



STATE OF CALIFORNIA  
 DECISION OF THE  
 PUBLIC EMPLOYMENT RELATIONS BOARD

COLLEGE AND UNIVERSITY SERVICE	)	
EMPLOYEES/SERVICE EMPLOYEES	)	
INTERNATIONAL UNION, AFL-CIO,	)	
	)	
Charging Party,	)	Case No. LA-CE-5-H
	)	
v.	)	PERB Decision No. 211-H
	)	
CALIFORNIA STATE UNIVERSITY,	)	April 30, 1982
SACRAMENTO,	)	
	)	
Respondent.	)	
	)	

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Appearances: Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg and Roger) for College and University Service Employees/Service Employees International Union, AFL-CIO; Jaffe D. Dickerson and Barbara E. Miller, Attorneys for California State University, Sacramento.

Before Tovar, Moore, and Jaeger, Members.

DECISION

This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both College and University Service Employees/Service Employees International Union, AFL-CIO (CAUSE or Charging Party) and the California State University, Sacramento (CSUS or Respondent) to the attached hearing officer's proposed decision. Charging Party excepts to that part of the proposed decision which finds

that Respondent did not violate subsection 3571(b)<sup>1</sup> of the Higher Education Employer-Employee Relations Act (HEERA or the Act)<sup>2</sup> by modifying its campus access rules without first meeting and conferring with Charging Party, a nonexclusive representative of CSUS employees. Respondent excepts, in summary, to: 1) the hearing officer's conclusion that Respondent violated section 3571(a)<sup>3</sup> by discriminatorily rejecting one of its employees during his probationary period in retaliation for his representation by CAUSE, and

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<sup>1</sup>Section 3571 provides:

It shall be unlawful for the higher education employer to:

.....

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

.....

<sup>2</sup>HEERA is codified at Government Code section 3560 et seq. All statutory references are to the Government Code unless otherwise specified.

<sup>3</sup>Section 3571 provides:

It shall be 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.

.....

2) the hearing officer's conclusion that Respondent further violated subsection 3571(a) by delaying access by the same employee to documents in his personnel file. For the reasons which follow, we sustain all three exceptions.

#### FACTS

##### The Employment of Thomas Gomes

Thomas Gomes was hired by CSUS on December 14, 1978, as a custodian. His regular working hours were on the swing shift from 5:00 p.m. until 1:30 a.m., with a lunch break at 9:00 p.m. He was placed initially under the direct supervision of Joseph Sanchez, a custodian supervisor I. As a new employee, Gomes' first year of employment was to be on a probationary basis pursuant to Education Code section 89531.<sup>4</sup>

On February 14, 1979, Gomes joined CAUSE. There is no evidence that Gomes was ever an active member of that organization.

On April 14, 1979, Gomes received his first probationary performance evaluation, which was prepared by supervisor Sanchez. The evaluation form contained eight categories on

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<sup>4</sup>Education Code section 89531 provides as follows:

Every nonacademic employee shall be appointed for one year which is a probationary period. On reappointment for the second year, the employee shall be permanent at the same level and salary step or higher salary step as at completion of the probationary year.

which the employee was to be rated. Categories labeled "work habits" and "personal fitness" were marked "improvement needed." Categories labeled "quantity of work" and "quality of work" were not marked at all. Supervisor Sanchez testified that he regarded Gomes' performance in these categories to be generally substandard, but that no negative comments or written warnings were given because Sanchez considered Gomes to be in training during this period. The overall rating on the April performance report was "standard."

Sanchez discussed the performance report with Gomes, indicating the areas in which he felt Gomes needed to improve. However, his performance during the next few months did not improve. Instead, it deteriorated. Gomes' supervisors perceived two primary problems in his work performance: Gomes' use of alcohol and/or marijuana, and his repeated failure to stay in his assigned work area during working hours.

While Sanchez denied having actually seen Gomes imbibing alcoholic drinks while working, he said it was clear to him that Gomes did in fact do so. On at least two separate occasions between April 15 and August 16, Sanchez observed Gomes, while on the job, staggering and otherwise appearing intoxicated. The first time, Sanchez encountered Gomes outside an employee food service area while Gomes was on break. Sanchez confronted Gomes about his "drinking or smoking" and counseled him to "try to knock it off." He also reminded him

that he was still on probation. About a month later, Sanchez encountered Gomes after the lunch break, again in what he believed was an inebriated condition. Sanchez again offered the same counsel and admonition.

In June, 1979, Gomes was assigned to work in a different area of the CSUS campus. Because the custodian supervisor I for that area was on vacation at that time, Gomes spent the first four to six weeks of his new assignment under the direct supervision of the crew's lead custodian, Ronnie Williams. According to Williams' observations, Gomes appeared to be under the influence of alcohol three to four times a week, usually after returning from his lunch break. His gait was unsteady and he would stagger about. Williams also smelled alcohol on his breath.

While Williams generally found Gomes' work to be satisfactory when Gomes was not inebriated, this was not the case when Gomes appeared to be under the influence. While in this state his work performance suffered and, on occasions when he failed to complete his assignments, his work would have to be reassigned to a co-worker for completion. Williams also received complaints from other custodians regarding Gomes' behavior, primarily to the effect that he was making offensive personal or racial comments.

Following one particular incident on August 9, when Williams observed Gomes staggering, pulling on a co-worker and

speaking incoherently, Williams reported Gomes' behavior to Gene Estioco, a custodian supervisor II, who is Williams' second level supervisor. Estioco directed Williams to prepare a written report of the incident. Williams prepared such a memorandum, dated August 13, 1978, and submitted it to Estioco. Estioco in turn gave the memo to Ben Crocco, chief of custodial services, together with a memo that Estioco himself had written which criticized Gomes' conduct on the job. Williams and Estioco had no knowledge of Gomes' membership in CAUSE at the time they prepared these memoranda.

Because Williams felt that he could not handle Gomes, Gomes was finally assigned to work directly under the supervision of Estioco. On August 14, Gomes received his second probationary performance evaluation report, which had been prepared by supervisor Sanchez. In four of the eight categories Gomes received a rating of "unacceptable". In two others he was rated "improvement needed." The remaining two were left unmarked. The overall rating was "unacceptable." Each area rated contained additional comments indicating deficiencies in performance. The space provided in which to indicate a "yes" or "no" recommendation regarding merit salary increase was marked "no." The form also provides a space, expressly labelled as being for use only on a final report, in which to make a "yes" or "no" recommendation regarding the granting of permanent status. This space was marked "no."

Sanchez met with Gomes and discussed the report with him. Gomes indicated his objection to the report and requested a meeting with the reviewing officer, in this case Chief of Custodial Services Ben Crocco. A meeting for this purpose was thereupon scheduled for the following evening, August 15.

In preparation for the meeting with Crocco, Gomes contacted Kathy Felch, a CAUSE representative, for assistance. Felch told Gomes that she would be unavailable to accompany him to the scheduled meeting with Crocco and therefore advised Gomes to cancel the meeting, with the intent to reschedule it for a time when Felch would be available. On reporting to work on the evening of the 15th, therefore, Gomes informed Sanchez of his wish to cancel the meeting, stating that he would not meet with Crocco until his union representative was available to attend the meeting with him.

On August 17, Crocco issued a memorandum to Gordon Landsness, director of plant operations. Its text is as follows:

I have requested Tom Gomes, Custodian, and Tony Sanchez, Supervisor, to come to my office to discuss Mr. Gomes' performance report. Mr. Gomes stated he will not come in unless represented by his union.

I have reviewed all of the documentation on Mr. Gomes and I recommend he be terminated from his position as custodian. He is a probationary employee at this time.

On the same day, Landsness sent a letter to Richard Hughes, director of personnel, which recommended that Gomes be terminated "as soon as practical," stating that the "attached documentation indicates without a doubt that he would not develop into a good state employee."

Gomes' Attempt to Obtain Documents from his Personnel File

On August 20, Felch contacted Personnel Director Hughes to object that Gomes had not yet been allowed to see the memoranda written by Williams and Estioco, which had been attached to Gomes' performance report by Crocco and forwarded to Landsness and Hughes. Felch requested copies of the documents and rescheduling of the meeting between Gomes, Felch and Crocco.

On August 21, Gomes and Felch, without previously notifying Hughes or otherwise making arrangements therefor, went to the CSUS personnel office to examine copies of the documents discussed above. When they arrived, Hughes was in a meeting. He interrupted the meeting and came out to speak with them. Felch requested copies of the documents. Hughes responded that he was busy with his meeting at the moment, that he would not release the documents to them until he had a chance to discuss them, and that they could make an appointment to return that afternoon or the next day. Felch reiterated her demand to be furnished with copies of the documents; Hughes repeated that he was busy with a meeting and that they would have to return when he was free.

Hughes did direct Crocco to reschedule a meeting with Gomes and Felch. This meeting, involving Gomes, Felch, Crocco, Estioco, and Sanchez did, in fact, occur on August 24. Crocco at that time furnished Felch with copies of the documents she sought. However, he refused to change his position on the matter of Gomes' termination.

#### The Firing of Gomes

On August 25, Felch wrote a letter to Dr. Lloyd Johns, president of CSUS, to complain about the problems she was experiencing in working with Hughes to resolve employee grievances at CSUS. Felch did not send a copy of the letter to Hughes, nor did she inform him that she had written it.

On August 28, Hughes called Felch to inform her that Gomes was going to be rejected during his probationary period. Felch requested an opportunity to meet with Hughes to discuss her view of the Gomes matter. Hughes offered to meet with her that afternoon. Before attending the meeting, Felch prepared a memorandum setting forth certain allegations and outlining the issues in the case. She presented the memorandum to Hughes at their afternoon meeting, at the conclusion of which Hughes agreed to investigate the charges against Gomes and contact Felch regarding his findings within two days.

When Felch did not hear from Hughes after four days had passed, she telephoned him. In response to her inquiry, Hughes

told her that he had not changed his decision to fire Gomes. He also revealed that he had learned of Felch's letter to the CSUS president, angrily telling her that she should send him a copy of the letter when writing to the president, and warning that he would be very difficult to deal with in the future as a result of this incident.

By letter from Hughes dated September 6, Gomes was notified of his rejection during his probationary period, effective September 21, 1979.

#### CSUS's Campus Access Regulations

In March of 1979, the California State Universities and Colleges Board of Trustees amended title 5 of the California Administrative Code to adopt systemwide access regulations for employee organizations.<sup>5</sup> As part of the aforementioned amendment, individual campuses were required to develop supplemental regulations which would apply to the local campus.

On June 18, 1979, CSUS issued copies of its access regulations to all campus employees. On July 1, 1979, HEERA became effective. Copies of the access regulations were distributed to employee organizations on July 11, 1979.

The regulations, in pertinent part, provided that employee organization representatives who are not employees of the campus must notify the campus president and director of

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<sup>5</sup>California Administrative Code, title 5, sections 43708 through 43711.

personnel in writing before coming to the campus to conduct organizational activities. It was added that such notice should normally be given no less than five days prior to the visit but, when this is not possible, the president and director of personnel should be telephoned prior to the visit.

Upon learning of these access regulations, CAUSE representative Felch objected to both the chancellor's office and to CSUS Director of Personnel Hughes about the failure of CSUS to meet and confer with CAUSE prior to issuing the supplemental regulations. She objected particularly to the "check-in procedure" required by the regulations.

Consequently, Hughes informed Felch that the check-in procedure would not be enforced. Thus, the check-in requirement of the regulations was never enforced until September 20, 1979.

Following the previously related conversation of September 1 between Felch and Hughes, Felch received a letter, dated September 20, from William Kerby, CSUS acting vice president for administrative and business affairs. The letter referred to both the CSUS access regulations and visits by representatives of employee organizations in past weeks and stated, "The campus insists that telephone or written notification be given to both the President and the Director of

Personnel at least 24 hours prior to any campus visitation." While at least three other employee organizations were known to be active on the CSUS campus during this period, none of them received the institution's September 20 communication.

In a memorandum from Kerby dated October 24, 1979 addressed to all employee organizations, the CSUS supplemental regulations to section 43704 of title 5 were revised. These revisions superseded the September 20 notice to CAUSE, and required visiting employee organization representatives to log in with the CSUS personnel office or police department.

#### DISCUSSION

##### The Termination of Thomas Gomes

Respondent excepts initially to the hearing officer's conclusion that Gomes was rejected during his probationary period in reprisal for his representation by CAUSE, in violation of subsection 3571(a).<sup>6</sup>

The Board itself has not previously decided a case involving subsection 3571(a). The wording of that subsection is, however, the same as that of subsection 3543.5(a) of the

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<sup>6</sup>The text of subsection 3571(a) appears in footnote 3, supra.

