

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

ASSOCIATION OF PENNSYLVANIA STATE :  
COLLEGE AND UNIVERSITY FACULTIES :  
 :  
v. : Case No. PERA-C-10-244-E  
 :  
PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION :  
CALIFORNIA UNIVERSITY<sup>1</sup> :

**PROPOSED DECISION AND ORDER**

On July 9, 2010, the Association of Pennsylvania State College and University Faculties (APSCUF) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Pennsylvania State System of Higher Education, California University (PASSHE), violated sections 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by (1) "[i]mplementing mid-contract changes to terms and conditions of employment by (a) abolishing free employee on-campus parking and (b) imposing a fee for on-campus parking," (2) "[i]nsisting to impasse that any agreement on parking issues be a three-year agreement, covering the period August, 2010, through July, 2013, even though the parties' collective bargaining agreements expire on June 30, 2011," (3) surface bargaining and (4) "[r]efusing to bargain over mandatory subjects of bargaining by insisting to impasse that APSCUF agree that future changes in parking rates and arrangements be subject only to meet and discuss."<sup>2</sup> On July 26, 2010, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on November 17, 2010. The hearing examiner held a first day of hearing on November 17, 2010.<sup>3</sup> The hearing examiner held a second day of hearing on February 14, 2011.<sup>4</sup> The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On April 15, 2011, each party filed a brief.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

**FINDINGS OF FACT**

1. The Board has certified APSCUF as the exclusive representative of a bargaining unit that includes faculty employed by PASSHE and of a bargaining unit that includes coaches employed by PASSHE. (Case Nos. PERA-R-755-C, PERA-R-1354-C and PERA-R-97-451-E)
2. Beginning as long as 22 years ago, PASSHE's faculty and staff at California University parked on campus for free. (N.T. I 26-28, 154, 161, 206, 211; II 33, 79, 163-167)
3. Effective July 1, 2007, the parties entered into a collective bargaining agreement covering the faculty through June 30, 2011. Article 31 of the agreement is entitled "**MISCELLANEOUS CONDITIONS**" and provides at section F "Past Practice" as follows:

"Rules, regulations, policies or practices relating to wages, hours, and terms and conditions of employment now existing and not in conflict with this Agreement shall remain in effect unless modified, amended or eliminated in the same manner as they had been adopted. The provisions of this section of this Article

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<sup>1</sup> The caption appears as amended by the hearing examiner to reflect the name of the respondent as set forth in the charge. The caption previously identified the respondent as the State System of Higher Education.

<sup>2</sup> APSCUF also charged that PASSHE violated the PERA by communicating directly with employees. In its brief, however, it does not argue the point, so that portion of the charge is waived. See SSHE, 32 PPER ¶ 32118 (Order Denying Application for Supersedeas 2001) (an argument not presented to a hearing examiner is waived).

<sup>3</sup> References to the notes of testimony from the first day of hearing will be preceded by a I. APSCUF's exhibits that were marked as Plaintiff's exhibits will be referred to as APSCUF's exhibits.

<sup>4</sup> References to the notes of testimony from the second day of hearing will be preceded by a II.

shall be subject to the provisions of Article 5, GRIEVANCE PROCEDURE AND ARBITRATION, but only with respect to whether the procedure used to modify, amend or eliminate the rules, regulations, policies or practices was the same as was used to establish the rules, regulations, policies or practices."

Article 37 of the agreement is entitled "**TOTALITY OF AGREEMENT**" and provides as follows:

"The parties acknowledge that this Agreement represents the results of collective negotiations between said parties conducted under and in accordance with the provisions of Act 195 and constitutes the entire Agreement between the parties for the term of said Agreement or any extension thereof. Each party waives his/her right to bargain collectively with the other with reference to any other subject, matter, issue, or thing, whether specifically covered here or wholly omitted herefrom, whether or not said subject was mentioned or discussed during the negotiations preceding the execution of this Agreement."

