STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LABORERS LOCAL 1276, LIUNA, AFL-CIO and ALAMADA COUNTY BUILDING AND CONSTRUCTION TRADES COUNCIL,	Case No. SF-CE-2-H
Charging Parties,	PERB Decision No. 212-H
v.	April 30, 1982
REGENTS OF THE UNIVERSITY OF CALIFORNIA, LAWRENCE LIVERMORE NATIONAL LABORATORY,	
Respondent.	

Appearances: Donald L. Reidhaar, James N. Odle, Susan M. Thomas, Attorneys for Regents of the University of California.

Before Moore, Jaeger and Tovar, Members.

DECISION

This case is before the Public Employment Relations Board (hereafter PERB or Board) on exceptions filed by the Regents of the University of California (hereafter Regents or University) to the attached hearing officer's proposed decision. In that decision, the hearing officer found that the Regents' newly announced policy regarding meeting and discussion of changes in employment-related matters and its policies regarding access to the Lawrence Livermore National Laboratory (hereafter Lab), which it operates, violated subsections 3571(a) and

(b) of the Higher Education Employer-Employee Relations Act (hereafter HEERA or the Act).[1]

In so finding, the hearing officer sustained unfair practice charges filed by Laborers Local 1276, Laborers International Union of North America, AFL-CIO, (hereafter Laborers) and Alameda County Building and Construction Trades Council (hereafter referred to jointly as Charging Parties). Charging Parties did not except to the hearing officer's dismissal of their subsection 3571(d) allegation regarding access, and we therefore make no finding regarding that allegation.

The Board has carefully reviewed the record in light of Respondent's exceptions and finds that the hearing officer's procedural history and findings of fact are free of prejudicial error. We therefore adopt them as the findings of the Board itself, except as supplemented or modified, infra.

Further, we affirm the hearing officer's conclusions of law, except as modified below.

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[1]HEERA is codified at Government Code section 3560 et seq. All statutory references are to the Government Code unless otherwise indicated. Subsections 3571(a) and (b) provide as follows:

> It shall be unlawful for the higher education employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

DISCUSSION

The case presents two discrete issues; each will be discussed separately.

The Unilateral Change in Notice, Meeting and Discussion Policy

As noted above, the hearing officer's findings of fact are free of prejudicial error and are adopted as those of the Board. Briefly summarized, the facts regarding this issue are as follows:

Prior to the effective date of HEERA, the Regents had a policy and practice at the Lab of giving notice and an opportunity to employee organizations recognized as non-exclusive representatives of potentially affected employees to meet and discuss proposed changes in terms and conditions of employment. Pursuant to their obligations under the George Brown Act, the Regents conducted formal meetings with employee organizations and considered their views prior to ". . . arriving at a determination of policy or course of action."[2]

> to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
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> (b) Deny to employee organizations rights guaranteed to them by this chapter.

[2]The George Brown Act (hereafter Brown Act) is codified at section 3525 et seq. The quoted language is excerpted from section 3540.

With the advent of HEERA, the Regents announced that they would no longer provide prior notice to and conduct meet and confer sessions with nonexclusive representatives regarding contemplated changes in employment conditions. Under its new policy, the University would meet informally with individual agents of nonexclusive representatives upon request to discuss such changes. However, Charging Parties would have to rely on the "grapevine" for information that changes in working conditions were contemplated and would not be given notice and an opportunity to comment on a routine, formalized basis prior to implementation of such changes.

As noted above, the University excepts to the hearing officer's finding that this concededly unilateral change in policy violated subsections 3571(a) and (b). We find, with the hearing officer, that HEERA does require that higher education employers provide nonexclusive representatives prior notice and an opportunity to meet and discuss projected changes in terms and conditions of employment and that the failure of the University to provide such notice and opportunity violates subsection 3571(a) and (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.[3] Under that legislation,

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[3]HEERA became effective July 1, 1979. Concurrent with HEERA's effective date, section 3526 of the Brown Act was

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.) In section 3529 that act defines the 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, Charging Parties and their constituent employee members enjoyed important representational rights under the Brown Act, prior to HEERA's effective date. The University would now have us find that nonexclusive representatives lost important representational rights once HEERA superseded the Brown Act. We decline to so hold, for the reasons set forth infra.

Unlike the State Employer-Employee Relations Act (hereafter SEERA) and the Educational Employment Relations Act (hereafter EERA),[4] HEERA does not specifically establish

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amended to remove those employees covered by HEERA from coverage under the Brown Act.

[4]SEERA is codified at Government Code section 3512 et seq. EERA is codified at Government Code sections 3540 et seq.

representational rights for nonexclusive representatives.[5]

However, the language of HEERA and its overall statutory scheme provide a clear indication that the Legislature did not intend to consign nonexclusive representatives to a state of powerless limbo when it enacted HEERA. The fact that a

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[5]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 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.