Educational Employment Relations Act.<sup>7</sup> In Carlsbad Unified School District (1/30/79), PERB Decision No. 89, and in Novato Unified School District, (4/30/82) PERB Decision No. 210, the Board has set forth the standard by which charges alleging discriminatory conduct in violation of subsection 3543.5(a) are to be decided. We find that the standard set forth in those decisions is equally applicable in deciding alleged violations of subsection 3571(a).

Subsection 3571(a) expressly prohibits a higher education employer from imposing reprisals against employees because of their exercise of rights guaranteed to them by the HEERA. CAUSE alleges that the rejection of Thomas Gomes was such an act of reprisal, taken in retaliation for his representation by CAUSE in his employment relation with CSUS.

As we explained in Novato, supra, a party alleging a violation of subsection 3571(a) has the burden of making a showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision to engage in the conduct of which the employee complains. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in

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<sup>7</sup>The Educational Employment Relations Act is codified at Government Code section 3540 et seq.

the absence of the protected conduct. As noted in Novato, this shift in the burden of producing evidence must operate consistently with the charging party's obligation to establish an unfair practice by a preponderance of the evidence.

Initially, then, Charging Party must identify the protected activity which is alleged to have been a motivating factor.

Gomes' Protected Activity

In the instant case, CAUSE asserts that Gomes exercised a protected right in availing himself of representation by CAUSE in his employment relation with CSUS.

Section 3565 establishes the right of higher education employees to form, join and participate in the activities of employee organizations for the purpose of representation.<sup>8</sup> Further, section 3567 establishes the rights of employees to present grievances to the employer through a representative of their own choosing.<sup>9</sup>

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<sup>8</sup>Section 3565 provides, in relevant part:

Higher education employees shall have 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 and for the purpose of meeting and conferring. . . .

<sup>9</sup>Section 3567 provides, in relevant part:

Any employee or group of employees may at any time, either individually or through a representative of their own choosing,

The evidentiary record, as reviewed above, shows that on August 15, 1979, Gomes contacted CAUSE representative Kathy Felch, seeking her assistance in meeting with Chief of Custodial Services Crocco the following day when Gomes apparently intended to contest the negative performance evaluation report prepared by Supervisor Sanchez. On the following day, Gomes informed Sanchez that he would not meet with Crocco until such time as Felch would be available to accompany him. Following these events, Felch took the following actions:

Had a telephone conversation on August 20 with Richard Hughes regarding Gomes' second performance evaluation and the failure of CSUS to provide Gomes with certain documentation which had been attached to that report.

Attempted, with Gomes on August 21, to gain access to Gomes' personnel file to review the documents that were attached to his second probationary performance evaluation.

Attended a meeting on August 24 with Gomes, Williams, Sanchez and Crocco to discuss the unsatisfactory performance evaluation written by Sanchez.

Wrote a letter on August 25 to Dr. Johns complaining about her difficulty working with Mr. Hughes to resolve, among others, Gomes' problems.

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present grievances to the employer and have such grievances adjusted, without the intervention of the exclusive representative; . . .

Met with Hughes on August 28 and obtained his agreement to investigate certain charges against Gomes.

Had a telephone conversation with Hughes on September 1 when Hughes angrily informed her that Gomes was being terminated or he could voluntarily resign.

We find that the above-described conduct of Gomes and Felch constitutes a clear course of representation by CAUSE on behalf of Gomes within the meaning of both section 3565 and section 3567.

The Totality of the Evidence Does Not Support the Inference that Protected Activity Was a Motivating Factor

In order to make out a violation of subsection 3571(a), Charging Party must present evidence which is sufficient to raise the inference that Gomes' exercise of his right to be represented by CAUSE was a motivating factor in the University's decision to reject Gomes during his probationary period. Based upon our review of the evidentiary record, however, we find that Charging Party has failed to make the necessary showing.

Where a charging party presents evidence in an effort to prove its allegation that protected activity was a motivating factor in an employer's decision, the employer may, of course, respond in its case-in-chief by introducing evidence of its own in an attempt to rebut the inference that such motivation was a factor. If successful in this endeavor, then it is, of course, unnecessary for the employer to demonstrate that it would have made the same decision in the absence of the protected

activity. In the instant case, Respondent has successfully presented just such a defense.

#### Crocco's Actions

In its argument, Charging Party has sought to make much of the evidence showing that on the evening of August 15, 1979, Gomes informed Supervisor Sanchez of his desire to postpone the scheduled meeting with Crocco at least until such time as his CAUSE representative could be available to accompany him. There has been no showing, however, that this revelation of union representation to CSUS gave rise to an antagonistic response on the part of CSUS. The meeting did, in fact, take place nine days later, with Felch in attendance.<sup>10</sup> It is true that Crocco's memo to Landsness, which was the first official recommendation of outright termination, followed just two days after Gomes' revelation of union representation and postponement of the meeting, and even referred to that revelation and postponement. But without more, Crocco's reference to Gomes' refusal to meet has not been shown to be anything other than a reporting of the nonoccurrence of the

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<sup>10</sup>We disavow the hearing officer's finding that NLRB v. Weingarten (1975) 420 U.S. 251 [43 L.Ed.2d 171] establishes Gomes' right to union representation at the meeting with Crocco. Weingarten applies to a factual setting different from that herein. Assuming, however, arguendo, that he had a right to representation at the meeting, we find that he was granted such a meeting, and that any delay resulted from his union representative's schedule and was not occasioned by any reluctance on the part of CSUS to arrange and hold a meeting.

meeting, and does not support the inference that there was a causal connection between Gomes' refusal and Crocco's recommendation. The timing of Crocco's recommendation similarly fails to demonstrate a connection. Although we note that it came on the heels of Gomes' refusal to meet, it is far more important that it came on the very day that the evaluation and accompanying documentation reached Crocco. In sum, neither the text of Crocco's memo, nor its date, are inconsistent with a legitimate termination for cause.

#### Gomes' Job Performance

The record is replete with evidence showing that Gomes' job performance was, as his second performance evaluation report stated, "unacceptable." That second report lists Gomes' job performance as unacceptable for the reporting period in four categories of review and in need of improvement in two others. According to his first evaluation report and the related testimony by Sanchez, Gomes' performance for that period was also unsatisfactory. Thus, there is no documentary evidence in the record that Gomes' job performance was ever at a satisfactory level at any time in his employment with CSUS.

Gomes' various supervisors were unanimous in their negative opinions of Gomes' job performance. While it appears from the record that no supervisory employee of CSUS below the level of chief of custodial services had official authority to recommend termination, they made apparent their dissatisfaction

with Gomes' work. Lead Custodian Williams testified that Gomes appeared to be intoxicated three to four nights each week; he complained to Estioco about Gomes' drinking and wrote a memorandum expressing his opinion that Gomes was "not fit for work." Supervisor I Sanchez officially rated Gomes' job performance, after seven months of employment, as unacceptable and recommended that he not be granted permanent status. Supervisor II Estioco also recorded on paper extensive criticisms of Gomes' conduct and job performance. The record indicates that these supervisors lacked the authority to recommend the termination of probationary employees per se. However, in completing Gomes' second performance evaluation report, Sanchez entered exclusively negative ratings and had recommended against permanent status for Gomes. The evaluation form indicates that a recommendation regarding permanent status is to be made only if the form is being used for a final report. Thus, it appears that Sanchez went to the limits of his authority to effectively recommend that Gomes not be retained.

The hearing officer cites testimony indicating that other custodians, including supervisors Williams and Sanchez, had on occasion consumed liquor at the work place with Gomes. However, our review of that testimony indicates that such incidents were limited at most to two or three organized parties. Partaking of liquor at such occasional festive events

cannot remotely be equated with the regular and frequent intoxication which witnesses have attributed to Gomes.

By the very nature of a multi-layered supervisory hierarchy such as CSUS', managerial decisionmakers such as the chief of custodial services and higher officials have little direct contact with the laboring ranks. Thus, in matters such as this one, these officials necessarily must generally place heavy reliance on information and recommendations supplied by lower level supervisors who directly supervise rank and file employees. CAUSE has been unable to demonstrate why we should not conclude that the managerial decision to terminate Gomes resulted from nothing more than the above-related supervisory expressions of opinion. Importantly, every one of those opinions were expressed before Gomes initiated the identified course of protected activity on August 15 by contacting Kathy Felch (indeed, Gomes himself admitted that he had heard informally prior to August 15 that Sanchez was taking steps to have him terminated). In view of this fact those supervisory actions cannot be construed as a part of any retaliatory conduct taken in reprisal for CAUSE's representation of Gomes.

Hughes' Actions

Director of Personnel Hughes informed Felch on August 28 that he had made the decision to terminate Gomes. At that point he had reviewed: 1) the memos of Crocco and Landsness, both of which unequivocally recommended the rejection of Gomes;

and 2) the April and August performance evaluation reports, along with the memos of Williams and Estioco. This latter group of documents indicates to us, as it must have to Hughes, that Crocco and Landsness based their recommendations on appropriate criteria. In turn, the extensive documentation, itemized above, which Hughes reviewed prior to making his August 28 decision abundantly supports that decision. In sum, the record evidence fails to support any inference or suggestion that Gomes' termination was unlawfully motivated.

CAUSE would nevertheless have us find that as a result of the lawfully protected representation of Gomes by CAUSE, Hughes failed to reverse his August 28 decision and instead proceeded to issue his September 6 letter of termination to Gomes. We do not so find.

On August 28, after Hughes had informed Felch of his decision, Felch prepared a memorandum in which she took issue with some of the facts as they had been reported to Hughes by his subordinates and alleged possible alternative reasons for the negative evaluations Gomes had received. Upon reviewing this memorandum, Hughes agreed to investigate Felch's allegations. On September 1 Felch called Hughes, at which time Hughes revealed that he had learned of Felch's letter to the CSUS president and displayed obvious anger about that fact. He also indicated that his August 28 decision remained unchanged.

The record is silent as to Hughes' actions between his conversations with Felch on August 28 and September 1. In any event, the record is utterly without evidence which would suggest that the performance evaluation reports and the documentary commentary of Williams, Sanchez and Estioco did not, as alleged by Felch, accurately reflect the nature of Gomes' job performance. Charging Party has thus failed to show facts which would support the inference that Hughes' refusal to reverse his August 28 decision to terminate Gomes was motivated in any way by Felch's vigorous representational efforts on behalf of Gomes. We conclude therefore that CSUS' rejection of Gomes did not violate section 3571(a).

Denial of Access to Gomes' Personnel File

The hearing officer found that Hughes' refusal to allow Gomes and Felch access to Gomes' personnel file on the morning of August 21, 1979 was a denial to Gomes of his section 3567 right to present grievances to his employer through a representative of his own choosing and have such grievances adjusted, and was thus a violation of subsection 3571(a) (see proposed decision attached, at p. 35). While we here approve her conclusion that subsection 3571(a) protects a higher education employee's right to present grievances to her/his employer through a representative, we are not convinced that the facts as presented here support her finding that a violation of that section occurred.

The record reveals that Felch and Gomes gave no advance notice of their visit on August 21 to Hughes' office and that, upon their arrival, they found Hughes already engaged in a meeting. Hughes interrupted his meeting to deal with the visitors but, in response to their request for copies of documents in Gomes' personnel file, he said that he wished to discuss the matter with them first and that, in any event, he did not have time at that moment to accommodate their request in light of his meeting. He did offer to meet their request that same afternoon.

In our view, common standards of reasonableness dictate that Hughes should not be held to the burden of suspending an ongoing meeting in order to accommodate on the instant the demands of a surprise visitor. While the employee's right to access to her/his personnel file may not be conditioned upon the desire of the employer to first discuss the contents of the file, it is not at all clear from the record that this is what actually transpired here.

On the foregoing basis, we conclude that the above-discussed refusal of Hughes to furnish the requested documentation did not violate subsection 3571(a).

CSUS' Unilateral Change in Campus Access Rules

CAUSE excepts to the hearing officer's failure to find that CSUS' unilateral change in access policy violated

subsection 3571(b).<sup>11</sup> We find, contrary to the hearing officer, that HEERA does require that higher education employers provide nonexclusive representatives notice and an opportunity to meet and discuss projected changes in access policy, and that the failure of CSUS to provide such notice and opportunity herein violated subsection 3571(b) of the Act.

Prior to the effective date of HEERA, the employer-employee relationship in the state universities and colleges was governed by the George Brown Act, (Brown Act).<sup>12</sup> Under that legislation, covered employees enjoy 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." Section 3527. Under section 3529, that act defines the

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<sup>11</sup>Subsection 3571(b) provides as follows:

It shall be unlawful for the higher education employer to:

. . . . .