(N.T. I 47; APSCUF Exhibit 1)

4. Effective July 1, 2007, the parties entered into a collective bargaining agreement covering the coaches through June 30, 2011. Article 15 of the agreement is entitled "**MISCELLANEOUS CONDITIONS**" and provides at section 4 as follows:

"Rules, regulations, policies, or practices relating to wages, hours, and terms and conditions of employment now existing and not in conflict with this Agreement shall remain in effect unless modified, amended or eliminated in the same manner as they had been adopted. The provisions of this section of this Article shall be subject to the provisions of Article 4, GRIEVANCE PROCEDURE AND ARBITRATION, only with respect to whether the procedure used to modify, amend or eliminate the rules, regulations, policies or practices was the same as was used to establish the rules, regulations, policies, or practices. This Section shall not be applicable to any rule, regulation, or policy that governs athletic competitions or the STATE SYSTEM/UNIVERSITY'S participation in the NCAA, PSAC, or any other athletic conference."

Article 20 of the agreement is entitled "**TOTALITY OF AGREEMENT**" and provides as follows:

"The parties acknowledge that this Agreement represents the results of collective negotiations between said parties conducted under and in accordance with the provisions of Act 195 and constitutes the entire Agreement between the parties for the term of said Agreement or any extension thereof. Each party waives his/her right to bargain collectively with the other with reference to any other subject, matter, issue, or thing, whether specifically covered here or wholly omitted herefrom, whether or not said subject was mentioned or discussed during the negotiations preceding the execution of this Agreement."

(N.T. I 47; APSCUF Exhibit 2)

5. In October 2009, PASSHE began constructing a convocation center on the main campus of California University as part of a master plan to provide, among other things, additional space for commencement and intercollegiate athletics. Under the master plan, funding for construction of the convocation center was to be derived from a variety of sources, including fees for parking on campus. The construction of the convocation center was on a site that included a lot where faculty and staff had been parking, resulting in the loss of parking there. In order to provide access to additional parking, PASSHE instituted a shuttle service between the main campus and a parking lot at a remote campus known as Roadman Park. (N.T. I 51, 53, 57-58, 102-103, 153-154, 163; II 9-18, 26, 29, 41, 44, 136, 159-160; APSCUF Exhibits 5-6, PASSHE Exhibit 14)

6. On February 18, 2010, the parties held a bargaining session with a mediator in attendance. PASSHE presented a proposal to APSCUF as follows:

"California University of Pennsylvania  
Parking Fee Structure  
February 18, 2010

The faculty and staff of California University of Pennsylvania will be charged the following to park effective with the start of the Fall 2010 Semester August 30, 2010:

**Reserved Tier** - \$3.99 per day

Starting at 7:00 am ending at 5:30 pm Monday through Friday.

**Tier One** - \$2.99 per day

All on campus parking exclusive of Reserved and Tier Two

**Tier Two** - \$1.99 per day

River Lot

**Tier Three** - Free

Roadman Park Lot

There will also be an hourly charge for select locations on campus.

There may or may not be a parking fee charged per event for after hours or weekend events. If and how much a fee will be determined by the University in conjunction with the event sponsor(s)."

Among other things, APSCUF asked what the parking fees would be on academic year, semester and calendar year bases. (N.T. I 60-63; II 97, 138-139; APSCUF Exhibit 9, PASSHE Exhibit 32)

7. At a bargaining session on March 16, 2010, with a mediator in attendance, PASSHE presented to APSCUF proposed parking plans under which reserved parking would cost \$3.99 per day, \$19.95 per week, \$39.90 per pay period, \$1,037.00 per calendar year, \$670.00 per academic year and \$377.00 per semester; tier one parking would cost \$2.99 per day, \$14.95 per week, \$29.90 per pay period, \$777.00 per calendar year, \$502.00 per academic year and \$282.00 per semester; tier two parking would cost \$1.99 per day, \$9.95 per week, \$19.90 per pay period, \$517.00 per calendar year, \$334.00 per academic year and \$188.00 per semester; tier three parking would be free; and transient parking would be \$1.00 per hour for the first three hours and \$4.00 for four to 18 hours. (N.T. I 63; II 105; APSCUF Exhibit 10)

8. At a bargaining session on April 8, 2010, with a mediator in attendance, APSCUF presented to PASSHE

"the following in response to management's proposal of [March 16,] 2010:

