STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNIVERSITY PROFESSIONAL AND TECHNICAL EMPLOYEES (UPTE), CWA LOCAL 9119, AFL-CIO,	)	
Charging Party,	)	Case No. SF-CE-414-H
v.	)	PERB Decision No. 1188-H
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)	March 19, 1997
Respondent.	)	

Appearances; Eggleston, Siegel & LeWitter by James E. Eggleston, Attorney, for University Professional and Technical Employees (UPTE), CWA Local 9119, AFL-CIO; Susan H. von Seeburg, Attorney, for The Regents of the University of California.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Regents of the University of California (University) to an administrative law judge's (ALJ) proposed decision. The ALJ found that the University violated the Higher Education Employer-Employee Relations Act (HEERA) section 3571(a) and (b)[1] by

[1]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. HEERA section 3571 states, in pertinent part:

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

retaliating against technical unit employees because of their exercise of the right to select the University Professional and Technical Employees, CWA Local 9119, AFL-CIO (UPTE) as their exclusive representative. The ALJ also found that the University violated HEERA section 3571(a), (b) and (c)[2] by unilaterally refusing to implement a salary increase plan for technical unit employees and failing to meet and confer with UPTE.

The Board has reviewed the entire record in this case including the hearing transcript, the ALJ's proposed decision and the filings of the parties. The Board finds that the University violated HEERA section 3571(a) and (b) by interfering with the right of technical unit employees to select an employee organization as their exclusive representative and by discriminating against technical unit employees for their exercise of protected rights by denying them a salary increase to which they were entitled. The Board finds that the allegation pertaining to HEERA section 3571(c) is hereby dismissed.

> employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

[2]HEERA section 3571(c) provides that:

> Refuse or fail to engage in meeting and conferring with an exclusive representative.

PROCEDURAL BACKGROUND

On December 28, 1994, UPTE filed an unfair practice charge against the University. On March 9, 1995, the PERB General Counsel's office issued a complaint alleging violations of HEERA section 3571(a), (b) and (c) by the University. First, the University's August and November 1994 correspondence stating that proposed wage increases for employees becoming exclusively represented by January 1, 1995, would be subject to HEERA bargaining allegedly constituted interference with employee rights in violation of HEERA section 3571(a) and (b). Second, the University allegedly changed its policy from granting nonexclusively represented employees salary increases under the "no trigger" plan by denying the retroactive payment of salary increases to employees who became exclusively represented after the plan's effective date, without affording UPTE with notice or the opportunity to negotiate. This conduct allegedly constituted a refusal to meet and confer in good faith in violation of HEERA section 3571(c). This same conduct also violated HEERA section 3571(a) and (b). Third, the University's refusal to pay technical unit employees the "no trigger" salary increases, after the employees exercised their right to participate in a mail ballot election and elect an exclusive representative, allegedly violated HEERA section 3571(a).

A PERB-conducted settlement conference did not resolve the dispute. Following a formal hearing in June 1995, a proposed decision was issued January 12, 1996.

FACTUAL BACKGROUND

In 1983, PERB established a technical employee unit at the University of California. The systemwide unit consists of approximately 4,000 employees on nine campuses. The numerous job titles in the unit include laboratory assistant, projectionist, computer resource specialist, interpreter for the deaf, artist and editor.

UPTE filed a petition for technical unit representation on March 10, 1994. On June 30, 1994, PERB approved a Consent Election Agreement between the University and UPTE. The Agreement required PERB to conduct a mail ballot election to determine if UPTE would exclusively represent the unit, mail ballots to eligible employees on October 17, 1994, and count ballots on November 15, 1994.

Three different personnel programs cover technical unit employees. Salary increase plans for employees of these programs also differ. Approximately 3,500 employees fall under the Staff Personnel Program (SPP). The SPP salary plan includes range adjustment increases, merit increases, and an incentive award system. Another 100 employees are in the Administrative and Professional Staff Program (APSP). The APSP salary plan provides for merit increases and an incentive award system. Lawrence Berkeley Laboratory (Laboratory) employs approximately 400 unit employees. Laboratory employees receive performance-based salary increases under United States Department of Energy rules.

Each year during its budget process, the University

develops a systemwide salary plan for the next fiscal year covering employees in each personnel program. Lubbe Levin (Levin), assistant vice president for Human Resources, oversees the development of the University's salary plans. The University develops plans across all categories of staff with different plans for nonexclusively represented and exclusively represented employees.

The University follows the same budget and salary plan process each year. In December, the University gives to the Governor its proposed budget for the fiscal year beginning the following July. The Governor issues his proposed state budget in January. During the spring and early summer, the University develops a number of different salary plan options based on different budget scenarios. The state budget is usually approved by the Legislature and signed by the Governor in July. Following the signing of the state budget, the University finalizes its budget and salary increase plans.

The timing and payment of salary increases under the plans varies depending on the funding source. The federally-funded Laboratory employees receive Department of Energy-mandated salary adjustments every October I.[3] The California state budget partially funds the SPP and APSP salary plans, but the state budget contains no specific line item for University salary

[3]Neither party disputed the University's consistent past practice of granting annual October 1 salary increases to the Laboratory technical unit employees under Department of Energy rules. These technical unit employees received their increases on October 1, 1994, and their award is not at issue in this case.

increases. The University's salary plans determine the timing and amounts of all SPP and APSP staff salary increases. Over the past seven years, there has been no consistent timing of salary adjustments for SPP and APSP employees. In recent years, the University has delayed salary increases, split payment of increases under different components of the program, paid no increases, and reduced salaries.

