States Supreme Court to confirm the fundamental rule against unilateral changes, which the Board

discussed in San Mateo Community College District, supra, PERB Decision No. 94. First, a unilateral change destabilizes the employer-employee relationship which can lead to job actions and other workplace disruptions. Second, unilateral changes in working conditions undercut the exclusive representative's negotiating power and ability to function effectively on behalf of bargaining unit members. Third, the rule against employer unilateral changes promotes the level playing field between the parties which is a basic prerequisite of the statutory design of collective bargaining. The bilateral duty to negotiate in good faith and the negotiating equality it relies upon are undermined by the ability of one party to unilaterally change conditions of employment prior to the completion of the bargaining process. These policy considerations particularly apply to parties to an expired CBA who are negotiating a successor CBA. This is precisely the context in which the dispute posed by the instant case arises.

An extensive body of precedent, including that cited above, confirms the fundamental rule that CSU was obligated to continue the MSA provision contained in the expired CBA during its negotiations with CSEA over a successor agreement, unless it can demonstrate an exception to this rule and/or an agreement by the parties to proceed differently. CSU asserts that it was not so obligated in this case, basing its arguments on the application of HEERA section 3572, the specific provisions of the expired CBA and its past practice with regard to the payment of MSAs.

HEERA Section 3572

In its oral argument brief, CSU argues that upon expiration of its CBA with CSEA on May 31, 1992, it exercised its authority, as expressly authorized in HEERA section 3572, to suspend payment of MSAs "in times when the Legislature did not appropriate funds for MSAs." CSU argues that all of the longstanding precedent cited above, cases arising under the Educational Employment Relations Act (EERA) and the National Labor Relations Act (NLRA) including those affirmed by the United States Supreme Court, should be deemed by the Board to be "irrelevant" and are "inapplicable and should not be followed" in this case. CSU asks the Board to sweep aside decades of precedent confirming a fundamental rule of collective bargaining stated above, to find that:

> When unrestrained by a collective bargaining agreement, the [Trustees of the California State University] and their delegees have the power to determine the compensation for all CSU employees.

This startling pronouncement is unsupported by legal authority. Many HEERA provisions relating to the obligation to bargain in good faith are identical to EERA provisions. Furthermore, the California Supreme Court has held that the bargaining requirements of the NLRA and cases interpreting them may be referred to for enlightenment on similar issues arising under state labor statutes. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616-617 [116 Cal.Rptr.507].) The

court has also used federal precedent for guidance in interpretation of other state labor statutory provisions. (El Rancho Unified School Dist. v. National Education Assn. (1983) 33 Cal.3d 946, 953 [192 Cal.Rptr. 123].)

It is simply unimaginable, and unsubstantiated, that the Legislature, in the very statute which provides CSU employees with the right to form, join and participate in employee organizations for the purposes of collective bargaining with CSU, would include a provision which restricts that right to the extent argued by CSU. HEERA section 3572 describes the process of securing funding for a memorandum of understanding (MOU) which has just been negotiated by the parties. After the parties reach an agreement which requires "budgetary or curative action by the Legislature," they must obtain such action or the entire MOU is referred back to the parties for further negotiations.

HEERA section 3572 does not address the parties' obligations during negotiations, does not address the efficacy of a provision of a CBA which has been in effect for three years, and categorically does not address or offer an exception to the employer's obligation to maintain certain terms and conditions of employment contained in an expired CBA while the parties are negotiating over a successor agreement.

The parties in this case were negotiating for a successor agreement following expiration of their prior CBA at the time of CSU's unilateral suspension of MSAs. They had not reached agreement on an MOU requiring budgetary or curative action by the

Legislature and, therefore, HEERA section 3572 is inapplicable to the circumstances of this case.

Of particular concern is the potential implication of the majority's view that under HEERA section 3572, CSU is without authority to continue a contractual financial obligation for which the Legislature has not provided specific funding. Under this interpretation, CSU apparently can and must repudiate a provision of an existing CBA based simply on its conclusion that the Legislature has not provided specific funding for it. Nothing is more likely to undermine the basic purpose of HEERA than to provide the employer with the ability to unilaterally repudiate a contractual financial obligation involving a condition of employment as fundamental as employee wages. I reject this unsubstantiated and potentially destructive view.[1]

Contract Provisions

CSU offers the alternative argument that its June 1, 1992, suspension of MSAs is specifically authorized by provisions of the parties' expired CBA. This argument is based on a theory of waiver by contract. The Board will not readily infer that a party has waived its rights, requiring that any such waiver be

[1]Since HEERA section 3572 is inapplicable to the circumstances of this case, I find it unnecessary to address the myriad of issues raised by that section, none of which is addressed in the majority opinion. These include: the process for determining that a provision of a CBA requires budgetary action by the Legislature; the process for determining whether such a CBA provision has been fully funded; the impact on an existing condition of employment of the failure to fully fund it in a period subsequent to its implementation; and the various bargaining obligations and rights of the parties in any and all of these situations.

expressed in clear and unmistakable terms, particularly where the waiver of the statutory right to bargain is asserted. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74; San Francisco Community College District (1979) PERB Decision No. 105.)