- 1) A total of 408 parking spaces will be designated as free parking for faculty/staff use on the Main campus (TIER I) and River Lot (TIER II) locations.
- 2) The allocation of the 408 free parking spots on Main Campus (Tier I) and River Lot (TIER II) will be jointly determined by the APSCUF negotiating team and PASSHE prior to the signing of a parking agreement.
- 3) Future free parking spaces on the Main campus (TIER I) and River Lot (TIER II) locations will be made available based on a percentage increase in the faculty/staff complement.
- 4) In addition to the 408 free parking spaces, paid parking will be made available in designated PARKING AREAS for those faculty interested in a guaranteed RESERVED parking space. The cost and locations to be determined by the APSCUF negotiation team and PASSHE prior to the signing of a parking agreement.
- 5) Pay by the hour rate (transient parking) shall be set as follows:

Length of Stay	Rate
1 hour	\$.25
2 hour	\$.50
3 hour	\$1.00
4 to 18 hours	\$1.50"

(N.T. I 62-65; II 107-108; APSCUF Exhibit 11)

9. At a bargaining session on June 3, 2010, with a mediator in attendance, PASSHE presented to APSCUF "the following final offer of California University of Pennsylvania (California University) regarding the parking tiers and fees at the University." The offer included "[f]ree parking will continue to be provided for all California University employees at the Roadman Stadium Parking Area including free transportation to and from the Roadman Stadium Parking area." The offer also included parking fees during the 2010-2011 academic year of \$1,100.00 for 12 months, \$700.00 per academic year and \$400.00 per semester for a reserved space, \$600.00 for 12 months, \$400.00 per academic year and \$250.00 per semester for tier 1 and \$400.00 for 12 months, \$300.00 per academic year and \$170.00 per semester for tier 2; during the 2011-2012 academic year of \$1,100.00 for 12 months, \$700.00 per academic year and \$400.00 per semester for a reserved space, \$675.00 for 12 months, \$450.00 per academic year and \$275.00 per semester for tier 1 and \$500.00 for 12 months, \$325.00 per academic year and \$200.00 per semester for tier 2; and during the 2012-2013 academic year of \$1,200.00 for 12 months, \$800.00 per academic year and \$500.00 per semester for a reserved space, \$750.00 for 12 months, \$500.00 per academic year and \$300.00 per semester for tier 1 and \$500.00 for 12 months, \$350.00 per academic year and \$225.00 per semester for tier 2. The offer also included that "[y]ear 3 fees will remain in place beyond 2012-2013 unless you are notified of an intended change and provided an opportunity to meet and discuss over the proposed changes." APSCUF rejected the proposal. (N.T. I 62-63, 69-71; II 60, 110-112, 144-145; APSCUF Exhibit 12)

10. On June 3, 2010, PASSHE posted the following on California University's website:

"June 3, 2010

All Cal U students, faculty and staff who intend to park in University parking lots, including the Roadman Lot, in Fall 2010 must pre-register for parking between **June 21 and July 6.**

Pre-registration is the chance for drivers to indicate which parking areas they prefer and to select one of the proposed parking plans.

Beginning **August 2 through August 11**, drivers will be able to go online and purchase a parking permit. Once this is complete, the permit/RFID hang tag will be mailed to the address identified during pre-registration.

Beginning on August 26, all drivers who wish to park on the main campus or at Roadman Park must have an RFID card to access parking areas, including all lots at Roadman Park.

Both pre-registration and registration forms will be posted online at <https://parking.calu.edu>, effective June 18, 2010. **Both forms must be completed** during the appropriate time periods.

The fee structure, a parking map, answers to Frequently Answered Questions, key dates, details on how to get your RFID card and other information also will be posted at <https://parking.calu.edu>, effective June 18, 2010.

Updated parking information will be posted at this address, as well. The campus community is encouraged to check their campus email and the parking website regularly."