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

<sup>12</sup>The Brown Act is codified at Government Code section 3525 et seq. HEERA became effective July 1, 1979. Concurrent with HEERA's effective date, section 3526 of the Brown Act was amended to remove those employees covered by HEERA from coverage under the Brown Act.

scope of representation as including "all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment." Further, at section 3530, it provides that ". . . the state . . . shall meet and confer with representatives of employee organizations upon request," and shall consider their proposals prior to arriving at a determination of policy or course of action. Thus, CAUSE and its constituent employee members enjoyed important representational rights under the Brown Act, prior to EERA's effective date.<sup>13</sup> CSUS would now have us find that nonexclusive representatives lost all representational rights once HEERA superseded the Brown Act. We decline to so hold for the reasons set forth infra.

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<sup>13</sup>Interestingly, the facts of this case demonstrate that CSUS acknowledged an obligation akin to that set forth in the Brown Act when it discussed its access policy with Felch on July 11, 1979, after the effective date of HEERA. As noted above, CSUS promulgated its access regulations prior to HEERA's effective date and distributed them to the affected employee organizations, including CAUSE, on July 11, 1978, just after HEERA's effective date. Upon receipt of those regulations, as noted, supra, Felch protested the failure of CSUS to meet and confer with CAUSE prior to issuance of the access regulations and expressed her dissatisfaction with the provisions of the regulations. In response to her complaints, Hughes informed her that the check-in procedure would not be enforced. Thereafter, Felch and representatives of other employee organizations visited the campus with no prior check-in, pursuant to CSUS' announced policy, until the unilateral change in policy which occurred on September 20, 1979.

The partial dissent of Member Tovar implies that, because HEERA contains an express independent check on reasonableness of access regulations at section 3568,<sup>14</sup> it would be superfluous to require CSUS to meet and discuss such regulations with nonexclusive representatives and would burden CSUS with "an unrewarded bureaucratic expense." The circumstances of this case amply demonstrate the potential value of prospective meeting and discussion regarding changes in access regulations. As noted above, CSUS discussed its access regulations with CAUSE when they were initially promulgated in July 1978 and decided it need not enforce the check-in requirement in those regulations. When the change in question was promulgated unilaterally on September 20, 1979, it in part motivated the filing of the instant charge. The attendant expense of money and time to defend this aspect of the charge might have been averted had CSUS discussed the matter with CAUSE prior to making the policy change. It can thus be seen that an

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<sup>14</sup>Section 3568 states:

Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act.

independent check on reasonableness of access regulations does not render superfluous a requirement that an opportunity for meeting and discussion of such matters be provided.

Access is an issue of significant concern to employee organizations and employees, especially when, as here, they are in the process of organizing for the first round of elections to establish whether there shall be an exclusive representative for the newly-established HEERA units. Changes in the employer's access policy are of vital concern to nonexclusive representatives, as their effectiveness in reaching employees, particularly during this crucial period, could determine their very viability as employee organizations in the units in question.

Unlike the State Employer-Employee Relations Act (hereafter SEERA) and the Educational Employment Relations Act (hereafter EERA),<sup>15</sup> HEERA does not specifically establish representational rights for nonexclusive representatives.<sup>16</sup>

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<sup>15</sup>SEERA is codified at Government Code section 3512 et seq. EERA is codified at Government Code sections 3540 et seq.

<sup>16</sup>Subsection 3515.5 of SEERA provides as follows:

Employee organizations shall have the right to represent their members in their employment relations with the state, except that once an employee organization is recognized as the exclusive representative of an appropriate unit, the recognized employee organization is the only

However, the language of HEERA and the overall statutory scheme set forth therein provide a clear indication that the Legislature did not intend to consign nonexclusive representatives to a state of powerless limbo when it enacted HEERA.<sup>17</sup> Nonexclusive representatives enjoyed

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organization that may represent that unit in employment relations with the state. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership. Nothing in this section shall prohibit any employee from appearing in his own behalf in his employment relations with the state.

Subsection 3543.1(a) of EERA provides as follows:

(a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

. . . . .

<sup>17</sup>The fact that a provision of general application contained in EERA or SEERA is not mirrored by a similar or identical provision in HEERA does not mean that the policy embodied by such provision is not applicable to HEERA cases. Thus, for example, we note that HEERA lacks the statutory provisions regarding deferral to arbitration contained at

representational rights under the Brown Act. Examination of HEERA's express provisions indicates a legislative intent to preserve representation rights for employees and employee organizations until such time as an exclusive representative is selected through the election process.

Among the express legislative purposes of the Act, set forth at subsection 3560(e), is to provide:

. . . an atmosphere which permits the fullest participation by employees in the 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 such organizations as their exclusive representative for the purpose of meeting and conferring.

While the Legislature desired to establish a procedure which would allow the option of selection of exclusive representatives, the above language makes it clear that designation of nonexclusive representatives also was

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subsection 3541.5(a) of EERA. Despite the lack of this express language, the practice set forth in that subsection has been applied to the higher education setting.

contemplated by the Legislature as an integral part of the statutory scheme.<sup>18</sup>

Section 3565, which sets forth the rights of higher education employees under HEERA, states that they

. . . shall have 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 and for the purpose of meeting and conferring. Higher education employees shall also have the right to refuse to join employee organizations or to participate in the activities of these organizations subject to the organizational security provision permissible under this chapter. [Emphasis added.]

Under the Act, only an exclusive representative can "meet and confer" with the employer. There is no such restriction on other representational functions. The fact that the statutory language noted above separates meeting and conferring from other representational functions is an indication that the Legislature intended to enable employees to be represented by nonexclusive representatives prior to selection of an exclusive representative.

The very definition of the term "employee organization," at subsection 3562(g), further indicates that the Legislature

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<sup>18</sup>It would be anomalous to conclude that while establishing the right of employees to opt for "no representative" in elections under the statute, the Legislature intended that employees making such a choice would be voting to leave themselves with no representational rights whatsoever.

contemplated that nonexclusive representatives would "deal with" the higher education employer regarding employment matters.<sup>19</sup> Had the Legislature intended that only exclusive representatives "deal with" higher education employers, it would have limited the definition accordingly, rather than including within that definition ". . . any organization of any kind . . .," a designation which clearly includes nonexclusive representatives.

The thrust of HEERA was to grant significant new collective negotiation rights to higher education employees. As we stated in Professional Engineers in California Government (3/19/80) PERB Decision No. 118-S, (hereafter PECG) regarding SEERA,

The SEERA granted significant new collective negotiation rights to state employees. If we were to adopt respondent's argument that nonexclusive representatives have no right to meet and discuss wages with the state employer, employees would be left with fewer rights than they had before SEERA. It would be anomalous for the Legislature in enacting a new law which generally expands the rights of employees, to strip employees in units with no exclusive representative of any voice in a matter as basic as wages.

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<sup>19</sup>Subsection 3562(g) provides, in pertinent part, as follows:

"Employee organization" means any organization of any kind in which higher education employees participate and which exists for the purpose, in whole or in part, of dealing with higher education employers concerning grievances, labor disputes, wages, hours, and other terms and conditions of employment of employees . . . .

While the matter at issue herein is access, not wages, and somewhat different statutory language is involved, the basic rationale expressed in PECG is applicable here. Access rights are fundamental to the fulfillment of the representational function of the nonexclusive representative as embodied in HEERA's statutory scheme.

In accord with the foregoing, we find that CSUS was not privileged to change its access policy without first affording notice of the contemplated change, and a reasonable opportunity to discuss it, to affected employee organizations. This does not mean that the obligation imposed upon higher education employers to meet with nonexclusive representatives is the same as that imposed under HEERA with regard to an exclusive representative. As we stated in PECG, supra, the parameters of this obligation will be defined on a case-by-case basis under the rationale of this decision. We do hold that CSUS was required under HEERA to afford notice and an opportunity for discussion to CAUSE and other affected organizations prior to changing its policy on a matter as crucial as access. Thus, we reverse the hearing officer and find that CSUS, by unilaterally altering its access policy and practice, violated subsection 3571(b).

#### Conclusions Not Excepted To

No exceptions have been filed to the hearing officer's conclusion that CSUS violated subsection 3571(b) and,

concurrently, subsection 3571(a) by subjecting CAUSE's section 3568 right of access to unreasonable regulation. In light of the absence of such exceptions, we adopt the hearing officer's findings.

#### REMEDY

The Board affirms the hearing officer's proposed remedy with respect to Respondent's violation of subsections 3571(b) and 3571(a) by subjecting Charging Party's section 3568 right to access to discriminatory and unreasonable regulation.<sup>20</sup> In light of our discussion and conclusions of law reached above, however, the remaining aspects of the hearing officer's proposed remedy are not adopted by the Board.

Further, inasmuch as we find that CSUS violated subsection 3571(b) by failing to afford notice and an opportunity to discuss to CAUSE prior to changing its access policy, the employer will be ordered to cease and desist from that practice.

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<sup>20</sup>The Board's remedial authority is found in section 3563.3, which provides:

The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including, but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, it is hereby ORDERED that the California State University, Sacramento and its representatives shall:

A. CEASE AND DESIST FROM:

1. Promulgating, applying or enforcing access regulations in a manner so as to unreasonably prevent employee organization representatives from having access to the campus to engage in organizational activities.
2. Promulgating, applying or enforcing access regulations in a discriminatory manner, or otherwise subjecting employee organizations to unequal treatment.
3. Interfering with the rights of CSUS employees to have access to or participate in employee organization activities.
4. Adopting any change in access policy without first affording affected employee organizations notice and an opportunity to discuss the proposed change.

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

1. Post copies of the attached Notice marked "Appendix" in conspicuous places at all campus locations where notices to employees are customarily placed for 20 consecutive workdays. Copies of this Notice, after being duly signed by the authorized agent of the District, shall be posted

within five workdays of the date of service of this Decision. Reasonable steps should be taken to ensure that said notices are not reduced in size, altered, defaced or covered by any other material.

2. Notify the Sacramento regional director of the Public Employment Relations Board in writing within 30 workdays from the receipt of this decision, of what steps the District has taken to comply herewith.

C. The charges that Respondent violated subsection 3571(a) by rejecting Thomas Gomes during his probationary period, and further violated that section by denying Thomas Gomes access to his personnel file, are DISMISSED.

This order shall become effective immediately upon service of a true copy thereof on the California State University, Sacramento.

John W. Jaeger, Member

Barbara D. Moore, Member

Member Tovar's dissent begins at page 36.

Member Tovar, dissenting in part:

My difference with the majority is limited to their conclusion that CSUS, by changing its access policy without first extending notice and an opportunity to discuss to CAUSE, violated subsection 3571(b). I would instead sustain the hearing officer as to both rationale and conclusion.

The majority admits that HEERA does not expressly provide that higher education employers are under a legal duty to extend advance notice and an opportunity to meet and discuss to nonexclusive representatives prior to effecting certain policy changes. They assert, however, that the "overall statutory scheme" indicates that the Legislature intended that such a duty should exist. In support of this assertion they cite several sections of HEERA, all of which in a very general way express the intention that employees shall have the right to be represented by employee organizations. The cited sections amply demonstrate that the function of representing employees is not limited solely to exclusive representatives; and with this much I have no quarrel.

The majority does not stop here, however. Having cited sections which establish HEERA's statutory guarantee to employees of their right to be represented by employee organizations, the claim is then set forth that this shows that the legislature also intended to impose upon employers the mandate that, notwithstanding the majority's own admission that

only exclusive representatives are authorized under HEERA to meet and negotiate with employers the terms and conditions of employment, nonexclusive representatives must be afforded notice and an opportunity to meet and discuss in advance of certain policy changes (the majority declines to reveal just what sorts of policy changes trigger this duty). I find that I cannot accompany the majority in an analytical leap of such magnitude.

The majority's discussion of this issue begins with a review of the George Brown Act. Under that act, employee organizations may represent covered employees, and may meet and confer with covered employers regarding terms and conditions of employment. But no provision therein is made for the recognition of any one employee organization to the exclusion of any other. Thus, multiples of employee organizations may, and do, share in the function of representing employee interests in the process of setting terms and conditions of employment. A foundational part of the Brown Act scheme of representation is that employers must afford employee organizations notice and an opportunity to meet and discuss prior to taking action to set terms and conditions of employment.