In July 1994, the California state budget included a fiscal year 1994-1995 increase in state general funds for the University. Companion legislation allowed the State Controller to "trigger" a mid-year state budget cut by November 15, 1994, if the state's revenues were projected to be insufficient to meet expenditures. Based on the different budget scenarios, two final salary plans for nonexclusively represented SPP and APSP employees were presented to the Regents of the University of California on July 15, 1994. To address the possibility of a mid-year budget cut, the University developed a "trigger" plan. This plan included only merit increases for SPP and APSP employees. If there were no mid-year budget cuts, the "no trigger" plan added salary increases. The salary increases varied for each personnel program, but centered around a 3 percent projected cost of living adjustment. For SPP employees, the plan included a 2.2 percent range adjustment payable in January 1995, retroactive to October 1, 1994, and a 0.8 percent set aside for incentive awards and half-year merit increases. For APSP employees, the plan included up to 3.5

percent merit increases payable in January 1995, retroactive to October 1, 1994, and 0.8 percent set aside for incentive awards.

Under the "no trigger" plan, the incentive and merit award components became effective at different times. The APSP merit awards were retroactive to October 1, 1994. The SPP merit increases became effective January 1995. The APSP and SPP incentive awards became effective January or July of 1995 depending on the employee's award cycle. The merit and incentive award programs, although effective in 1995, covered fiscal year 1993-1994 performance.

Gayle Cieszkiewicz (Cieszkiewicz) is the associate director of the University Office of Labor Relations. The Office of Labor Relations implements systemwide labor relations policies. Cieszkiewicz considered the salary plans to be negotiable for SPP and APSP technical unit employees if they became exclusively represented in the scheduled election. Levin and Cieszkiewicz discussed the plans in late July 1994 in order to develop communications for employees and employee organizations. On August 10, 1994, the University sent out a notice to all unions, including UPTE, and employees. The notice outlined the "trigger" and "no trigger" salary plans. The University noted that the State Controller would make the announcement that could trigger mid-year state budget cuts by November 15, 1994. The notice also included the following language:

> Proposed wages for staff employees who are currently exclusively represented or who become exclusively represented by January

> 1995 are subject to meeting and conferring under HEERA.

Cieszkiewicz testified that the University was aware that the only nonexclusively represented employees who could become exclusively represented by January 1995 were technical unit employees.

Levin developed a similar model salary plan communication to notice employees. The University Office of Human Resources sent that model to human resources directors on each campus. Based on that model, the campuses prepared and sent a notice to all staff employees. The notice outlined the "trigger" and "no trigger" plans. The notice included the following language:

> The proposal is also subject to notice, consultation, and/or meeting and conferring as appropriate under the Higher Education Employer-Employee Relations Act (HEERA).

Cieszkiewicz oversaw the University's election campaign. The University conducted its campaign from August 1994 to November 15, 1994. Cieszkiewicz developed and distributed to the campuses a series of 30 model flyers expressing the University's position that exclusive representation is unnecessary within the University setting. The flyers concerned a variety of issues, including: why employees should vote, information about union dues, decertification, election of union officers, technical unit titles eligible to vote, agency shop, strikes, and the influence of the Communication Workers of America on local union policies.

The University of California, Los Angeles (UCLA) created additional election materials beyond the systemwide approved campaign materials. Approximately one-fifth of all technical unit members work on the UCLA campus. Cieszkiewicz approved a letter sent from UCLA Assistant Vice Chancellor Stanley McKnight to UCLA technical unit employees on November 9, 1994. The letter noted that the state would apparently not pull the trigger and salary increases would be forthcoming. The letter advised technical unit employees that "receipt of this anticipated salary increase would become dependent on the process of contract negotiations, if CWA/UPTE wins the election which is being conducted at this time."

The mail ballot listed two choices: "UPTE-CWA 9119" and "No Representation." PERB counted the mail ballots on November 15, 1994. UPTE received 1,215 of the 2,207 votes cast. Neither party filed objections to the election. On December 1, 1994, PERB certified UPTE as the exclusive representative for the technical employees unit.

The University learned that the state would not pull the trigger, and would fully fund the University's fiscal year 1994-1995 budget, in early November. On November 18, 1994, the Office of Labor Relations sent a notice to UPTE and employees stating that the University would proceed to implement the "no trigger" plan for nonexclusively represented SPP and APSP employees. While the increase was retroactive to October 1, 1994, the University indicated that it would be unable to pay the increases

until February 1995. However, the notice stated that "following PERB certification of UPTE/CWA as the exclusive representative of SPP & A&PS [APSP] covered employees in the Technical Unit, wages for Technical Unit employees would be subject to negotiations under HEERA between the University and UPTE/CWA."

On December 6, 1994, Cieszkiewicz notified Libby Sayre (Sayre), UPTE president, that she would negotiate the initial round of bargaining over wages, hours, and working conditions for technical unit employees. Cieszkiewicz expressed the University's position that salary increases for SPP and APSP technical unit employees were subject to bargaining between the University and UPTE. Sayre argued that technical unit employees should receive the increase automatically because UPTE was not the exclusive representative on October 1, 1994.