The fee for purchasing a parking permit was \$20.00. (N.T. I 80-81, II 56, 151; APSCUF Exhibit 15)

11. At a bargaining session on July 6, 2010, with a mediator in attendance, APSCUF presented to PASSHE

"the following response to PASSHE's June 3, 2010 proposal:

1) California University will continue to provide free parking at the main campus to faculty and coaches in the following faculty designated areas:

- River Lot Entry areas - 105 free parking spots at the Beazell Street entry and 105 free parking spots at the entry near Hamer Rear Lot.

- Vulcan Garage - 95 free parking spots

- Gallagher - 50 free parking spots

2) California University will provide reserved parking spots for faculty and coaches at the remaining main campus locations at Tier 2 rates as indicated on management's proposal dated June 3, 2010 at the YEAR 1 2010-2011.

3) California University will provide free ADA parking accommodations on the main campus for faculty and coaches.

4) This agreement will be subject to expiration on June 30, 2011 along with the current collective bargaining agreement between the two parties.

5) The Parking and Advisory Committee shall consist of one union representative and four faculty (one each from the four academic units: Education and Human Services; Liberal Arts, Science and Technology, and Graduate Studies and Research) that are appointed by APSCUF."

PASSHE responded that a one-year agreement was a deal breaker and walked out. (N.T. I 62-63, 76, 78-79, 137-138; II 53, 56-57, 61, 63-64, 114, 116; APSCUF Exhibit 13)

12. By letter dated July 16, 2010, PASSHE's assistant vice chancellor for labor relations (Michael Mottola) wrote to APSCUF's president at California University (Dr. Michael Slavin) in pertinent part as follows:

"While we are not in agreement with any of the five points you proposed in your July 6, 2010, response, California University and the Office of the Chancellor managers continue to be willing to meet with APSCUF in an attempt to resolve the parking issues at California University."

(N.T. I 79-80; II 53-54, 116; APSCUF Exhibit 14)

13. In August 2010, without any additional bargaining, PASSHE implemented its "final offer" and began charging faculty and coaches to park on campus at California University. (N.T. I 171, 175-176, 186-187, 199, 211, 220, 230-231; II 172-173, 177)

14. The faculty and coaches were not on strike at the time. (N.T. I 87)

#### **DISCUSSION**

APSCUF has charged that PASSHE committed unfair practices under sections 1201(a) (1) and (5) by (1) "[i]mplementing mid-contract changes to terms and conditions of employment by (a) abolishing free employee on-campus parking and (b) imposing a fee for on-campus parking," (2) "[i]nsisting to impasse that any agreement on parking issues be a three-year agreement, covering the period August, 2010, through July, 2013, even though the parties' collective bargaining agreements expire on June 30, 2011," (3) surface bargaining and (4) "[r]efusing to bargain over mandatory subjects of bargaining by insisting to impasse that APSCUF agree that future changes in parking rates and arrangements be subject only to meet and discuss."

PASSHE contends that the charge should be dismissed (1) because it had the managerial prerogative to abolish the free on-campus parking and to impose the fee for parking on-campus, (2) because it was contractually privileged to do so even if it did not have the managerial prerogative to do so and (3) because it otherwise met whatever bargaining obligation it may have had.

#### **I**

APSCUF's first charge is that PASSHE committed unfair practices by changing terms and conditions of employment when it abolished the free on-campus parking for faculty and staff. In support of the charge, APSCUF presented voluminous testimony by faculty that

the abolishment of the parking has caused a multitude of inconveniences for them (N.T. I 156-160, 171-175, 185-192, 197-203, 211-216, 221-223, 236-239).

An employer has the managerial prerogative to enhance the level of services it provides and is under no obligation to bargain over any non-severable impact the exercise of its managerial prerogative has on employe terms and conditions of employment, including inconveniences to employes occasioned by the abolishment of parking inevitably resulting from the exercise of its managerial prerogative. Mt. Lebanon School District, 30 PPER ¶ 30043 (Proposed Decision and Order 1999) (applying the balancing test set forth in PLRB v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975)) (Mt. Lebanon I). In such a case, the employer's only obligation to bargain is over any severable impact the exercise of its managerial prerogative has on employe terms and conditions of employment. Mt. Lebanon School District, 32 PPER ¶ 32047 (Final Order 2001) (Mt. Lebanon II). See also Lackawanna County Detective's Association v. PLRB, 762 A.2d 792 (Pa. Cmwlth. 2000) (defining the employer's obligation to impact bargain).