The unspoken implication of the majority's review of the Brown Act is that the employer's "meet and discuss" duty under that act should carry over to the HEERA setting. The problem

with this idea is that, as the majority notes, albeit in a footnote, the Legislature expressly amended the Brown Act, concurrent with the effective date of HEERA (July 1, 1979) to exclude those employees covered by HEERA from coverage under the Brown Act. With that amendment, the legislative directive that higher education employers must provide nonexclusive representatives with advance notice and opportunity for meeting and discussion, being purely a creature of statute, ceased to exist as it applied to employees covered by HEERA. In the face of the express elimination of that statutory duty, it seems to me that if the Legislature intended that the duty should be resurrected in HEERA, the legislators would have chosen to express this intention in a somewhat more obvious manner than to weave it by subtly suggestive threads into the fabric of the "overall statutory scheme," as the majority suggests they did. It would appear more likely that it is the majority's analysis that is constructed wholly of cloth, rather than the Legislature's putative expression of intent.

Certainly the HEERA makes plain that employee organizations having the status of nonexclusive representatives are free to function in representative capacities--they may represent employee grievants, present expressions of employee opinion or position on matters within the scope of representation, lead campaigns in a lawful manner for changes in terms and conditions of employment, etc. But I cannot agree that this

statutory scheme inexorably requires the conclusion that employers have the duty to honor moribund Brown Act obligations.

Neither can I accept the majority's assertion that HEERA's purpose was to expand employee rights beyond the preceding Brown Act and that, therefore, any reading of HEERA which would find any reduction of employee rights whatsoever would be inconsistent with the Act. In enacting HEERA, the Legislature was giving expression to a perceived need to provide the people of California with a labor relations program tailored with more precision to the needs of the higher education sphere. Thus the Brown Act was amended, and a new and different scheme of labor relations--the HEERA--was substituted in its place. The HEERA differs from the Brown Act in a number of respects, but of primary importance was the introduction of the exclusive representative concept to California higher education. In any event, while an effect of HEERA may be to work, for the most part, an expansion of employee rights, I am not convinced that such expansion was the ultimate or directly intended purpose of HEERA's enactment. From this viewpoint, there is no reason to view an isolated and limited reduction of a previously existing employee right as being inconsistent with the purpose of the Act. More to the point is the question of whether a given change would be consistent with the newly imposed program of exclusive representation, for it is the introduction of this

program which I see as the real "thrust" of HEERA. My answer to this question, I think, is plain from the foregoing.

Finally, even were I to endorse the notion that there may be certain situations in which a duty of notice and discussion may properly be imposed upon a higher education employer (a proposition to which I remain open), I would not find the instant case, involving the right to access, to be such.

The right to access is already afforded extensive protection by section 3568, which establishes access to the work place as a right of all employee organizations, subject only to reasonable regulations. The majority claims that the imposition of an obligation to meet and discuss regarding access regulations would result in an additional safeguard of the access right. The instant case is pointed to as an example of the failure of section 3568 to sufficiently secure access rights.

Again, the majority does not persuade me. The reason section 3568 failed to perfectly secure Charging Party's access rights is that it was violated, as we unanimously found, and therefore, as the majority notes, the consequent expenditure of effort and money was engendered. Yet is not an obligation to meet and discuss equally capable of violation? No matter what rules we impose to protect a right, violations, and the consequent expense of enforcement, remain possible.

Even with the imposition of the obligation to afford notice and opportunity to meet and confer, an employer may lawfully meet that obligation, and yet go forward and implement access policies which unreasonably restrict the right to access. The only case in which the meet and discuss obligation could conceivably be of value would be in the rare instance when a well-intentioned employer unwittingly formulated access policies which unreasonably restricted access. Even in this situation, an after-the-fact communication from an affected employee organization to the employer would quickly remedy the matter. Because of the existence of section 3568, then, the subject of access is probably less in need of the protections afforded by the imposition of a meet and discuss requirement than any other subject that comes to mind. Indeed, the majority is here imposing a virtually unrewarded bureaucratic expense to the operating budgets of higher education employers.

In reaching this conclusion, it is not my purpose to limit the rights of any party. Indeed, I join in the majority's concern for the representational rights of employees in the absence of an exclusive representative. However, I feel constrained to interpret the intent of the Legislature based upon the language of the Act.

Irene Tovar, Member

APPENDIX

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

After a hearing at which all parties had the right to participate, it has been found that the California State University, Sacramento violated the Higher Education Employer-Employee Relations Act by subjecting College and University Service Employees/Service Employees International Union to unreasonable regulation of its right to access to the CSUS campus, which had the further effect of interfering with the right of CSUS employees to participate in activities of College and University Service Employees/Service Employees International Union. As a result of this conduct, we have been ordered to post this notice and we will abide by the following:

WE WILL NOT:

1. promulgate, apply, or enforce any access regulations in a manner so as to unreasonably prevent employee organization representatives from having access to the campus to engage in organizational activities;
2. promulgate, apply or enforce access regulations in a discriminatory manner, or otherwise subject employee organizations to unequal treatment.
3. interfere with the right of CSUS employees to have access to or participate in employee organization activities.
4. Adopt any change in access policy without first affording affected employee organizations notice and an opportunity to meet and discuss the proposed change.

CALIFORNIA STATE UNIVERSITY,  
SACRAMENTO

\_\_\_\_\_  
Authorized Agent of the University  
Dated:

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

PUBLIC EMPLOYMENT RELATIONS BOARD  
OF THE STATE OF CALIFORNIA



COLLEGE AND UNIVERSITY SERVICE	)	
EMPLOYEES/SERVICE EMPLOYEES	)	
INTERNATIONAL UNION (CAUSE/SEIU),	)	
AFL-CIO,	)	
	)	Unfair Practice
Charging Party,	)	Case No. LA-CE-5-H
	)	
v.	)	
	)	
CALIFORNIA STATE UNIVERSITY,	)	<u>PROPOSED DECISION</u>
SACRAMENTO,	)	
	)	(6/30/80)
	)	
Respondent.	)	
	)	

Appearances: Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg and Roger) for College and University Service Employees/Service Employees International Union (CAUSE/SEIU), AFL-CIO); Jaffe D. Dickerson, Attorney, for California State University, Sacramento.

Before W. Jean Thomas, Hearing Officer

PROCEDURAL HISTORY

This case arises as a result of the alleged wrongful conduct of the employer in terminating an employee during the probationary period because of his representation by an employee organization and subsequently adopting and imposing a separate campus access policy upon that employee organization.

On September 10, 1979, the unfair practice charge in this matter was filed by College and University Employees/Service Employees International Union, AFL-CIO, (hereafter CAUSE/SEIU or charging party) against California State University, Sacramento (hereafter CSUS or respondent), alleging a violation

of Government Code sections 3565, 3568 and 3571(a), (b), and (d) of the Higher Education Employer-Employee Relations Act (hereafter HEERA or Act).<sup>1</sup>

The substance of the amended charge is as follows: (1) CSUS violated sections 3565 and 3571(a) by terminating its employee Thomas Gomes during his probationary period in retaliation for Gomes' membership in and representation by CAUSE/SEIU regarding his work performance, and (2) CSUS also violated sections 3568 and 3571(b) and (d) by adopting an unreasonable, illegal and discriminatory campus access policy which required a CAUSE/SEIU representative to give 24-hour notice prior to visiting or conducting organizational activities at CSUS.

CSUS filed its answer on October 3, 1979, denying any violations of sections 3565, 3571(a), (b) or (d).

On October 4, 1979, an informal conference failed to resolve the matter. Subsequently, on October 12, 1979, the charge was amended to add the imposition of the campus access policy requiring CAUSE/SEIU to give 24-hours' prior notice as a violation of section 3568. CSUS answered the amended charge on October 19, 1979, denying a violation of section 3568.

On October 26, 1979, respondent filed a motion to dismiss, arguing that: (1) the disputed 24-hour prior notice policy had

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<sup>1</sup>The HEERA is codified at Government Code section 3560 et seq. All statutory references are to the Government Code unless otherwise specified.

been superseded by a supplemental CSUS access regulation issued to all employee organizations on October 24, 1979, therefore, the CAUSE/SEIU charge as to this issue was moot; and

(2) charging party's claim regarding the rejection of Mr. Gomes during probation failed to state a violation of HEERA.

On November 1, 1979, charging party filed a second amendment<sup>2</sup> to the charge alleging that the respondent's unfair practices stated in the original and the first amended charges are continuing violations constituting denial of rights guaranteed to respondent's employees and CAUSE/SEIU in sections 3565 and 3568.

Charging party filed a response to the motion to dismiss on November 6, 1979. On that same date PERB Hearing Officer Diane Spencer, issued an order denying the motion to dismiss.

The formal hearing in this matter was conducted before the undersigned in Sacramento on November 13 and 14, 1979. At the start of the hearing, the charging party clarified that the charges do not include any allegations of discrimination by the respondent against Mr. Willie Allen, another CSUS employee.<sup>3</sup>

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<sup>2</sup>This document was originally entitled "First Amended Unfair Practice Charge." At the hearing the parties stipulated that it would be referred to as the "Second Amended Unfair Practice Charge."

<sup>3</sup>See Charge 2(b) of the Second Amended Unfair Practice charge. Also CAUSE/SEIU Exhibit 1 includes a detailed account of problems related to Mr. Allen.

Post-hearing briefs were filed, and the case was submitted on January 21, 1980.

Following submission of the case, this hearing officer reopened the record solely to admit additional documents into evidence as Public Employment Relations Board (hereafter PERB) exhibits.<sup>4</sup>

#### ISSUES

1. Whether, in rejecting Thomas Gomes during his probationary period, the respondent did so because of Gomes' exercise of representational rights guaranteed by sections 3565 and 3567; and, in doing so, violated section 3571(a)?

2. Whether the adoption and application of an access policy requiring an employee organization to give 24-hours' notice prior to engaging in any organizational activity on the CSUS campus is a "reasonable regulation" within the terms of section 3568?

3. If not, did the Respondent, in applying the policy:

a. Violate section 3571(b) by denying CAUSE/SEIU rights guaranteed to it by the HEERA?

b. Violate section 3571(d) by dominating or interfering with the administration of the organization?

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<sup>4</sup>Three documents were admitted, without objections, as PERB Exhibits 1, 2, and 3.

FINDING OF FACT

CSUS is 1 of 19 higher education campuses in the California State University and Colleges system.<sup>5</sup> At the hearing, the parties stipulated that CSUS is a higher education employer and CAUSE/SEIU is an employee organization within the meaning of HEERA.

Gomes' Employment History with CSUS<sup>6</sup>

On December 14, 1978, Mr. Gomes was hired to work as a custodian at CSUS. His regular working hours were on the swing shift from 5:00 p.m. until 1:30 a.m., with a lunch break at 9:00 p.m. During the first five months of employment, Gomes worked under the direct supervision of Joseph (Tony) Sanchez, a custodian supervisor I. During the period of time from January to June 1979, Sanchez had supervisory responsibility for nine separate buildings on CSUS campus. One of those was business administration, where Gomes was assigned.

In overseeing the work of the custodians, it is the practice of the custodial supervisors to rotate to each custodian during the course of the shift to inspect the work performed.

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<sup>5</sup>Education Code section 89001.

<sup>6</sup>The record in this matter contains conflicting testimony between Gomes and Joseph (Tony) Sanchez who supervised Gomes during a substantial period of his employment. Unless specifically stated otherwise, conflicts are left unresolved, since, in the hearing officer's opinion, the testimony is not crucial to the decision, and therefore, it is not relied upon.

The probationary period for non-academic employees, which includes custodians, is one year.<sup>7</sup> On April 11, 1979, Mr. Gomes received his first probationary performance evaluation which was completed and signed by Mr. Sanchez as the rater. The report covered the period from December 1978 to March 1979. This report reflected standard ratings in four of the six categories marked. Two categories were marked improvement needed in work habits and personal fitness, commenting on the use of sick leave and the need to "accumulate some sick credits" and organize the work. No rating was done on the quantity or quality of work performed. The overall rating was standard, noting that Gomes was "doing an average job."

During the first three months of employment, Gomes was absent on sick leave approximately once a month. Although the organization and quality of Gomes' work was regarded by Mr. Sanchez as generally substandard,<sup>8</sup> no written warnings, other than the comments in the performance report, were given because Sanchez considered Mr. Gomes to be in training during this period.

Sanchez discussed the performance report with Gomes, however, his performance during the next few months did not

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<sup>7</sup>California Administrative Code, title 5, sections 89531 and 89533.

improve. Instead, it became more unsatisfactory. Sanchez described as one problem, Gomes' consistent failure to stay in his work area during working hours. He would disappear and Sanchez would be unable to locate him.

Other problems centered on Gomes' drinking alcoholic beverages and alleged smoking of marijuana on the campus during working hours. Mr. Sanchez was aware that Gomes had consumed liquor while working, but denied ever actually seeing Gomes drink alcoholic beverages while working.