Cieszkiewicz agreed to discuss UPTE's position with the Human Resources Advisory Committee (HRAC) on December 14, 1994. HRAC is the systemwide labor relations policy committee chaired by Levin. On December 16, 1994, Cieszkiewicz told Sayre that HRAC had decided that the salary increases were bargainable. Following a telephone conversation *on* January 13, 1995, Cieszkiewicz wrote Sayre a letter confirming that the SPP and APSP incentive awards programs for UPTE-represented technical unit employees were also on hold pending negotiations with UPTE.

In January and February 1995, nonexclusively represented SPP and APSP employees began receiving their "no trigger" plan salary adjustments. Nonexclusively represented SPP employees received a

separate check for the payment of range adjustments retroactive to October 1, 1994. Nonexclusively represented APSP employees awarded merit increases also received a separate check for payment of merit increases retroactive to October 1, 1994. Technical unit SPP and APSP employees received no salary adjustments.

POSITIONS OF THE PARTIES

UPTE's Position

UPTE contends that the University's August and November 1994 communications threatened technical unit employees with the withholding of salary increases in the event employees selected UPTE as their exclusive representative. These communications interfered with employee free choice in the representation election in violation of HEERA section 3571(a) and (b).

Although PERB counted election ballots on November 15, 1994, UPTE argues it became empowered to act as the exclusive representative for technical unit employees only after PERB certification on December 1, 1994. As a nonexclusive representative prior to December 1, 1994, UPTE had no right, and the University had no duty, to negotiate over technical unit employees' terms and conditions of employment. (Regents of the University of California (1984) PERB Decision No. 470-H; Regents of the University of California v. Public Employment Relations Bd. (1985) 168 Cal.App.3d 937 [214 Cal.Rptr. 698].)

UPTE asserts that the "no trigger" plan was effective and fully funded by November 15, 1994. Regardless of when the

specific components of the separate plans were actually paid, by November 15, 1994, the elements of the plan were funded and became a permanent element of the University's salary plans for fiscal year 1994-1995. While the timing of the implementation of the "no trigger" plan fell within the discretion of the University, the parameters of the plan never changed after July 1994.

UPTE argues that the University violated HEERA section 3571(a), (b) and (c) when it unilaterally changed the status quo by withholding the salary increase from technical unit employees because: (1) the University altered its own wage benefit policy by withholding the increase from certain nonexclusively represented employees and granting it to all other similarly situated nonexclusively represented employees; (2) the change in the status quo deprived technical unit employees of the right to bargain over the change through their exclusive representative after certification of UPTE; (3) the change had a generalized effect and continuing impact on technical unit employees; and (4) the change involved a matter within the scope of representation. (Pajaro Valley Unified School District (1978) PERB Decision No. 51; Grant Joint Union High School District (1982) PERB Decision No. 196.)

UPTE asserts that the fact that the University would grant the salary increase to technical unit employees during the representation election period is irrelevant. The employer may lawfully grant employees involved in a representation election

wage increases already promised, or provided uniformly to a group of employees that includes bargaining unit employees. (McCulloch Corporation (1961) 132 NLRB 201 [48 LRRM 1344]; Cutter Boats, Inc. (1960) 127 NLRB 1576 [46 LRRM 1246]; Insulating Fabricators, Inc. (1963) 144 NLRB 1325 [54 LRRM 1246] enf. (4th Cir. 1964) 338 F.2d 1002 [57 LRRM 2606]; "M" System, Inc. (1960) 129 NLRB 527 [47 LRRM 1017].)

Finally, UPTE argues that, having failed in its efforts to improperly influence the outcome of the representation election, the University violated HEERA section 3571(a) by carrying through on its threat to withhold salary increases from technical unit employees in retaliation for their selection of UPTE as their exclusive representative.

UPTE seeks a make whole remedy in this case, consisting of full payment, with interest, of all "no trigger" plan salary increases and compensation benefits that the University unlawfully denied technical unit employees; and a PERB order directing the University to cease and desist from its unlawful conduct.

The University's Position

The University contends that it had a duty to notify nonexclusively represented employees of potential changes in terms and conditions of employment. The University asserts that it consistently advised employees that, for those who become exclusively represented by January 1995, salary increases would be subject to HEERA negotiations. This caveat was included in

its communications with employees about the salary plans, and was itself a component of the "no trigger" salary plan. Thus, the allegation that the "no trigger" plan became a benefit to nonexclusively represented technical unit employees when it was announced in August, or on the effective date of retroactive payment, October 1, 1994, or when it became known that the trigger would not be pulled on November 15, 1994, is simply wrong. Staff employees who were exclusively represented, or became exclusively represented by January 1995, were specifically and consistently apprised in "no trigger" plan descriptions that their salary increases would be subject to HEERA meeting and conferring because no increases would be paid to any employees before January 1995.