CSU asserts that the language of CBA section 20.19 gives it the authority to suspend MSAs on June 1, 1992. CBA section 20.19 provides:

> Merit salary adjustments shall be paid effective July 1, 1989, and for the duration of this Agreement, subject to provisions 20.18 and 25.2.[2]

CSU argues that the phrase "for the duration of this Agreement" constitutes a waiver by CSEA of its right to negotiate over the subject of MSAs following expiration of the CBA on May 31, 1992, and indicates agreement by CSEA that CSU can unilaterally suspend MSAs at that time.

This argument is without merit. As concluded by the ALJ in his proposed decision, this durational language does not address CSU's statutory obligation under HEERA during the period after expiration of the contract. The durational language of Article 20.19 does not constitute in clear and unmistakable terms a waiver by CSEA of. its right under HEERA to bargain in good faith over terms and conditions of employment. Nor does it constitute a clear and unmistakable agreement by CSEA to waive CSU's

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[2]Section 20.18 provides for movement between steps on the salary schedule based on merit and performance, and section 25.2 concerns reopeners for 1991-92.

obligation to maintain wages, hours and other terms of employment embodied in the expired CBA during bargaining over a successor agreement.

To interpret agreement on mere durational language as a waiver of the statutory right to bargain would severely undermine the principles of collective bargaining by allowing widespread unilateral changes after expiration of CBAs containing such language, while the parties are bargaining over a successor agreement. In this case, for example, the expired CBA contained a general durational provision in Article 25.1. Clearly that statement of CBA duration does not allow the employer to unilaterally alter terms and conditions of employment, such as wages, hours, and health benefits, described in the contract once it has expired. Similarly, CSU's reliance on the durational language of CBA Article 20.19 to justify its suspension of MSAs upon expiration of the CBA is unavailing.

CSU also justifies its unilateral suspension of MSAs by reliance on CBA Article 25.4, which states:

> Any term of this Agreement which is deemed by the Employer to carry an economic cost shall not be implemented until the Employer determines that the amount required therefore has been appropriated and makes such amount available for expenditure for such purpose. If the Employer determines that less than the amount needed to implement this Agreement, or any provision herein, has been appropriated to implement this Agreement or any provision herein, the term(s) of this Agreement deemed by the CSU to carry economic cost shall automatically be subject to the meet and confer process.

This provision is designed to prevent implementation of any CBA term having an economic cost if it is determined by CSU that funds are unavailable for that purpose. In this case, CSU made no such determination prior to the implementation of the MSA provision of the contract. Instead, the record is clear that CSU implemented CBA Article 20.19 providing for payment of MSAs for the entire negotiated term of the CBA. Having implemented the MSA provision, Article 25.4 does not give CSU the discretion to make a subsequent determination of funding unavailability which could affect the status of that provision. CSU offers no argument on this issue, nor does it address the issue of the effectiveness of Article 25.4 on June 1, 1992, following expiration of the CBA. Furthermore, this Article does not lead to the conclusion that CSU can unilaterally suspend a CBA provision, once implemented, without completing the meet and confer process. More importantly, Article 25.4 does not address CSU's obligation under HEERA to maintain terms and conditions of employment after the CBA's expiration while the parties are negotiating over a successor agreement. Therefore, CSU's assertion that its suspension of MSAs is permitted by Article 25.4 of the parties' expired CBA is without merit.

In summary, CSU's arguments involving CBA Articles 20.19 and 25.4 fail to demonstrate a clear and unmistakable waiver by CSEA of its statutory right to bargain over the subject of wages. Nor do these arguments provide CSU with an exception to its

obligation to maintain the MSA provision of the expired CBA during negotiations over a successor agreement.