On at least two separate occasions, between April 15 and August 16, Sanchez personally observed Gomes on the job, staggering and appearing to be under the influence of some substance--whether alcohol and/or drugs. The first incident involved an encounter outside an employee food service area called the "Coin Cafe" while Gomes was on break. Sanchez confronted Gomes about his "drinking or smoking" and counseled him to "try to knock it off." In addition, Gomes was reminded that he was still on probation.

The second instance occurred approximately a month later when Gomes was seen after the lunch break. Sanchez again spoke to Gomes about his "drinking or smoking" and advised him "to

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<sup>8</sup>The standard for Gomes' performance was based on the job description for this position.

straighten up."<sup>9</sup> Sanchez prepared no written warning nor recommendation for suspension in either instance.

Although Mr. Sanchez was aware that other custodial employees had consumed alcoholic beverages on the job during the period from January to August 1979, he denied talking to or admonishing any of them. Between December 1978 and May 1979, at least two parties were given by custodial employees on the campus during work time. Alcoholic beverages were consumed by some present. Mr. Gomes was present at both parties. He drank alcoholic beverages at both and, by his own admission, became inebriated at the May party. Mr. Sanchez was present at both parties and drank alcoholic beverages with Mr. Gomes.<sup>10</sup>

During June 1979, Gomes was assigned to work in a different area under Don Maciel, another custodian supervisor I. Because Maciel was on vacation at the time of the transfer, the first four to six weeks Gomes was assigned to work under the direct supervision of Ronnie Williams, lead custodian for the crew.

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<sup>9</sup>Gomes denied that Sanchez ever spoke to him or warned him about drinking on the job, except for the instance at the Coin Cafe. Although Sanchez displayed a poor memory for details about instances when he allegedly warned Gomes, I credit Sanchez's version over Gomes whose testimony about not receiving verbal warnings, I considered unreliable.

<sup>10</sup>Sanchez denied any knowledge of parties being held by or for custodial employees, or any drinking on the job by himself or other custodial supervisors. Gomes' testimony corroborated, in part, by Ronnie Williams, a witness for the respondent, was much more forthright and credible. I credit the testimony of Gomes over that of Sanchez.

Williams found Gomes' work to be generally satisfactory when Gomes was not inebriated. However, approximately three nights a week, after returning from his lunch break, Gomes would appear to be under the influence of alcohol or some other substance. His gait was unsteady or he would stagger about. Williams also smelled alcohol on his breath. While in this state, Gomes would sometimes make offensive comments to and about other custodians. On occasion, he failed to complete his assignment which would then be reassigned to a co-worker for completion.

On August 9 around 9:30 p.m., Williams and another custodian, Santiago Rosa Rosa, were going for supplies when they encountered Gomes who followed them to the supply room. After the three of them left the supply room and were waiting for the elevator, Gomes suddenly started pulling on Mr. Rosa Rosa, staggering, and speaking incoherently to Williams.

That same night, Williams reported the incident to Gene Estioco, a custodian supervisor II who is Williams' second level supervisor. Estioco directed Williams to prepare a written report of the incident. Williams prepared a memorandum, dated August 13, 1979, to Estioco which Estioco typed, Williams signed, and Estioco gave to Ben Crocco, chief of custodial services. Neither Williams nor Estioco showed the memorandum to Gomes; however, Estioco later discussed its

contents with Gomes. This memorandum and a memorandum from Estioco to Crocco, dated August 14<sup>11</sup> were attached to a second evaluation report on Gomes after he signed it on August 14, 1979.

Williams denied any knowledge of Gomes' membership in CAUSE/SEIU at the time Williams prepared the August 13 memo.

Because Williams felt that he could not handle Mr. Gomes, Gomes was then assigned to work directly under the supervision of Mr. Estioco. Estioco directly supervised Gomes until Gomes was terminated on September 21, 1979.

Other than the memoranda discussed above, neither Williams nor Estioco ever issued a written warning to Gomes about deficiencies in or problems with his performance.

On August 14, 1979, Gomes received his second probationary performance evaluation report covering the period from April to June 1979. This report was also prepared by Sanchez who had directly supervised Gomes until the end of May. The rating in four categories was unacceptable and improvement needed in two categories. The overall rating was unacceptable, with no recommendation for merit salary increase or permanent status. Each area checked contained additional comments indicating deficiencies in performance. No actual rating was made on either of the factors quality or quantity of work. One

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<sup>11</sup>Estioco's memorandum related several incidents and complaints about Gomes' conduct on the job during an undefined period of time.

comment stated "I don't feel you are maintaining appropriate standards of efficiency and should be appropriately warned."<sup>12</sup>

The usual practice in preparing performance reports during probation is for the rater to give the report to the custodial supervisor II who reviews it and forwards it to the chief of custodial services. As the reviewing officer, the chief of custodial services also signs the report and forwards it to the director of plant operations, Gordon Landsness, who then forwards it to Richard Hughes, director of personnel.

Sanchez discussed the report with Gomes who objected to the entire evaluation as unfair. Consequently, Gomes requested to meet with the reviewing officer, in this case, Ben Crocco.

The day following his meeting with Sanchez, Gomes was scheduled to meet with Mr. Crocco. On the day of the meeting, Gomes informed Sanchez that he (Gomes) would not meet with Crocco and Sanchez unless Gomes' union representative was present.

There is conflicting evidence in the record about a meeting between Gomes and Crocco on August 15.<sup>13</sup> I find that no meeting was held with Gomes on that date.

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<sup>12</sup>Verbatim excerpt from CSUS Exhibit 4.

<sup>13</sup>Gomes testified that he did not meet with Crocco on August 15. Crocco signed the second performance evaluation form on August 15, stating that he had discussed the report with Gomes on that date. Since Gomes' testimony was unrefuted, it is credited over the documentary evidence (CSUS Exhibit 4).

In a memorandum from Crocco to Gordon Landsness, dated August 17, Crocco made the following recommendation:

I have requested Tom Gomes, Custodian, and Tony Sanchez, Supervisor, to come to my office to discuss Mr. Gomes' performance report. Mr. Gomes stated he will not come in unless represented by his union.

I have reviewed all of the documentation on Mr. Gomes and I recommend he be terminated from his position as custodian. He is a probationary employee at this time.

In another memorandum from Landsness to Richard Hughes, director of personnel, also dated August 17, Landsness stated:

I recommend that Thomas Gomes by [sic] terminated as soon as practical from his probationary period as a custodian. The attached documentation on Mr. Gomes indicates without a doubt that he would not develop into a good State employee.

On August 24 Mr. Gomes, Kathy Felch, the CAUSE/SEIU representative, Crocco, Estioco and Sanchez had a meeting about the second performance evaluation. Felch requested that Crocco modify the performance report to reflect Gomes' true work performance, destroy the attached memos from Williams and Estioco, and withdraw his own recommendation for Gomes' termination. Crocco refused to make any changes and told Felch to file a grievance.

#### The Termination of Gomes

Following the meeting between Gomes and Sanchez on August 14 to discuss the second performance report, Ms. Felch contacted Mr. Hughes on August 20 to object to the denial to

Gomes of access to the two documents that were attached to the second performance report after Gomes signed it. Hughes investigated her complaint and verified that the report submitted to him had letters attached to it. Felch requested copies of the documents and rescheduling of the meeting with Crocco, Gomes and Felch.

On August 21 Gomes and Felch went to the CSUS personnel office to review the documents discussed above. Hughes refused to permit them access to Gomes' file, stating that he could not give them the documents until he (Hughes) had first talked with them. When they arrived, Hughes was in a meeting and stated that he was too busy to see them. He suggested that they make an appointment and return later that day or the next day. However, Felch demanded to see the documents before discussing them with Hughes. But, Hughes did not permit them access to Gomes' file.

Hughes did direct Crocco to reschedule a meeting with Gomes and Felch which was held on August 24, 1979. At that meeting, which was described above, Crocco gave Felch copies of the memos written by Crocco and Landsness recommending Gomes' termination.<sup>14</sup>

The next day Ms. Felch wrote a letter, dated August 25, to Dr. Lloyd Johns, president of CSUS, to complain about the

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<sup>14</sup>See pp. 12 and 13 supra, for the texts of both memoranda.

problems she was experiencing in working with Richard Hughes to resolve two employee grievances at CSUS. One grievance concerned Thomas Gomes. Felch did not send a copy of the letter to Hughes, nor did she inform him that she had written it.<sup>15</sup>

On August 28 Hughes called Felch to inform her that Gomes was going to be rejected during his probationary period. Hughes offered Gomes an opportunity to voluntarily resign in lieu of rejection; however Gomes later refused. Felch requested to meet with Hughes to discuss procedural and substantive problems with the Gomes case. Hughes agreed to meet. That day Felch prepared and presented a memorandum to Hughes outlining the problems regarding Gomes' rejection as she saw them.<sup>16</sup> At the conclusion of the meeting between the two, Hughes agreed to investigate the charges against Gomes and contact Felch within two days.

When Felch did not hear from Hughes as promised, she telephoned him four days later. Her testimony about their conversation is as follows:

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<sup>15</sup>The letter stated that complaints about Gomes included drunkenness, sexual molestation of a co-worker, excessive absenteeism, poor work habits and revving his motorcycle in the parking lot. It also alleged that Gomes believed the actual reason for his dismissal was his refusal of homosexual advances by a lead custodian who was Gomes' supervisor at the time. (CAUSE Exhibit 1).

<sup>16</sup>The problems listed are essentially the same ones outlined in Felch's letter to Dr. Johns referenced above.

Q. (Mr. Bezemek) What did Mr. Hughes say to you?

A. (Ms. Felch) Mr. Hughes said that he was going to fire Tom Gomes.

Q. What else was said during the conversation?

A. He informed me that next time that I write to the president regarding his performance or anything to do with him that I should send him a copy of the letter.

Q. What else did he say?

A. He said that he was going to, he, he was very angry about the letter and that he was going to be very, very difficult to deal with in the future, that he was going to begin enforcing the rules against the Union on the campus.

Q. Did he say what rules?

A. No, he did not.

Q. Did he say what letter he was referring to?

A. I can't recall if he identified the letter, but I, it was clear in my mind that he was discussing, or talking about the letter to Johns.<sup>17</sup>

Subsequently Hughes notified Gomes by letter, dated September 6, of his rejection during the probationary period, effective September 21.

On September 21, 1979, Gomes' employment at CSUS was terminated.

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<sup>17</sup>Excerpt of Felch's unrefuted testimony on direct examination by counsel for charging party. Observing this witness, on the whole, I found her testimony regarding Hughes to be credible.

### Gomes Union Activity and Representation

CAUSE/SEIU began organizing and representing various classes of non-academic employees, including custodians, on the CSUS campus in 1978.

Gomes joined CAUSE/SEIU February 14, 1979. There is no evidence that Gomes was ever an active member of the union. On June 29, 1979, Gene Estioco noticed that Gomes was missing from his work area for approximately one and a half hours. When Gomes returned, Estioco noticed that Gomes appeared inebriated and confronted him about the use of alcohol on the job and leaving his area without permission. In response, Gomes told Estioco that he (Gomes) and another custodian had gone to a CAUSE/SEIU meeting and caused a disturbance.

Estioco, Sanchez and Williams all denied any knowledge of Gomes' union membership or activity in CAUSE/SEIU until Gomes refused to meet with Crocco.

Kathy Felch was unaware of Gomes' membership in CAUSE/SEIU until she was contacted in August 1979 by the CSUS union steward and Gomes himself about Gomes' problems. The only known representation of Gomes by CAUSE/SEIU began in August 1979.

### CSUS Employee Organization Campus Access Regulations

In March 1979, the California State University and Colleges (hereafter CSUC) Board of Trustees amended title 5 of the

California Administrative Code to adopt systemwide access regulations for employee organizations.<sup>18</sup>

As part of the aforementioned amendment, individual campuses were required to develop supplemental regulations which would apply to the local campus. On June 18, 1979, CSUS issued copies of its access regulations entitled "Supplemental Regulations Concerning Access of Employee Organizations" to all university employees. Copies of the same regulations were distributed to employee organizations on July 11, 1979.

Those regulations, in pertinent part, provided for the following:

Referring to Section 43704 (Representatives) of Title 5 as amended, the following supplemental regulations shall apply to the CSU, Sacramento campus:

1. Employee organization officers and representatives who are not employees of the campus and who desire to carry on organizational activities on the campus must notify the President and the Director of Personnel in writing of the names of the campus visitor(s), the organization represented, the day and time of the intended visit, and the area to be visited. Normally, this written notice of intent shall be received by the President and the Director of Personnel no less than five (5) working days prior to arrival. If such advance notice is not possible, then the President and the Director of Personnel shall be telephoned as soon as possible before the intended visit.

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<sup>18</sup>California Administrative Code, title 5, sections 43708 through 43711.