The record shows that in October 2009 PASSHE began construction of a convocation center on the main campus of California University as part of a master plan to provide, among other things, additional space for commencement and intercollegiate athletics (finding of fact 5). The record also shows that the construction of the convocation center was on a site that included a lot where faculty and staff had been parking, resulting in the abolishment of any parking there. Id.

PASSHE's construction of the convocation center enhances the level of services it provides and therefore under Mt. Lebanon I, supra, was a managerial prerogative over which APSCUF had no right to bargain. The abolishment of parking on the lot where the convocation center is being constructed inevitably resulted from PASSHE's exercise of its managerial prerogative, so under Mt. Lebanon I APSCUF also had no right to bargain over the abolishment of parking there despite any inconveniences to faculty and coaches. Thus, to the extent that APSCUF has charged that PASSHE committed unfair practices by changing terms and conditions of employment when it abolished free on-campus parking,<sup>5</sup> the charge must be dismissed.<sup>6</sup>

## II

APSCUF's next charge is that PASSHE committed unfair practices by changing terms and conditions of employment when it imposed the fee for on campus parking.

A parking fee is a mandatory subject of bargaining. West Chester State College, 13 PPER ¶ 13047 (Final Order 1982), aff'd sub nom. Commonwealth of Pennsylvania v. Commonwealth of Pennsylvania, PLRB, 467 A.2d 1187 (Pa. Cmwlth. 1983) (applying the State College balancing test, supra). PASSHE, therefore, was under an obligation to bargain over any fee for faculty and coaches to park at the lots on campus remaining after it began construction of the convocation center. Thus, to the extent that APSCUF has charged that PASSHE committed unfair practices by changing terms and conditions of employment when it imposed the fee for on campus parking, the charge must be sustained if PASSHE did not meet its obligation to bargain before imposing the fee.

In its brief, PASSHE contends that Commonwealth of Pennsylvania is distinguishable on the facts in that the parking fee found to be a mandatory subject of bargaining in that case was to relieve parking congestion on campus while the parking fee in the instant case is to pay for construction of the convocation center. According to PASSHE,

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<sup>5</sup> Under Mt. Lebanon II, supra, PASSHE was obligated to bargain over the severable impact its abolishment of free on-campus parking had on faculty and staff. APSCUF, however, has not charged that PASSHE violated its obligation in that regard, so whether or not PASSHE violated its obligation in that regard is not before the Board and will not be addressed. See Iroquois School District, 37 PPER 167 (Final Order 2006) (the Board only has jurisdiction to find the violations alleged in a charge); Commonwealth of Pennsylvania (Liquor Control Board), 22 PPER ¶ 22009 (Final Order 1991), citing PHRC v. United States Steel Corporation, 458 Pa. 559, 325 A.2d 910 (1974) (same).

<sup>6</sup> Given that disposition, there is no need to address whether or not this portion of the charge also should be dismissed because PASSHE was contractually privileged to act as it did or because PASSHE otherwise met whatever obligation to bargain it may have had.

because it had the managerial prerogative to construct the convocation center to enhance the level of services it provides, it necessarily follows that it also had the managerial prerogative to impose on the faculty and coaches a parking fee to pay for the construction. Under the State College balancing test as applied in Commonwealth of Pennsylvania, however, a fee for parking must be bargained regardless of the use for which the fee is put. Commonwealth of Pennsylvania is, therefore, controlling authority.

### III

In order to meet its obligation to bargain, an employer must approach the bargaining table with "a serious effort to resolve differences and reach a common ground," Appeal of Cumberland Valley School District, 483 Pa. 134, 142, 394 A.2d 946, 950 (1978), and as a general rule may not impose its last bargaining proposal unless the parties are at impasse and the employees involved are on strike. Philadelphia Housing Authority v. PLRB, 620 A.2d 594 (Pa. Cmwlth. 1993), appeal denied, 536 Pa. 634, 637 A.2d 294 (1993). An employer may defend a refusal to bargain charge by showing that it was contractually privileged to act as it did. Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000) (construing the analogous provisions of the Pennsylvania Labor Relations Act as read in pari materia with Act 111 of 1968).