Past Practice

CSU argues alternatively that its unilateral suspension of MSAs is permitted because it is consistent with its past practice, specifically its suspension of MSAs under the terms of the previous, 1985-88, CBA. The language of that agreement provided that MSAs "shall be subject to funds being appropriated by the Legislature and made available to the CSU specifically for merit salary adjustments." CSU suspended MSAs at the beginning of the 1988-89 fiscal year, a year in which the Legislature and Governor did not make funds available specifically for MSAs. An arbitrator ruled that CSU's action was in accordance with and authorized by the MSA provision of the 1985-88 contract described above. With the exception of this contractually authorized MSA suspension, the record includes no evidence of a practice of suspending MSAs by CSU based on funding availability or any other considerations.

The application of a provision of a prior CBA is insufficient to constitute a past practice constraining parties who have substantially altered that provision in a subsequent agreement. The 1989-92 contract contains different language regarding MSAs, specifically deleting the provision making MSAs subject to specific funding by the Legislature. CSU's practice with regard to this CBA provision was to pay MSAs regardless of whether funds were specifically appropriated for that purpose by

the Legislature, including paying them for the first eleven months of the 1991-92 fiscal year prior to their unilateral suspension on June 1, 1992.[3]

The majority's discussion of past practice contains statements which demonstrate a profound misunderstanding of HEERA and misapplication of precedent. The majority states that CSU "had the right not to pay MSAs whenever it had no contractual obligation to do so"; and CSU has the contractual and management right "to not pay MSAs on a permanent basis."

Under HEERA, CSU has the obligation to negotiate in good faith with CSEA over the subject of employee wages, including MSAs, a matter expressly within the scope of representation defined in HEERA section 3581.3. CSU is bound by the fundamental rule of collective bargaining that an employer must maintain certain terms and conditions of employment following expiration of a CBA during the parties' negotiations over a successor agreement. There is no statutory or management right to not pay MSAs.

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[3]It is interesting to note that contrary to CSU's assertions, the evidence leads to the conclusion that budgetary action by the Legislature was not required to fund the payment of MSAs. During the term of the CBA, including eleven months of the 1991-92 fiscal year, MSAs were paid even though not specifically funded by the Legislature. CSU offers no evidence to support its assertion that it needed specific legislative funding to pay MSAs in the twelfth and final month of 1991-92, or subsequently in 1992-93 when the Legislature's practice of not specifically funding MSAs continued.

Remedy

HEERA section 3563.3 gives the Board broad remedial power, including the authority to issue cease and desist orders and to require affirmative action effectuating the policies of the HEERA. In a long line of cases, the Board has ordered a make whole remedy for employees affected by a unilateral change. (Regents of the University of California (1983) PERB Decision No. 356-H; Rio Hondo Community College District (1983) PERB Decision No. 292; Oakland Unified School District (1980) PERB Decision No. 126; Compton Unified School District (1989) PERB Decision No. 784.) Such remedies have been approved by the courts. (San Diego Adult Educators v. Public Employment Relations Bd. (1990) 223 Cal.App.3d. 1124, 1137 [273 Cal.Rptr. 53].)

A make whole remedy is clearly called for and appropriate in this case. First, CSU unilaterally and unlawfully changed a condition of employment involving the fundamental subject of employee wages. Second, consistent with the discussion above, the ALJ's reliance on HEERA section 3572 in declining to order a make whole remedy is misplaced, as it describes circumstances which do not present themselves in this case. Furthermore, as noted above, during the term of the CBA, CSU paid MSAs in accordance with CBA section 20.19, despite the fact that they had not been specifically funded by the Legislature during that period. Therefore, no finding that funds are unavailable to pay MSAs can be made in this case.

CSU finds support for the ALJ's decision not to order a make whole remedy in Regents of the University of California (Davis, et al.) (1990) PERB Decision No. 842-H (University of California) but that case is clearly distinguishable. University of California involves the failure to provide adequate advance notice of a phase in of merit increases to employees represented by a nonexclusive representative and not covered by a CBA. The Board determined that since the employer's meet and discuss obligation to a nonexclusive representative includes neither a requirement to reach agreement or impasse, and the record did not include sufficient evidence to support a finding that funds were available to pay the increase, the entitlement to back pay was speculative and not an appropriate remedy.

In this case, the employees affected by the unlawful unilateral change are represented by an exclusive representative and are covered by the terms of an expired CBA. The record here also reveals that funds were available to pay MSAs under that CBA, and MSAs were paid, regardless of whether funds had been specifically appropriated for that purpose by the Legislature. University of California does not lead to the conclusion that a make whole remedy is inappropriate in this case.

Having found that the suspension of MSAs by CSU was unlawful, I conclude that a make whole remedy is appropriate. I would order backpay plus interest to be paid to employees affected by CSU's unlawful action.