Ms. Felch, on behalf of CAUSE/SEIU, objected both to the chancellor's office and to Richard Hughes about the failure of CSUS to meet and confer with CAUSE/SEIU prior to issuing the supplemental regulations. In addition, she objected to the "check-in procedure" required by the regulations.

Consequently, Hughes informed Felch that the check-in procedure would not be enforced on the campus and not to worry about it. Therefore, from the period of July 11 to September 20, 1979, CSUS' administrative personnel did not enforce the "check-in" requirements of its access regulations against CAUSE/SEIU representatives who visited the campus.

The first notice of a change in this practice occurred during the telephone conversation between Hughes and Felch on September 6, 1979.<sup>19</sup>

The next notice came in a letter, dated September 20, 1979, from William C. Karby, CSUS acting vice-president for administrative and business affairs, to Kathy Felch. This letter, in pertinent part, stated:

The question of visits by representatives of employee organizations after the close of normal working days has arisen in recent weeks. The campus is interpreting these visits as ones which fall under the section identified above. The campus insists that telephone or written notification be given to both the President and the Director of

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<sup>19</sup>See excerpt of conversation on pp. 15-16, supra.

Personnel as least 24 hours prior to any campus visitation." [20]

At least three other employee organizations--California State Employees' Association (hereafter CSEA), State Employees' Trade Council, Local 1268 (hereafter SETC) and United Professors of California (hereafter UPC)--were known to be active on the CSUS campus during August through October 1979. Neither UPC nor SETC received any notice of the 24-hour prior notice rule.<sup>21</sup> The letter itself did not show distribution to any other employee organizations.

Felch verbally objected to both Kerby and Hughes about the imposition of the new notice requirement. Although CAUSE/SEIU did not fully comply with the 24-hour prior notice rule while it was in effect, CSUS did not take any administrative action against CAUSE/SEIU for violation of the rule.

In a memorandum dated October 24, 1979 and addressed to all employee organizations from Kerby, the CSUS supplemental regulations to section 43704 of title 5 were revised. When visiting the campus, employee organization representatives are required to log in with the CSUS personnel office or police

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<sup>20</sup>Section cited in letter is California Administrative Code section 43704.

<sup>21</sup>Unrefuted and credited testimony of Felch and Franklin Hughes, SETC representative. No evidence was presented regarding CSEA.

department, depending on the hours of the visit. This rule revision superseded the September 20 notice sent to Ms. Felch.

Ms. Felch testified that the effect of the 24-hour notice requirement on CAUSE/SEIU organizing activities was minimal, namely, the inconvenience of telephoning the campus every time she made a visit.

### CONCLUSIONS OF LAW

#### The Positions of the Parties

Charging party contends that the rejection of Thomas Gomes during his probationary period was a disciplinary action taken by the respondent because Gomes exercised a protected statutory right on two separate occasions: first, he refused to attend a meeting to discuss a performance evaluation without his union representative; and second, because of his representation by the charging party.

In addition, charging party contends that the respondent, without meeting and conferring with CAUSE/SEIU, adopted an unreasonable, invalid access rule that was applied discriminatorily to CAUSE/SEIU.

Furthermore, it argues, respondent violated HEERA when the challenged access rule was adopted, irrespective of whether or not it was ever enforced or complied with. The existence of the rule had a chilling effect on the charging party and the employees whom it seeks to represent. Subsequent rescission of the rule does not void its initial unlawful adoption.

On the other hand, the respondent argues that unsatisfactory performance was the causative factor in Gomes' rejection during probation and that his termination occurred following repeated warnings about substandard performance; not because of representation by the charging party.

With respect to the challenged access regulation, respondent maintains that charging party has failed to demonstrate that the rule was discriminatory, unreasonable or that it was, in fact, enforced. In addition, respondent argues that the challenged regulation was rescinded by a superseding regulation issued subsequent to the filing of the charge, rendering the entire issue moot.

#### Alleged 3571(a) Violations

Section 3565 of the HEERA guarantees higher education employees the "right to form, join and participate in the activities of employee organizations . . . for the purpose of representation . . . ."22

Additionally, section 3571 of HEERA makes it unlawful for a higher education employer to impose or threaten to impose or to

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<sup>22</sup>Section 3565 provides, in part, as follows:

Higher education employees shall have 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 . . . .

discriminate against employees for their exercise of these statutory rights.<sup>23</sup> When the two sections are applied in concert, it becomes unlawful for a higher education employer to take reprisals or discriminate against an employee because of the exercise of the right to representation by an employee organization.

Although there is no PERB or other state precedent on the issue of unfair practices under section 3571(a), PERB has

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<sup>23</sup>Section 3571 states, in pertinent part, as follows:

It shall be 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.
- (b) Deny to employee organizations rights guaranteed to them by this chapter.
- (c) Refuse or fail to engage in meeting and conferring with an exclusive representative.
- (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another; provided, however, that subject to rules and regulations adopted by the board pursuant to Section 3563, an employer shall not be prohibited from permitting employees to engage in meeting and conferring or consulting during working hours without loss of pay or benefits. . . .

interpreted section 3543.5(a),<sup>24</sup> a parallel section of the Educational Employment Relations Act (hereafter EERA) and adopted a test for evaluating alleged violations of that statute.

In Oceanside - Carlsbad Unified School District (1/30/79) PERB Decision No. 89, the Board established a single standard and test for all alleged violations of section 3543.5(a). In so doing, PERB held that where there is "some nexus" between the exercise of employee rights under EERA and the actions of the employer, a prima facie case is established upon a showing that those acts resulted in some harm to the employee's rights. The Carlsbad test is as follows:

1. A single test shall be applicable in all instances in which violations of section 3543.5(a) are alleged;
2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;

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<sup>24</sup>Section 3543.5(a) states:

It shall be unlawful for a public school 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.

3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;

4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;

5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

#### Proof of Unlawful Intent Where Offered or Required

Unlawful motivation, purpose or intent is essentially a state of mind, a subjective condition generally known only to the charged party. Direct and affirmative proof is not always available or possible. However, following generally accepted legal principles the presence of such unlawful motivation, purpose or intent may be established by inference from the entire record.

#### Gomes' Protected Activities

There is no factual dispute that other than his membership in CAUSE/SEIU, Mr. Gomes was not an "active" member of the union. All three of his immediate supervisors--Sanchez, Williams and Estioco--denied any knowledge of Gomes' membership in or activities with CAUSE/SEIU until on or about August 15, 1979, when Gomes refused to meet with Ben Crocco without his

union representative present. Estioco did testify that on June 29 Gomes told him that he (Gomes) and another custodian had attended a CAUSE/SEIU meeting and caused a disturbance. However, the record does not show that, even on that occasion, Gomes actually informed Estioco that he was a member of CAUSE/SEIU. Also Kathy Felch, the CAUSE/SEIU organizer on the CSUS Campus, denied any knowledge of Gomes or his membership in the union until his problem was brought to her attention in August, 1979.

Irrespective of this previous history of union activity, Gomes' assertion to Sanchez (who then told Crocco) of his right to union representation before meeting with Crocco to discuss an unsatisfactory performance evaluation is clearly a "protected activity" as that activity has been interpreted under the National Labor Relations Act (hereafter NLRA) and California law.<sup>25</sup> Although not bound by Federal law, PERB takes cognizance of applicable NLRB precedent in interpreting its own statutory provisions. (Fire Fighters Union v. City of

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<sup>25</sup>NLRB v. Weingarten, Inc. (1975) 420 U.S. 251 [43 L.Ed. 2d. 171; 88 LRRM 2689]; International Ladies Garment Worker's Union v. Quality Manufacturing Company (1975) 420 U.S. 275 [43 L.Ed.2d 189; 88 LRRM 2698]. See also Civil Service Association v. City and County of San Francisco (1978) 22 Cal.3d 552 [150 Cal.Rptr. 129] interpreting the Meyers-Milias-Brown Act (Gov. Code section 3500 et seq.), and Robinson v. State Personnel Board (1979) 97 Cal.App.3d 994 [159 Cal.Rptr. 222] interpreting the George Brown Act (Gov. Code section 3525 et seq.).

Later during August and September when Ms. Felch, on behalf of Gomes, took the following actions:

1. Had a telephone conversation with Crocco regarding his recommendation that Gomes be terminated.
2. Attempted, with Gomes, to gain access to Gomes' personnel file to review documents that were attached to his second probationary performance evaluation, after Gomes met with Sanchez to go over the report.
3. Had a telephone conversation with Richard Hughes regarding Gomes' second performance evaluation and the failure of Crocco to meet with Gomes as requested by Gomes.
4. Attended a meeting on August 24 with Gomes, Williams, Sanchez and Crocco to discuss the unsatisfactory performance evaluation written by Sanchez.
5. Wrote a letter on August 25 to Dr. Johns complaining about her difficulty working with Mr. Hughes to resolve Gomes' problems.
6. Met with Hughes on August 28 and obtained his agreement to investigate certain charges against Gomes before making a final decision about terminating his employment.
7. Had a telephone conversation with Hughes on September 6 when Hughes angrily informed her that Gomes was being fired or he could voluntarily resign.

It is found these actions were also "protected" activities within the meaning of section 3565.

The un rebutted evidence shows that Crocco had knowledge of Gomes' exercise of his right to union representation when Crocco made a written recommendation to Gordon Landsness, Crocco's immediate superior, that Gomes be terminated as a probationary custodian.

Also there is no doubt that Mr. Hughes was aware of the representation of Gomes by CAUSE/SEIU when he received the challenged performance report and the written recommendations for termination from both Crocco and Landsness and when he ultimately decided to terminate Gomes' employment.

Having found that Gomes engaged in known protected activity related to his termination, it must be determined whether anti-union motivation was the determining factor in Gomes' rejection.

#### Application of the Carlsbad test

Initially respondent argues that charging party has failed to show any "relationship between the exercise of employee's rights and the employer's conduct." Baldwin Park Unified School District (4/4/79) PERB Decision No. 92 . Hence, charging party has not established the existence of a prima facie case.

The evidence shows that the only written documents relied upon by Mr. Crocco in making his recommendation for termination were the following: (1) the second performance report prepared by Sanchez which did not recommend Gomes for permanent status

or a merit salary increase and stated that Gomes should be "appropriately warned 'about' maintaining appropriate standards of efficiency," (2) a memorandum from Williams recommending that Estioco take "whatever action you deem to take," and (3) a memorandum from Estioco recommending to Crocco "whatever thing is proper to be done."

All three of these witnesses denied recommending that Gomes be terminated or even having the authority to so recommend. The documentary evidence supports their testimony. In addition, a recommendation for permanent status was only to be checked on the final report, presumably at the end of the one year probationary period. The second report covered only the period from April to June, 1979, which totaled six months of employment.

Gomes did not deny drinking alcoholic beverages on the job. However, his testimony that, on occasion, he had consumed liquor on the job with other custodians, including his supervisors Sanchez and Williams, was unrefuted.

Sanchez, testified that although Gomes used his sick leave and vacation as it accumulated, he was never charged for using any unearned time. There is no evidence that shows Gomes abused sick leave or had excessive absenteeism.

As for the charges of substandard performance, it is noted that Sanchez did not rate Gomes on either the quantity or quality of work on either performance report that he

prepared. The record does not reveal any explanation for this omission on both reports since these factors are normally crucial in determining one's adequacy to do a job. Further, Williams testified that the only problem he had with Gomes' work was his "drinking on the job."

Although Gomes testified that prior to his meeting with Sanchez on August 14, he had heard that he might be fired, respondent offered no explanation for why Crocco signed the performance report on August 15, indicating a discussion with Gomes on that date when no meeting occurred.

In addition, no testimony was presented to explain Mr. Hughes' sudden change in attitude toward Ms. Felch shortly after she complained about his conduct, when he angrily informed her on September 6 that he was going to fire Gomes and enforce the rules against CAUSE/SEIU.

The nexus between Gomes' exercise of protected right, his representation by CAUSE/SEIU, and his termination is obvious.

It is, therefore, concluded that charging party has established a prima facie case and respondent's arguments to the contrary are rejected. Charging party having established a prima facie case, the burden of rebuttal shifted to the respondent. Respondent made absolutely no effort to rebut charging party's case. Although Mr. Hughes may have been able to state the results, if any, of his promised investigation of

the charges against Gomes, the record is bare of any factors influencing his final decision to reject Gomes.

Even though respondent alleges that Gomes was discharged solely because of operational necessity,<sup>26</sup> the timing of the final decision, in view of the chain of events immediately preceding and subsequent to that decision, create a taint around Hughes' actual motive for the discharge.