The record shows that during bargaining over fees for on-campus parking PASSHE presented an initial proposal on February 17, 2010 (finding of fact 6), an explication of that proposal on March 16, 2010 (finding of fact 7) and another proposal styled a "final offer" on June 3, 2010 (finding of fact 9). The record also shows that PASSHE unilaterally implemented its "final offer" and began charging faculty and coaches to park on campus even though they were not on strike at the time (findings of fact 13-14).<sup>7</sup>

Under Philadelphia Housing Authority, regardless of whether or not the parties were at impasse, PASSHE could not lawfully implement its last bargaining proposal unless the faculty and coaches were on strike. Thus, since the faculty and staff were still working when PASSHE implemented its "final order" and began charging them to park on campus, PASSHE must be found in violation of its obligation to bargain unless it was contractually privileged to act as it did.

In its brief, PASSHE cites to a number of subcontracting cases where the Board's focus was on whether or not the employers bargained to impasse without regard to whether or not their employees were on strike. See, e.g., Snyder County Prison Board v. PLRB, 912 A.2d 356 (Pa. Cmwlth. 2006); Upper Moreland School District v. PLRB, 695 A.2d 904 (Pa. Cmwlth. 904 (Pa. Cmwlth. 1997), and Morrisville School District v. PLRB, 687 A.2d 5 (Pa. Cmwlth. 1996). Subcontracting cases are an exception to the general rule set forth in Philadelphia Housing Authority, however. Clinton County, 24 PPER ¶ 24144 (Final Order 1993). Thus, PASSHE's reliance on those subcontracting cases is misplaced.

### IV

PASSHE's contractual privilege defense rests on article 31, section F, of the parties' collective bargaining agreement covering the faculty and on article 15, section 4, of the parties' collective bargaining agreement covering the coaches. Each of those provisions addresses changes to past practice and the scope of the grievance procedure to be applied if the provision is violated (findings of fact 3-4). According to PASSHE, those provisions mean (1) that it could change a past practice so long as it did so in the same manner the practice came into being and (2) that APSCUF only had the right to grieve the manner in which PASSHE changed a past practice. In PASSHE's view, because it unilaterally provided free on-campus parking in the past, those provisions provide a sound arguable basis for it to contend that free on-campus parking was a past practice that it could change unilaterally subject only to APSCUF's limited right to file a grievance.

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<sup>7</sup> PASSHE's imposition of the parking fees occurred post-charge but was a continuation of the conduct at issue in the charge and therefore subject to review by the Board even though APSCUF never amended its charge to cover post-charge events. As the Board explained in Commonwealth of Pennsylvania, Department of Transportation, 19 PPER ¶ 19137 (Final Order 1988), where the overall course of conduct at issue in a charge concludes after the charge is filed, the Board has jurisdiction to remedy the employer's post-charge conduct.

In Commonwealth of Pennsylvania, *supra*, however, the court held that a past practice clause in a collective bargaining agreement did not insulate an employer from its obligation to bargain over the imposition on employees of a fee for parking. In that case, the past practice clause provided as follows:

"Employee benefits and working conditions now existing and not in conflict with the Agreement shall remain in effect subject, however, to the right of the Employer to change these benefits or working conditions in the exercise of its management rights reserved to it under Article II of this Agreement."

467 A.2d at n. 4. Noting that the collective bargaining agreement also included a zipper clause, the court explained its holding as follows:

"In a footnote to our decision in Commonwealth v. Pennsylvania Labor Relations Board, 74 Pa. Commonwealth Ct. 1, 459 A.2d 452 (1983), we noted that it would be 'problematic in the extreme' for us to permit unilateral alterations in working conditions based on a past practice clause, while at the same time excusing the employer from bargaining over an issue not in the agreement based on the zipper clause. We did not allow the petitioner to unilaterally change an issue which was not included in the collective bargaining agreement based on the past practice clause in that case, and we will not allow it in the case *sub judice*."

Id. at 1190-1191 (footnote omitted).