The University pointed out its obligation to bargain over any salary increase in its August 10, 1994, notice to employees to avoid making a promise of future benefits during the election period. These statements were not threats but accurate and truthful statements reflecting the University's obligation to bargain. Since its communications consistently and correctly acknowledged the University's duty to bargain over the salary plan with employees who were exclusively represented prior to its implementation in January, the University argues that its communications with its employees concerning the salary plans constitute protected speech under HEERA section 3571.3.[4]

[4]HEERA section 3571.3 states:

The University also points to the employer's unique obligations during the pre-election period. The employer must grant benefits that would have been granted in the normal course of business. (San Ramon Valley Unified School District (1979) PERB Decision No. 111.) However, the employer may not promise or grant benefits if that promise or grant is intended to interfere with the employee's organizational rights. (NLRB v. Exchange Parts Company (1964) 375 U.S. 405 [55 LRRM 2098].) The University contends that an employer may grant a salary increase during an election period only when the employer has a past practice of granting salary increases. Those increases are part of the status quo and must be implemented during the election period. (Davis Unified School District (1980) PERB Decision No. 116.) Since the University had no consistent past practice of granting wage increases, it could not lawfully promise a salary increase to technical unit employees during the election campaign. Similarly, since the University had no established past practice of granting salary increases for technical unit employees, the University's failure to do so did not constitute a

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> The expression of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute, or be evidence of, an unfair labor practice under any provision of this chapter, unless such expression contains a threat of reprisal, force, or promise of benefit; provided, however, that the employer shall not express a preference for one employee organization over another employee organization.

unilateral change and refusal to bargain in violation of HEERA section 3571(c).

The University argues that it was prohibited from changing the wage rates during the November 15 to December 1 post-election, precertification period. (Mike O'Connor Chevrolet (1974) 209 NLRB 701 [85 LRRM 1419] enf. denied on other grounds (8th Cir. 1975) 512 F.2d 684 [88 LRRM 3121].) In addition, once PERB certified UPTE as the exclusive representative on December 1, 1994, the University was obligated to bargain over wages because they are a mandatory subject of bargaining. Since wages are a mandatory subject of bargaining, the University did not discriminate against technical unit employees in violation of HEERA section 3571(a) and (b) by failing to implement the "no trigger" plan for technical unit employees.

DISCUSSION

HEERA's fundamental purpose is to provide employees of California's public higher education systems with the right to participate in employee organizations and select an exclusive representative for the purpose of representation in their employment relationships with their employers.[5] HEERA

[5]HEERA section 3560(e) states:

> (e) It is the purpose of this chapter to provide the means by which relations between each higher education employer and its employees may assure that the responsibilities and authorities granted to the separate institutions under the Constitution and by statute are carried out in an atmosphere which permits the fullest participation by employees in the

section 3562(j) defines exclusive representative as "any-recognized or certified employee organization." The higher education employer may "recognize" an employee organization as the exclusive representative or PERB may "certify" an employee organization as the exclusive representative based on the results of a representation election.[6] PERB Regulation 32750 provides

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> determination of conditions of employment which affect them. It is the intent of this chapter to accomplish this purpose by providing a uniform basis for recognizing the right of the employees of these systems to full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of representation in their employment relationships with their employers and to select one of these organizations as their exclusive representative for the purpose of meeting and conferring.

[6]HEERA section 3562(p) states:

> "Recognized organization" means an employee organization which has been recognized by an employer as the exclusive representative of the employees in an appropriate unit pursuant to Article 5 (commencing with Section 3573).

HEERA section 3577(a) states, in pertinent part:

> Upon receipt of a petition filed pursuant to Section 3575 the board shall conduct such inquiries and investigations or hold such hearings as it shall deem necessary in order to decide the questions raised by the petition. The determination of the board may be based upon the evidence adduced in the inquiries, investigations, or hearings. If the board finds on the basis of the evidence that a question of representation exists, or a question of representation is deemed to exist pursuant to subdivision (a) or (b) of Section 3574, it shall order that an election shall be conducted by secret ballot placing

that "the Board shall certify the results of the election or issue a certification of an exclusive representative if the results of the election are conclusive and no timely objections are filed."[7]

The HEERA statutory scheme specifically defines the employer's bargaining obligation. The higher education employer must meet and confer with the employee organization selected as the exclusive representative of a bargaining unit.[8] However, under HEERA, the nonexclusive employee organization has no independent right to represent its members, and the higher education employer has no duty to meet and confer with a nonexclusive employee organization, on matters within the scope of representation. (Regents of the University of California v. Public Employment Relations Board, supra, 168 Cal.App.3d 937.)

> on the ballot all employee organizations evidencing support of at least 10 percent of the members of an appropriate unit, and it shall certify the results of the election on the basis of which ballot choice received a majority of the valid votes cast.

[7]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[8]HEERA section 3570 states:

> 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.

It is important to take note of these fundamental features of HEERA in considering the rights and obligations of the employer, employees and the exclusive representative during the time employees first become exclusively represented. It is in this period of a PERB-conducted representation election, and the subsequent transition from no representation to exclusive representation, that the alleged unlawful conduct in this case occurred.