Based on the uncontradicted actions and statements attributed to Hughes, there is evidence of union animus that raises an inference that Hughes' decision to terminate Gomes was, at least in part, discriminatorily motivated.<sup>27</sup> It is concluded that Hughes discharged Gomes in retaliation for and

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<sup>26</sup>CAUSE/SEIU vigorously challenges the CSUS failure to follow its own procedural policies in providing Gomes with timely performance reports and access to his personnel files. Although this hearing officer is aware of the close interrelationship between the procedural and substantive rights at issue in this case, absent the introduction of relevant evidence for disposition of the procedural charges, no finding is made as to these allegations.

<sup>27</sup>And where, as here, the employer's motive is the central issue, the factfinder must often rely heavily on circumstantial evidence and inferences. Only rarely will there be probative direct evidence of the employer's motivation. (Shattuck Denn Mining Corp. v. NLRB (9th Cir. 1966) 362 F.2d 466.) It is a well-established rule that in such cases the board is free to draw inferences from all the circumstances, and need not accept self-serving declarations of intent, even if they are uncontradicted. (NLRB v. Pacific Grinding Wheel Co., Inc. (9th Cir. 1978) 572 F.2d 1343; Shattuck Denn Mining Corp. v. NLRB, *supra*, 362 F.2d 466; NLRB v. Warren L. Rose Castings Inc. (9th Cir. 1978) 587 F.2d 1005, 1008; Royal Packing v. ALRB, et al. (4th Cir. 2/4/80) 4 Civ. No. 18956.)

displeasure over the vigorous representation of Gomes by Ms. Felch, the CAUSE/SEIU representative.

Charging party introduced Crocco's memorandum to Landsness as evidence of Crocco's anti-union state of mind when he prepared the document.<sup>28</sup> The document fails to state whether Crocco had given Gomes any other opportunity to meet with him after the first refusal on August 15. The August 24 meeting between them only occurred at the direction of Hughes after Felch complained to Hughes about Crocco's actions.

Because of the timing of Gomes' refusal to initially meet with Crocco, and Crocco's subsequent recommendation that he be terminated, Crocco's action also raises an inference that union animus discriminatorily motivated his decision.

Despite the CSUS contention that it had an "operational necessity" justification for rejecting Gomes during probation, it is further concluded that under both parts 3 and 4 of the Board's test (supra, p. 24), a violation of section 3571(a) is found.

The harm in this case, the discharge of a single union adherent, is "inherently destructive" of employee rights. CSUS's discharge of Gomes would have the natural and probable consequence of causing other employees reasonably to fear that similar action would be taken against them if they sought

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<sup>28</sup>CAUSE/SEIU Exhibit 8.

representation by CAUSE/SEIU. Carlsbad Unified School District (supra, at p. 23).

Furthermore, no proof was presented that the rejection was occasioned by circumstances beyond the respondent's control or that no alternative course of action was available.

Since this case is a "dual motive" situation where both lawful and unlawful causes exist for the complained of conduct, the "but for" test adopted in part 5 of the Carlsbad test must be applied.

The record clearly shows that based on his employment history, Gomes may have been deserving of some disciplinary action. However, it is not at all clear that the complaints about Gomes' work performance which are supported by the evidence, would have been sufficient, by themselves, to justify his rejection during probation.

. . . [T]he fact that a lawful cause for discharge is available is no defense where the employee is actually discharged because of his Union activities. (Original emphasis; NLRB v. Ace Comb Co. (8th Cir. 1965) 342 F.2d 841, 847 [58 LRRM 2732]; accord, Shattuck Denn Mining Corp. v. NLRB (9th Cir. 1966) 362 F.2d 466 [62 LRRM 2401, 2403].)

Noting that none of the supervisory reports of Gomes' performance relied upon by Hughes, Landsness and Crocco actually recommended that Gomes be rejected, the actual legitimate basis for the rejection becomes suspect. Coupling the union animus of Crocco and Hughes with the questionable

basis for rejection, raises a strong inference and that but for the unlawful motivation, Crocco would not have recommended and Hughes would not have effected the rejection of Gomes.<sup>29</sup>

Based on the foregoing, it is concluded that CSUS violated section 3571(a) by discriminating against Thomas Gomes in reprisal for his representation by CAUSE/SEIU.

As a separate basis for finding a section 3571(a) violation, charging party, in its second amended complaint, alleges denial of rights guaranteed by section 3567.<sup>30</sup> Respondent, through its agent Richard Hughes, is charged with affording disparate treatment to employees represented by CAUSE/SEIU by delaying discussion of resolving problems of such

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<sup>29</sup>No finding is made regarding the conduct of Landsness whose role in the evaluation process, from the record, is not clear.

<sup>30</sup>Section 3567 states:

Any employee or group of employees may at any time, either individually or through a representative of their own choosing, present grievances to the employer and have such grievances adjusted, without the intervention of the exclusive representative; provided, the adjustment is reached prior to arbitration pursuant to Section 3589, and the adjustment is not inconsistent with the terms of a written memorandum then in effect. The employer shall not agree to resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution, and has been given the opportunity to file a response.

employees. At the hearing this charge was amended to clarify its reference only to Thomas Gomes.

CAUSE/SEIU was stipulated to be an employee organization within the meaning of HEERA. However, there is no evidence that charging party is the exclusive representative nor that there had been any determination of an exclusive representative for the employee being represented. Lacking evidence to the contrary, it is concluded that no exclusive representative has been selected for Mr. Gomes and CAUSE/SEIU is his non-exclusive representative.

The question then becomes whether the employer, in the absence of an exclusive representative, has a duty to process a grievance for an employee represented by a non-exclusive representative pursuant to rights granted by section 3567.

This issue has not yet been addressed under HEERA. However, PERB, in interpreting section 3543.1(a) of EERA,<sup>31</sup> held in Santa Monica College Part-Time Faculty Association,

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<sup>31</sup>Section 3543.1(a) states, in pertinent part:

Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer.

Decision No. 103, that

". . . prior to the time an exclusive representative is selected, the right of the nonexclusive representative to present grievances encompasses the right to obtain the information it needs from the employer to evaluate those grievances on behalf of its members."

Using this decision as guidance for the present case, it is reasoned that Mr. Gomes, under section 3567, had a statutory right, in the absence of an exclusive representative, to have CAUSE/SEIU represent him in his employment problem with CSUS. There is no evidence of a formal grievance having been filed on his behalf. Furthermore, Ms. Felch testified that Hughes preferred to handle employee problems on an informal basis, if possible, and the record shows that Gomes' difficulty was handled informally through Hughes.

Charging party has failed to present evidence establishing that Hughes subjected employee grievances represented by CAUSE/SEIU to disparate treatment as compared to other employee organizations. However, it is found that, when Hughes denied Mr. Gomes and Ms. Felch access to Gomes' personnel file to review the documents attached to his second performance report, Hughes unjustifiably delayed the evaluation of Gomes' grievance. In effect, this delay was a denial to Mr. Gomes of his section 3567 right to be represented in his employee relationship, thereby violating section 3571(a).

## Alleged 3571(b) Violations

In its first and second amended complaints CAUSE/SEIU alleges that on September 20, 1979, CSUS, through its agent William Kerby, unilaterally and discriminatorily instituted a separate access policy for CAUSE/SEIU. This policy required 24 hours' advance notice before a CAUSE/SEIU representative could visit the CSUS campus. Charging party contends that respondent violated section 3571(b)<sup>32</sup> by adopting an unreasonable, invalid policy that denied rights guaranteed by section 3568.<sup>33</sup>

CSUS answered, denying that the policy was invalid, unreasonable, or discriminating against CAUSE/SEIU. Instead, CSUS alleged that the challenged policy was applicable to all employee organizations and was issued in response to supervisor

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<sup>32</sup>See p. 22, supra, fn. 23.

<sup>33</sup>Section 3568 states:

Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act.

complaints regarding specific actions by Ms. Felch and others in violation of CSUC access regulations.<sup>34</sup>

In a motion to dismiss filed October 26, 1979, CSUS argued that because of the issuance on October 24 of a revised CSUS supplemental access policy which superseded both the June 18, 1979 and the September 20 advance notice rule, the issue of the "reasonableness" of the advanced notice rule was mooted.

#### Limits of "Reasonable Regulations"

As one of its enumerated rights, section 3568 expressly grants an employee organization the right of access at reasonable times to areas in which employees work, subject to reasonable regulations established by the employer. (See p. 36, supra, fn. 33.)

Therefore, as for the challenged access policy in the present case, it must be determined whether that policy falls

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<sup>34</sup>Title 5, California Administrative Code, section 43708 states, in part:

Organizational Solicitation. Solicitation by nonemployee representatives of employee organizations shall not occur during work time. . . . In the event that it is not possible for a representative of a verified employee organization to communicate with an employee during non-work times, such employee organization shall be afforded reasonable opportunities as determined by the Chief Executive Officer to communicate with employees so long as such communication does not interfere with the work of the campus or violate security, safety or health requirements.

within the standards adopted by PERB for "reasonable regulations" within the meaning of section 3543.1(b)35 of the EERA. See Richmond Federation of Teachers v. Richmond Unified School District and Simi Educators Association CTA/NEA v. Simi Valley Unified School District (8/1/79) PERB Decision No. 99.

The Richmond and Simi cases concerned the reasonableness of school district administrative policies governing the use of internal mail system distribution by employee organizations.

Recently the Board again had occasion to interpret section 3543.1(b) based on a challenge to several school district rules regulating the on-campus activities of employee organizations, particularly organizational solicitation. See Long Beach Federation of Teachers, Local 1263, AFT, AFL-CIO v. Long Beach Unified School District (5/28/80) PERB Decision No. 130. One of the rules restricted the number of employees who could meet with an employee organization representative at one time and required that representatives who did not work on the campus

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35Section 3543.1(b) states:

(b) Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

where the on-site meetings took place make prior arrangements at least one day in advance.

In developing the "reasonableness" standard in Richmond-Simi and expanding its application in Long Beach, the PERB was guided by precedent from private sector federal labor law (Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [46 LRRM 620]; NLRB v. Babcock & Wilcox Co. (1956) 351 U.S. 105 [38 LRRM 2001]; Stoddard Quirk Mfg. Co. (1962) 138 NLRB 615 [51 LRRM 1110]).<sup>36</sup>

Decisions in this area of organizational activity have attempted to accommodate the employees' rights to freely participate in the activities of employee organizations with the right of the employer to maintain order and discipline.

In striking this adjustment the NLRB in Stoddard established a distinction between distribution of literature and solicitation. Restrictions on employee solicitation during nonworking time and restrictions on distribution during nonworking time and in nonworking areas

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<sup>36</sup>PERB may use federal labor law precedent where applicable to public sector labor issues. See Sweetwater Union High School District (11/23/76) EERB Decision No. 4. (The Public Employment Relations Board was previously know as the Educational Employment Relations Board, or EERB.) Also see Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 611.

are violative of section 8(a)(1) of the NLRA<sup>37</sup> unless the employer justifies the rules by a showing of special circumstances which make the rule necessary to maintain production or discipline. (Also, see Okaloosa-Walton Jr. College v. PERC (Fla. Dist. Ct. App. 1979) 372 So.2d 1378 [102 LRRM 2419], cited in Long Beach, supra, p. 38.)

In determining the propriety of an employer's rule concerning organizational activity in terms of resultant interference with employees' rights, the PERB has decided that an employer's regulation of an organization's access rights is reasonable if it is consistent with basic labor law principles embodied in the EERA which are designed to insure effective and nondisruptive organizational communications and access.

There is no PERB precedent interpreting section 3568. However, since sections 3543.1(b) and 3568 are virtually identical, it is appropriate to look to the Board's interpretation of 3543.1(b) for guidance in deciding the current charge.

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<sup>37</sup>Section 8(a)(1) of the NLRA provides:

It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

## The 24 Hour Prior Notice Rule

In Long Beach The Board found the district's one-day advance notice rule to secure the use of rooms not normally used by nonworking employees to be a legitimate and reasonable regulation to control conduct disruptive to the educational process. However, to the extent that the district's rule appeared to require that all meetings with four or more employees be conducted at such pre-arranged facilities, the regulation was deemed unreasonable. Absent a showing of non-availability of appropriate facilities or probable disruption of school functions, the district failed to justify a reason for the rule. Consequently, the rule resulted in denying an employee organization the right to use such facilities for organizational activity conducted during nonworking hours.

In the present case, the 24-hours' prior notice requirement, on its face, applied to all campus visits and organizational activities, regardless of the reason for the visit. (See p. 19, supra.) In the letter to Ms. Felch, Kerby states no justification for the rule. In fact, his comment about "visits . . . after the close of normal working days . . ." is vague and somewhat confusing since custodians work on a 24 hour basis on the campus.