The record shows that each of the parties' collective bargaining agreements contains a zipper clause entitled "**TOTALITY OF AGREEMENT**" (findings of fact 3-4). Given those clauses, the same result as in Commonwealth of Pennsylvania obtains no matter how the past practice clauses may be interpreted. Accordingly, PASSHE's contractual privilege defense fails.

## V

APSCUF's next charge is that PASSHE committed unfair practices by insisting to impasse that any agreement on parking fees be from August 2010 through July 2013 even though the parties' collective bargaining agreements expire on June 30, 2011. In support of the charge, APSCUF points out that PASSHE's "final offer" was for a three-year period extending beyond the expiration dates of the parties' current collective bargaining agreements (findings of fact 3-4, 9). The record shows, however, that PASSHE indicated its willingness to bargain even after it presented its "final offer" (finding of fact 12). Thus, there is no basis for finding that the parties were at impasse, and this portion of the charge must be dismissed for lack of proof.

## VI

APSCUF's next charge is that PASSHE committed unfair practices by surface bargaining.

A charge alleging surface bargaining is to be sustained if under the totality of circumstances it may reasonably be concluded that the employer "never intended to achieve an agreement, demonstrated unreasonableness, or displayed a single-minded purpose to thwart the public policy." Homer-Center School District, 12 PPER ¶ 12169 at 262 (Final Order 1981).

The record shows that free parking at Roadman Park was included in each of PASSHE's proposals (findings of fact 6, 7 and 9) and that PASSHE indicated its willingness to bargain further even after it presented its "final offer" (finding of fact 12).

Given the number of proposals presented by PASSHE, its inclusion of some free parking, albeit at a location remote from the main campus (Roadman Park), in them and its evident willingness to bargain further, there is no basis for finding that PASSHE surface bargained. See Ford City Borough, 37 PPER 11 (Final Order 2006) (no surface bargaining found where the employer presented proposals at the bargaining table). Accordingly, the surface bargaining portion of the charge must be dismissed for lack of proof.

APSCUF would have the Board find that PASSHE surface bargained because PASSHE never presented a proposal under which any parking on the main campus would be free. An employer, however, is under no obligation to make a concession at the bargaining table,

Ford City Borough, supra, so the fact that PASSHE did not present a proposal under which parking on the main campus would be free provides no support for any such finding.

## VII

APSCUF's last charge is that PASSHE committed unfair practices by insisting to impasse that future changes in parking rates and arrangements be subject only to meet and discuss. In support of the charge, APSCUF points out that in its "final offer" PASSHE proposed that "[y]ear 3 fees will remain in place beyond 2012-2013 unless you are notified of an intended change and provided an opportunity to meet and discuss over the proposed changes" (finding of fact 9). As noted above, however, the record shows that PASSHE indicated its willingness to bargain even after it presented its "final offer." Thus, there is no basis for finding that the parties were at impasse, and this portion of the charge must be dismissed for lack of proof.

## CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. PASSHE is a public employer under section 301(1) of the PERA.
2. APSCUF is an employe organization under section 301(3) of the PERA.
3. The Board has jurisdiction over the parties.
4. PASSHE has committed unfair practices under sections 1201(a)(1) and (5) of the PERA.

## ORDER

In view of the foregoing and in order to effectuate the policies of the PERA, the hearing examiner

## HEREBY ORDERS AND DIRECTS

that PASSHE shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in article IV of the PERA.
2. Cease and desist from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but limited to the discussing of grievances with the exclusive representative.
3. Take the following affirmative action which the hearing examiner finds necessary to effectuate the policies of the PERA:
  - (a) Rescind the fees for faculty and coaches to park on campus at California University;
  - (b) Reimburse faculty and coaches for any parking fees paid by them as the result of its imposition on them of fees for parking on campus at California University;
  - (c) Pay interest at the simple rate of six per cent per annum on any monies due them from the date they paid the fees to the date they were reimbursed;
  - (d) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

(e) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this order by completion and filing of the attached affidavit of compliance.

**IT IS HEREBY FURTHER ORDERED AND DIRECTED**

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98 within twenty (20) days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twelfth day of May 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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DONALD A. WALLACE, Hearing Examiner