Technical unit employees were nonexclusively represented prior to December 1, 1994. PERB conducted the tally of mail ballots on November 15, 1994. Neither the University nor UPTE filed objections to the election. PERB certified UPTE as the exclusive representative of the technical employee unit on December 1, 1994. Prior to December 1, 1994, therefore, the University had no HEERA obligation to meet and confer over terms and conditions of employment affecting technical unit employees. Similarly, UPTE had no independent right to exclusively represent technical unit employees prior to December 1, 1994.[10]

The specific timing of UPTE's exclusive representation is particularly important in this case due to the close proximity of the election events to the University's decision to implement the "no trigger" salary plan for non-exclusively represented

[10]The University's assertion that technical unit employees "were no longer non-represented" after the November 15, 1994, tally of ballots contradicts its own communications. The November 18, 1994 correspondence from the University's Acting Coordinator of Labor Relations to the UPTE President correctly notes that UPTE had not yet been certified by PERB as the exclusive representative.

employees. In a November 18, 1994, letter to the UPTE President, a University representative stated:

> . . . the University will proceed with the 'No Trigger' Plan . . . for non-exclusively represented SPP- and A&PS-covered [APSP] staff employees.

The letter further stated:

> . . . the increases for non-exclusively represented SPP- and A&PS-covered [APSP] employees . . . continue to be retroactive to October 1, 1994 . . . .

These statements clearly indicate that by November 18, 1994, the University had made the decision to implement the "no trigger" salary plan for nonexclusively represented employees. The same letter reiterated the retroactivity of the salary increases but noted some delay in their actual payment. As noted above, technical unit employees were nonexclusively represented on November 18, 1994.

The University asserts that the salary plan was not in effect until January or a later date when salary increases were actually paid. This assertion is without merit. It is common practice for an employee salary package to consist of multiple components that the employer implements at different times. The effectiveness of such a plan and its components does not occur on the actual date of payment of each component, whenever that might occur. For nonexclusively represented employees, a multiple component salary program is "in effect" when it is clear that the employer has decided to implement the program for those employees.

The University's November 18, 1994, letter unequivocally states that it is proceeding with the "no trigger" salary plan for nonexclusively represented employees, regardless of the subsequent timing of the actual payment of its various components. By that date, therefore, it is clear that the salary plan was in effect for nonexclusively represented employees. Technical unit employees were nonexclusively represented on November 18, 1994. Therefore, the "no trigger" salary plan was in effect for technical unit employees on November 18, 1994.

We now turn to the specific allegations in this case. First, UPTE alleges that the University interfered with employees' right to freely choose an exclusive representative, and violated HEERA section 3571(a) and (b), by stating in its August and November 1994 correspondence that it would not grant proposed wage increases to employees who became exclusively represented by January 1, 1995.

In Carlsbad Unified School District (1979) PERB Decision No. 89, the Board established its test for evaluating allegations of unlawful employer interference. Under this test, the charging party must show that the employer's conduct tends to or does result in harm to protected employee rights. The employer then has the burden of demonstrating operational necessity or circumstances beyond the employer's control as justification for the conduct. Proof of unlawful motivation or actual harm to employee rights is not required in interference cases. (Novato Unified School District (1982) PERB Decision No. 210.)

Technical unit employees possessed the protected right to participate in the selection of UPTE as their exclusive representative. HEERA section 3565 gives higher education employees the right to "form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." An employer's conduct that impedes the employees' right to freely choose a representative may form the basis for an unfair practice charge. (Clovis Unified School District (1984) PERB Decision No. 389.)

The Board considered the effect of employer speech on the employees' right to choose an exclusive representative in Office of Kern County Superintendent of Schools (1985) PERB Decision No. 533. In that case, the Superintendent of Schools (superintendent) made speeches to all employees of the district prior to a decertification election. The superintendent stated that support for the incumbent union would result in an automatic decline in benefits to employees irrespective of the employer's ability to provide the same level of benefits. The Board found that the superintendent's conditioning a continuation of benefits on the waiver of the employee's right to select an exclusive representative interfered with the employee's right to join and participate in employee organizations. Once the superintendent began describing the consequences of an association victory which did not flow naturally from the collective bargaining

relationship, and prevention was within the employer's power, his speech lost its protection.

The University contends that its statements during the election campaign were protected truthful statements reflecting the University's obligation to bargain. HEERA section 3571.3 states that an employer's expression of views, arguments, or opinions may not constitute evidence of an unfair labor practice unless the expression contains a threat of reprisal, force, or promise of benefit.[11] PERB applies an objective standard to determine if the employer's speech contains a threat or promise of benefit. (California State University (1989) PERB Decision No. 777-H.) The Board views the employer's statements in light of the surrounding circumstances and places considerable weight on the accuracy of the content of the speech. (Los Angeles Unified School District (1988) PERB Decision No. 659; Alhambra City and High School Districts (1986) PERB Decision No. 560; Chula Vista City School District (1990) PERB Decision No. 834.)

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[11]The HEERA language parallels language in National Labor Relations Act section 8(c). PERB looks to National Labor Relations Board precedent in cases involving employer free speech rights. (Rio Hondo Community College District (1980) PERB Decision No. 128.) In NLRB v. Gissel Packing Co. (1969) 395 U.S. 575 [71 LRRM 2481], the U.S. Supreme Court made a distinction between permissible preelection predictions and unlawful threats of reprisal. The court balanced the employer's right of free speech against the rights of employees to be free from coercion, restraint and interference. The First Amendment protects employer predictions based on objective fact that convey the reasonable likely economic consequences of unionization outside the employer's control. However, threats of economic reprisal taken solely on the employer's own volition fall outside free speech protection.