CSUS alleges that the rule was adopted because of complaints by supervisors about violations of CSUS regulations

by Felch and others. Other than this bare allegation, no supporting evidence was offered at the hearing, hence this contention is rejected.

In defense of the charge that the rule was discriminating in that it was imposed only on CAUSE/SEIU, CSUS contends that, while in effect, the rule applied to all employee organizations. This argument is not persuasive. It is noted that the September 20 letter notifying CAUSE/SEIU about the requirement was addressed personally to Felch from Kerby. On the other hand, the July 11 and October 24 communications were memoranda addressed to "All Employee Organizations." In addition, there was un rebutted testimony that at least two other employee organizations active on the campus at the time in question, SETC and UPC, did not receive any notice about the adoption of the advance notice rule. Also noted is the timing of imposition of the rule, approximately two weeks following Hughes' statement to Felch that he "would be difficult to deal with in the future."

CSUS further contends that, while the 24-hour advance notice rule was in effect, Ms. Felch failed to ever comply with its requirement and the rule was never actually applied or enforced against CAUSE/SEIU. Thus, it caused no harm nor adverse impact on the organization's activities. This argument is likewise rejected. When the letter was sent to Felch, this act, in and of itself, was an imposition of the policy,

regardless of whether Felch was ever denied access to the campus for failure to give advance notice of a visit.

The above factors, coupled together, warrant a conclusion that the CSUS 24-hour prior notice requirement is unreasonable. There has been no showing of special circumstances which make the rule necessary to avoid disruption or maintain discipline. Absent such justification, the rule had the result of denying an employee organization access to the campus for organizational activity conducted during nonworking hours. Additionally, it is concluded that the rule was enforced discriminatorily against CAUSE/SEIU. Consistent with the foregoing discussion, it is found that the CAUSE/SEIU right of access, as guaranteed by section 3568 of HEERA, was subjected to unreasonable regulation by the CSUS rule in violation of section 3571(b) of HEERA.

Additionally, it is concluded that the CSUS rule likewise interfered with the rights of employees to participate in the activities of an employee organization and deprived the employees access to the organizational efforts of the CAUSE/SEIU representatives. It is further found that the justification proffered by the respondent in support of its rule fails to evidence operational necessity or conduct based on circumstances beyond the employer's control where no alternative course of action was available. Carlsbad Unified School District, p. 23, supra. Therefore, consistent with

the holding in San Francisco Community College District  
(10/12/79) PERB Decision No. 105, it is found, as a derivative  
violation of section 3571(b), that the CSUS rule concurrently  
contravened section 3571(a) of HEERA.

Denial of Right to Meet and Confer

As a further basis for finding denial of rights guaranteed  
by sections 3565 and 3568, in violation of section 3571(b),  
charging party alleges that CSUS adopted the prior notice  
access rule without consulting or meeting and conferring with  
CAUSE/SEIU, thereby impeding the union's ability to represent  
its members.

Respondent's only rebuttal is that charging party has  
failed to offer any competent authority to support its  
allegation.

Facially, neither section 3565 nor section 3568 mandates  
that an employer meet and confer with an individual employee or  
groups of employees.

The only provision mandating meeting and conferring by a  
higher education employer is section 3570<sup>38</sup> which requires

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<sup>38</sup>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.

the employer to meet and confer with an exclusive representative on all matters within the scope of representation.

Having previously determined that CAUSE/SEIU is a nonexclusive representative of the employees it seeks to represent, it is concluded that within the meaning of section 3570, CSUS had no obligation to meet and confer or consult with CAUSE/SEIU prior to promulgating the controverted advance notice access policy.

Respondent is correct that charging party has failed to cite any authority for this allegation. This hearing officer is unaware of any PERB, federal or state statutes or case law on point with charging party's proposition. Neither of the two most recent PERB decisions<sup>39</sup> dealing with the scope of the right of representation by nonexclusive representatives is applicable to the issue raised by this charge.

For the above reasons, this charge is dismissed insofar as it alleges that charging party has been denied the right to meet and confer or consult prior to the adoption by the employer of access rules in violation of section 3571(b).

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<sup>39</sup>Santa Monica Community College, supra, p. 34 (employer has duty to furnish information upon request of the nonexclusive representative until an exclusive representative is recognized or selected); Professional Engineers in California v. State of California (3/19/80) PERB Decision No. 118-S (nonexclusive representative has right to meet and discuss wages with the state employer prior to the employer taking action on a policy decision).

Mootness

Respondent vigorously contends that the adoption by CSUS of the supplemental access regulation on October 24 superseded the 24-hour prior notice rule, thereby rescinding the latter regulation and rendering the unfair practice charge moot. The October 24 revision requires only that non-campus personnel wishing to engage in organizational activities on the campus must log in at a designated area of the campus prior to such activities.<sup>40</sup> This regulation applies to all employee organizations.

CSUS maintains that by enacting the new access regulation, the employer has "lost its power to enforce the challenged portions of the previous regulations which CSUS specified are now superseded." Respondent cites Amador Valley Secondary Educators Association v. Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74 in support of this proposition. Respondent further states "no useful purpose" would be served by a PERB decision regarding an obsolete regulation.

Respondent's arguments are not persuasive and are rejected. Besides, respondent misreads Amador Valley. A

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<sup>40</sup>PERB Exhibit 3

There is no CAUSE/SEIU challenge to the propriety of this rule, therefore no conclusion as to its legality is made in this proposed decision.

material question remains to be answered in this case. Therefore, the case is not moot. There is nothing in the October 24 regulation which indicates that respondent is prohibited from reinstating the controverted policy. As for the September 20 rule, it appears that respondent voluntarily decided to discontinue the alleged unlawful conduct. Presumably, respondent is free to promulgate and apply future regulations in the same manner that the unlawful regulation was promulgated and applied.

#### Alleged Section 3571(d) Violation

There is no evidence in the record nor does charging party in its briefs discuss how CSUS's conduct might have violated section 3571(d). Therefore, it is concluded that CAUSE/SEIU has failed to prove a violation of section 3571(d). Accordingly, the allegation that this section was violated is hereby dismissed.

#### REMEDY

Section 3563.3 gives the PERB broad remedial authority in unfair practice cases. It provides:

The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including, but not limited to, the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

Under similar language in section 10(c) of the LMRA, the standard remedy in a discriminatory discharge case is reinstatement with back pay. See Morris, The Developing Labor Law (BNA 1971), p. 854. Such a remedy, in addition to a cease and desist order and posting, is appropriate here.

In the instant case, it is concluded that CSUS violated section 3571(a) by rejecting Gomes from probation because of the exercise of his rights guaranteed by section 3565. The remedy set forth is "designed to restore, so far as possible, the status quo which would have obtained but for the wrongful act." (NLRB v. Rutter-Rex Mfg. Co., Inc. (1969) 396 U.S. 258 [72 LRRM 2881] reh. den. 397 U.S. 929 [25 L.Ed.2d 109].) Therefore, to fully compensate Gomes and to place him in the position he would have been but for the respondent's actions, it is appropriate to order that he be reinstated as a custodian at CSUS.

Interest will be added to the back pay award at the legal rate of 7 percent (Cal. Constitution, art. XIV, sec. 1), beginning from the date of Gomes' discharge. Winn-Dixie Stores, Inc. v. NLRB (5th Cir. 1969) 413 F.2d 1008 [71 LRRM 3003, 3004]. It also is appropriate that any amounts earned by Gomes after his discharge be set off in mitigation of the back pay award. Phelps Dodge Corp. v. NLRB (1941) 313 U.S. 177 [8 LRRM 439, 448].

This relief is consistent with remedial orders of other state public employment relations boards and commissions involving reinstatement of wrongfully discharged or transferred public employees. (City of Boston (MA 1978) 5 MLC 1558; City of Elizabeth (NJ 1979) 5 NJPER 10048; Freeport Union Free School District (NY 1979) 12 PERB 3038; City of Green Bay Board of Education v. Wisconsin Employment Relations Commission.)

The parties did not present evidence relating to mitigation at the hearing.

In addition, having found that CSUS violated section 3571(a) by delaying discussing or adjusting the problems of Thomas Gomes because he was represented by CAUSE/SEIU, CSUS is ordered to cease and desist such conduct, or otherwise discriminating in violation of section 3571(a).

Having also found that CSUS adopted and applied an access policy which unreasonably denied CAUSE/SEIU access to the campus for organizational purposes in violation of section 3571(b), CSUS is ordered to cease and desist from such conduct. It is appropriate to order CSUS to also cease and desist from any conduct which interferes with the rights of employees to have access to or participate in organizational activities in violation of section 3571(a).

It is clear that unless CSUS is directed to cease and desist from promulgating and enforcing unreasonable access

regulations, employee organizations, like CAUSE/SEIU, may have difficulty gaining access to CSUS employees.

It is also appropriate that CSUS should be required to post a copy of the attached appendix. Posting will provide employees with notice that the CSUS has acted in an unlawful manner and is being required to cease and desist from the activity. It effectuates the purposes of EERA that employees be informed of the resolution of the controversy. See CSEA Chapter 658 v. Placerville Union High School District (9/18/78) PERB Decision No. 69 [2 PERC 2185]. A posting requirement has been upheld in a California case involving the Agricultural Labor Relations Act, Pandol and Sons v. ALRB (1979) 98 Cal.App.3d 580, 587. Posting orders of the NLRB also have been upheld by the United States Supreme Court, NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415]; Pennsylvania Greyhound Lines, Inc. v. NLRB (1938) 303 U.S. 261 [2 LRRM 600].

#### PROPOSED ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, it is hereby ordered that California State University, Sacramento and its representatives shall:

A. CEASE AND DESIST FROM:

1. Promulgating, applying or enforcing any access regulations in a manner so as to unreasonably prevent employee organization representatives from having access to the campus to engage in organizational activities.

2. Interfering with the rights of CSUS employees to have access to or participate in employee organization activities.

3. Discriminating against Thomas Gomes because of the exercise of rights guaranteed by the HEERA or otherwise discriminating in violation of Government Code section 3571(a).

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

1. Offer Thomas Gomes immediate reinstatement to his former or equivalent position at CSUS.

2. Make Thomas Gomes whole for the salary and benefits he would have earned from the date of his termination on September 21, 1979 until his reinstatement, or offer of reinstatement from CSUS, if not accepted by Gomes, together with interest thereon at the rate of 7 percent per annum, less any amounts earned by Gomes in mitigation.

3. Within five days after this decision becomes final, post copies of the Notice set forth in the Appendix for 30 work days after this Order becomes final, in its headquarters office and in all locations where notices to nonacademic employees are customarily posted.

4. Immediately after the posting period set forth in B.3. above, notify the Sacramento Regional Director of the Public Employment Relations Board in writing of the actions it has taken to comply with this Order.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on July 21, 1980 unless a party files a timely statement of exceptions within twenty (20) calendar days following the date of service of the decision. Such statement of exceptions and supporting brief must be actually received by the Executive Assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on July 21, 1980 in order to be timely filed. (See California Administrative Code, title 8, part III, section 32135.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. (See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.)

Dated: June 30, 1980

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W. JEAN THOMAS  
Hearing Officer

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. LA-CE-5-H, College and University Service Employees/Service Employees International Union (CAUSE/SEIU), AFL-CIO v. California State University, Sacramento, in which both parties had the right to participate, it has been found that California State University, Sacramento violated the Higher Education Employer-Employee Relations Act, Government Code section 3571(a) and (b). As a result of this conduct, we have been ordered to post this notice. We will abide by the following:

1. CEASE AND DESIST FROM:

- (a) Promulgating, applying or enforcing any access regulations so as to unreasonably deny employee organizations access to the campus to engage in organizational activities.
- (b) In any manner imposing or threatening to impose reprisals on employees, discriminating or threatening to discriminate against employees, or otherwise interfering with, restraining or coercing employees because of their exercise of their right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation in all matters of employer-employee relations.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS NECESSARY TO EFFECTUATE THE POLICIES OF THE HIGHER EDUCATION EMPLOYER-EMPLOYEE RELATIONS ACT:

- (a) Reinstate Thomas Gomes as a custodian at California State University, Sacramento.

- (b) Tender to Thomas Gomes a back pay award which reflects an amount equal to that he would have been paid absent CSUS's rejection of Gomes during probation on September 21, 1979 until the present, with payment of interest at 7 percent per annum of the net amount due, this total amount to be offset by Gomes' earnings as a result of other employment during this period.

Dated: California State Univeristy, Sacramento

By \_\_\_\_\_

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 WORK DAYS FROM THE DATE OF POSTING AND MUST NOT BE DEFACED, ALTERED OR COVERED BY ANY MATERIAL.