The University's August 1994 notices to unions and employees asserted that salary increases for employees becoming exclusively represented by January 1995 would be subject to HEERA meeting and conferring. UCLA's November 1994 letter to one-fifth of the technical unit employees stated that the receipt of a forthcoming salary increase depended on contract negotiations if UPTE won the election. The letter emphasized that negotiations would only occur if employees elected UPTE as their exclusive representative.

As noted above, these statements do not accurately describe the applicability of the salary plans to technical unit employees or the parties' HEERA bargaining rights and obligations. It is irrelevant whether the University's statements were consistent, or based on its good faith understanding of its HEERA bargaining obligation. The statements were nonetheless inaccurate.

Furthermore, the University knew the close proximity of election events to the dates critical to salary plan implementation at the time these statements were made. In August 1994, the University was aware that by November 15 the State Controller would make the announcement that would determine which salary program would go into effect. The University was also aware that, under the Consent Election Agreement, PERB would tally ballots in the representation election on November 15, 1994. Therefore, it was clear that, pursuant to its regulations, PERB would not certify an exclusive representative before the

date of the Controller's announcement.[12] Despite this knowledge, the University definitively stated in its August communication that the described salary increases would not be granted, and HEERA negotiations would be required, for those employees becoming exclusively represented by January 1995.

The November 9, 1994, correspondence to UCLA technical unit employees is particularly troubling. The letter asserts that "staff pay increases should be forthcoming," but specifically states that technical unit employees will not receive the increases if UPTE "wins the election which is being conducted at this time." The letter clearly communicates that the University knew prior to the completion of the election that the trigger would not be pulled and that it would implement the "no trigger" plan. However, the University continued to assert that HEERA would require technical unit employees' salary increases to be bargained if they elected an exclusive representative.

During the pre-election period, the University inaccurately informed technical unit employees that if UPTE became their exclusive representative before January 1, 1995, any salary increase depended on the outcome of bargaining. UCLA directly informed employees that they would not receive a specific salary increase, which would otherwise be forthcoming, if they elected UPTE as their exclusive representative. Since the University

[12]PERB Regulation 32738 gives a party 10 days following the service of the tally of ballots to file election objections, and PERB Regulation 32750 directs PERB to certify the election "if the results of the election are conclusive, and no timely objections are filed."

possessed no HEERA obligation, and UPTE possessed no right, to meet and confer over the subject of salary increases on the date the "no trigger" plan was in effect for technical employees, the University's speech described consequences of a union victory which did not flow naturally from the collective bargaining relationship and were totally within the employer's control. In effect, the speech contained a threat of reprisal and had no protection under HEERA section 3571.3. The University's unprotected communications conditioning receipt of the "no trigger" salary increase on employees not electing an exclusive representative violated HEERA section 3571(a) and (b) by interfering with their right to participate in an election to choose an exclusive representative.[13]

UPTE's second allegation is that the University violated HEERA section 3571(a), (b) and (c) by unilaterally changing its policy regarding "no trigger" salary increases for technical unit employees who became exclusively represented and failing to meet and confer in good faith over the change. An employer's unilateral change in a matter within the scope of representation is a per se violation of the duty to meet and confer in good faith. To establish a unilateral change, the charging party must show: (1) the employer changed a past practice; (2) the employer

[13]The Board notes that during the campaign the Office of Labor Relations distributed 30 model flyers expressing the University's nonunion preference. None of the flyers contained a threat of reprisal or promise of benefit. As an expression of the University's opinion, this speech falls under the protection of HEERA section 3571.3.

changed the practice in a manner that has a generalized effect or continuing impact on the members of the bargaining unit; (3) the change in policy involves a matter within the scope of representation; and (4) the employer made the change without giving the exclusive representative notice or an opportunity to bargain. (Grant Joint Union High School District, supra. PERB Decision No. 196.)

Until December 1, 1994, UPTE was a nonexclusive employee organization, not the certified exclusive representative for technical unit employees. The November 18, 1994, notice from the University clearly indicates that technical unit employees would be excluded from the "no trigger" salary plan. The University had no duty to meet and confer with the nonexclusive representative on the date it made that unilateral decision. (See Regents of the University of California v. Public Employment Relations Board, supra. 168 Cal.App.3d 937.) Since the University possessed no duty to meet and confer with UPTE over the salary plan prior to December 1, 1994, its November 18, 1994, denial of the "no trigger" salary plan to technical unit employees does not constitute a unilateral change in violation of HEERA.

However, the University's denial of the "no trigger" salary plan to technical unit employees also relates to UPTE's third allegation, that the University's denial constitutes discrimination in violation of HEERA section 3571(a). HEERA prohibits employer discrimination against employees due to the

exercise of their protected rights. To establish a discrimination violation, the charging party must show that the employee engaged in a protected activity, that the employer knew of the activity, and that the employee's participation motivated the employer's adverse action. (Novato Unified School District, supra, PERB Decision No. 210.)

Technical unit employees possess the protected right to participate in a PERB conducted representation election to determine an exclusive representative in their bargaining unit. It is undisputed that the University was aware of this protected activity. It is also clear that denial of a salary increase to employees who are entitled to that increase constitutes action adverse to those employees. The Board must determine if the technical unit employees' participation in the UPTE representation election motivated the University's action.

PERB requires a specific nexus of unlawful motive between the employer's adverse action and the employee activity. PERB may draw an inference of unlawful motivation from the timing of the employer's conduct in relation to the protected activity, the employer's disparate treatment of employees engaged in protected activities, the employer's departure from established procedures and standards for those employees, and the employer's inconsistent or contradictory justifications. PERB may make this inference from circumstantial evidence and the record as a whole. (Novato Unified School District, supra, PERB Decision No. 210.)

Here, it is unnecessary to infer the University's motivation. The November 18, 1994, notice states that the University would not implement the "no trigger" salary increase for members of the technical unit because they elected UPTE as their exclusive representative. By the University's own admission, therefore, this adverse action is the direct result of the technical unit employees' protected conduct. Therefore, the University's action constitutes unlawful discrimination against technical unit employees in violation of HEERA section 3571(a). By the same conduct, the University denied UPTE its guaranteed rights in violation of section 3571(b).

As justification for its action, the University points to the employer's unique obligations during the period in which employees are choosing to become exclusively represented in their employment relations. It is important to note that those obligations must be consistent with the fundamental purpose of HEERA. HEERA section 3560(a) states:

> The people of the State of California have a fundamental interest in the development of harmonious and cooperative labor relations between the public institutions of higher education and their employees.

The transition from no representation to exclusive representation must occur in a manner that promotes stability, avoids disruption and acknowledges the changing relationships between the employer, employees and exclusive representative, while recognizing their rights and obligations under HEERA. In this way, the public

interest in the development of harmonious and cooperative labor relations is served.

To further this principle, the employer must proceed with caution during the election process. The employer may not grant or withhold benefits unless: (1) operational necessity or factors other that the pendency of the election justify the decision and timing; or (2) the action is consistent with past practice. (San Ramon Valley Unified School District, supra, PERB Decision No. Ill; The Great A & P Tea Co. (1967) 166 NLRB 27 [65 LRRM 1489].) Neither granting nor withholding benefits is per se unlawful. The test is whether the employer manipulates benefits to influence the employees' decision during the union's organizing campaign. (NLRB v. Industrial Erectors. Inc. (7th Cir. 1983) 712 F.2d 113 [113 LRRM 3665]; NLRB v. Otis Hospital (1st Cir. 1976) 545 F.2d 252 [93 LRRM 2778].)

Clovis Unified School District, supra, PERB Decision No. 389, involved an employer's lawful grant of a salary increase during the election process. The district issued a salary schedule containing no fiscal year 1983-1984 salary increase. A month later, the district conditioned employee wage increases on increased legislative funding in similar notices issued to confidential and management employees. Then the association filed a representation petition. During the preelection campaign, district administrators actively urged employees to vote "no representation." Later, since the Governor's proposed budget included a 6 percent increase for school districts, the

district voted to continue a 2 percent pay increase into the 1983-1984 year. The Board found the increase lawful since the district never altered its behavior because of the union's organizing campaign. Granting the increase to employees outside the organizing campaign, and according to an announced plan, further indicated that factors other than the election governed the action.

In this case, the University was obligated to act without reference to the representation election with regard to the inclusion of technical unit employees in the "no trigger" salary plan. The University followed its standard procedure to develop two fiscal year 1994-1995 SPP and APSP salary plans for all nonexclusively represented employees in July 1994. Since the University gave the salary increase to numerous employees not involved in the representation election, and the increase was consistent with a systemwide salary plan which resulted from the increase in state funding, the pendency of the election did not prohibit the University from granting technical unit employees the salary increase. On the contrary, once the state funding situation allowed implementation of the "no trigger" plan, the University was obligated to treat technical unit employees like other nonexclusively represented SPP and APSP employees and grant them the "no trigger" salary increases.

The University also contends that its HEERA obligation to bargain with UPTE over wages prohibited it from granting the salary increase during the post-election, precertification

period. (Mike O'Connor Chevrolet, supra, 209 NLRB 701.) Mike O'Connor Chevrolet does not strictly prohibit employer wage changes during this period. This case instructs the employer that it must exercise caution in making post-election, pre-certification wage changes.

The employer is not free to make any and all changes during the period prior to the onset of the HEERA obligation to meet and confer with the certified exclusive representative. During this period, the employer may not change wage rates in order to avoid its HEERA bargaining obligation after certification. However, nothing prohibits the employer from granting a wage increase whose timing is clearly justified by factors other than the pendency of the union's certification. In fact, as noted above, failure to grant an increase during this period due to the employees' selection of an exclusive representative may constitute unlawful discrimination. In this case, the State Controller's announcement that there would be no state budget cuts, and a preexisting salary plan for all SPP and APSP employees, justified the timing of the University's decision to implement the "no trigger" plan, not the pendency of UPTE's certification. Therefore, the HEERA obligation to meet and confer with the newly-certified exclusive representative did not prohibit the University from granting the "no trigger" salary increase to technical unit employees during the post-election, pre-certification period.

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 HEERA's policies. In a long line of cases, the Board has ordered a make whole remedy to compensate employees for the difference between what they actually earned and what they would have earned but for the employer's discriminatory conduct. (Santa Monica Community College District (1979) PERB Decision No. 103; Santa Clara Unified School District (1979) PERB Decision No. 104; Los Gatos Joint Union High School District (1980) PERB Decision No. 120; San Diego Community College District (1983) PERB Decision No. 368.)

In addition to a cease and desist order, a make whole remedy is clearly called for and appropriate in this case. The University unlawfully discriminated against technical unit employees and denied them the "no trigger" salary increases given to other nonexclusively represented employees because of their participation in protected conduct. Therefore, the University should be ordered to make those employees whole by granting them the salary increases they were unlawfully denied, plus interest.

The Board originally ordered 7 percent interest on backpay awards, consistent with Article XV, Section 1 of the California Constitution. Although California Code of Civil Procedure section 685.010 deals with interest rates on court judgments and does not apply to PERB, the Board in Mount San Antonio Community

College District (1988) PERB Decision No. 691 adopted the section's 10 percent interest rate for backpay awards. However, since Government Code section 970.1 exempts local public entities from Code of Civil Procedure section 685.010 (California Fed. Savings & Loan Assn. v. City of Los Angeles (1995) 11 Cal.4th 342 [45 Cal.Rptr.2d 279]), PERB has applied the 10 percent rate of interest only to University of California backpay awards, and the 7 percent rate of interest to backpay awards involving other employers. The Board finds no justification for continuing this disparate approach.

Several California Courts of Appeal have held that administrative agencies are not bound by the 7 percent interest rate specified in Article XV, Section 1 of the California Constitution. (Bertuccio v. Agricultural Labor Relations Bd. (1988) 202 Cal.App.3d 1369, 1393 [249 Cal.Rptr. 473]; J.R. Norton Co. v. Agricultural Labor Relations Bd. (1987) 192 Cal.App.3d 874 [238 Cal.Rptr. 87]; Sandrini Brothers v. Agricultural Labor Relations Bd. (1984) 156 Cal.App.3d 878, 887 [203 Cal.Rptr. 304].) These courts also have noted that substantial policy considerations support the imposition of a flexible, market-oriented interest rate on backpay awards. (J.R. Norton Co. v. Agricultural Labor Relations Bd., supra, at p. 902 (noting that an interest rate keyed to the private money market more closely reflects the actual cost of money to an employer and more adequately compensates an employee); Sandrini Brothers v. Agricultural Labor Relations Bd., supra, at p. 888 (finding that

a market-oriented interest rate closely approximates the actual cost of money).) Furthermore, the remedial order of a quasi-judicial agency such as PERB, exercising its original jurisdiction, will stand unless it represents an attempt to achieve ends other than those reasonably calculated to effectuate the policies of the acts it administers. (J.R. Norton Co. v. Agricultural Labor Relations Bd., supra, 192 Cal.App.3d 874.)

As noted above, the Board has broad authority to order remedies necessary to effectuate the policies and purposes of the HEERA. In this case, the Board determines that the payments to eligible technical unit employees unlawfully denied the "no trigger" salary increases shall be subject to interest at the rate of 7 percent per annum.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Board finds that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a), by interfering with the right of technical unit employees to select an exclusive representative and discriminating against technical unit employees, by denying them the "no trigger" salary increase, in retaliation for their exercise of protected rights. This same action also interfered with the right of University Professional and Technical Employees, CWA Local 9119, AFL-CIO (UPTE) to represent its members in violation of HEERA section 3571(b).

Pursuant to HEERA section 3563.3, it is hereby ORDERED that the University shall:

A. CEASE AND DESIST FROM:

1. Interfering with the right of technical unit employees to select an exclusive representative;

2. Discriminating against technical unit employees, by denying them the "no trigger" salary increase, in retaliation for their exercise of protected rights; and

3. Interfering with the right of UPTE to represent its members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF HEERA:

1. Pay eligible technical unit employees salary increases set forth in the "no trigger" plan promulgated by the University on August 10, 1994. Retroactive sums paid to such employees shall be subject to interest at the rate of seven (7) percent per annum.

2. Within thirty-five days (35) following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees are customarily placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

3. Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with the Director's instructions.

Members Johnson and Dyer joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-414-H, University Professional and Technical Employees (UPTE), CWA Local 9119, AFL-CIO v. The Regents of the University of California, in which all parties had the right to participate, it has been found that the Regents of the University of California (University) violated Government Code section 3571(a) and (b) of the Higher Education Employer-Employee Relations Act (HEERA). The University violated HEERA by interfering with the right of technical unit employees to select an exclusive representative and discriminating against technical unit employees, by denying them the "no trigger" salary increase, in retaliation for their exercise of protected rights.

As a result of this conduct, we have been ordered to post this Notice, and we will:

A. CEASE AND DESIST FROM:

1. Interfering with the right of technical unit employees to select an exclusive representative;

2. Discriminating against technical unit employees, by denying them the "no trigger" salary increase, in retaliation for their exercise of protected rights; and

3. Interfering with the right of UPTE to represent its members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF HEERA:

1. Pay eligible technical unit employees salary increases set forth in the "no trigger" plan promulgated by the University on August 10, 1994. Retroactive sums paid to such employees shall be subject to interest at the rate of seven (7) percent per annum.

Dated: _____

REGENTS OF THE UNIVERSITY
OF CALIFORNIA

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.