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. Thus, for example, we note that HEERA lacks the statutory provisions regarding deferral to arbitration contained at 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. Similarly, SEERA does not contain an express provision granting access to facilities of the State employer to exclusive representatives of non-supervisory employees, as do EERA (at subsection 3543.1(b)) and HEERA (at section 3568). Even in the absence of such a provision, the Board has concluded that the right of access is implicit in SEERA. State of California, (Department of Corrections) (5/5/80) PERB Decision No. 127-S.

Nonexclusive representatives enjoyed representational rights under the Brown Act. As found by the hearing officer, 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.

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. [Emphasis added.]

Whereas 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 was contemplated by the Legislature as an integral part of the statutory scheme.[6]

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

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[6]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.

> 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 <u>represented</u> 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 contemplated that nonexclusive representatives would "deal with" the higher education employer regarding employment matters.[7] Had the Legislature intended that only exclusive

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[7]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. . . .

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 state 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 negotiations 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.

Charging Parties do not contend that the Regents unilaterally changed any specific employment-related terms or conditions pursuant to their new policy. Rather, they object to the unilateral change in the policy itself and to the terms of the new policy.

In keeping with the rationale set forth above, and as outlined by the hearing officer, we find that the Regents violated HEERA by changing their overall meet and discuss policy without first affording notice of the contemplated

change, and a reasonable opportunity to discuss it, to Charging Parties and other affected employee organizations. We do not hold that the obligation imposed upon higher education employees to give notice and meet with nonexclusive representatives is the same as that imposed under HEERA with regard to exclusive representatives. 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 HEERA requires the University to provide prior notice and an opportunity to discuss contemplated changes in wages, hours, and other terms and conditions of employment to nonexclusive representatives, and that the change in policy at issue herein is within the scope of this obligation. Further, as the hearing officer points out, the procedural ground rules for meeting and discussion are properly the subject matter of discussions between the Regents and affected nonexclusive representatives.

The Regents argue that the obligation of prior notice will make them vulnerable to charges of unlawful support to or favoritism towards an employee organization and hence that it is unduly burdensome. We disagree. All this decision requires is that the Regents give prior notice of contemplated changes to the nonexclusive representative of potentially-affected employees. We do not find that this subjects the Regents to an unduly-burdensome obligation, fraught with risks of violating

subsection 3571(d).[8] We thus reject the argument that the prior notice requirement should not be imposed because it could unduly expose the Regents to charges of favoritism.

We further affirm the hearing officer in his application of Carlsbad Unified School District (1/30/79) PERB Decision No. 89. We agree that it is not necessary for Charging Parties to demonstrate that they suffered quantifiable, measurable harm as a result of the change in policy. Rather, as noted by the hearing officer, it is reasonable to ". . . find some inherent harm to employees and employee organizations in the denial of advance notice, and in such a major policy change without any prior discussion with the organization affected by that change." (Proposed Decision, page 48. Emphasis added.) The Regents have failed to demonstrate justification based on

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[8]Subsection 3571(d) states:

> It shall be unlawful for the higher education employer to:
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> . . . . . .
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> (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.

operational necessity sufficient to outweigh the significant interest of Charging Parties herein, and thus the balance must be struck in favor of Charging Parties and a violation of subsections 3571(a) and, concurrently, (b) found. San Francisco Community College District (10/12/79) PERB Decision No. 105.

The Access Policies of the Lab

The hearing officer found that the Regents' policies governing access to the Lab were unreasonably restrictive in several particulars, and thus conflicted with the right of access guaranteed to employee organizations by section 3568.[9] We affirm the hearing officer's decision except as noted infra.

The hearing officer correctly noted that HEERA establishes a presumptive right of access for employee organizations. The Regents argue that because the Lab is a facility which, due to national security requirements, is closed to access by the public, it is unique and the presumption of access established by section 3568 was not intended by the Legislature to apply to

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[9]Section 3568 provides as follows:

> 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.

it. For the reasons set forth by the hearing officer, we expressly reject that contention. There is no exception to the presumptive right of access set forth in the statute for national security facilities, and we decline to create one.

The Regents argue futher that even if the presumptive right of access is applicable to the Lab, the evidence they have presented regarding the need for restricted access to protect national security, and the attendant burden on them, is sufficient to rebut the presumption. We understand this as a restatement of their initial contention that, due to the unique national security requirements at the Lab, there is in essence no presumptive right of access thereto. Insofar as this is the gravamen of their argument, it is rejected for the reasons noted above.

Rather than rebutting the presumptive right of access totally, we view national security considerations as a weighty factor to be considered in reaching the necessary accommodation between Charging Parties' statutory right of access and the Regents' operational needs. Consideration of the operational realities at the Lab is necessary to determine whether particular restrictions on access to the Lab imposed by the Regents are reasonable. As noted by the hearing officer, "[a]ccommodation to valid employer concerns is still apppropriate under the HEERA, as the Board itself has demonstrated in decisions in EERA and SEERA. This exercise of

labor board expertise is especially fitting in this situation, involving as it does serious uncontested concerns of the Laboratory for national security protection of its work. Instead of eliminating the access presumption, the questions to be answered are whether the regulations established by the employer are properly related to justifiable concerns about disruption of the Laboratory's mission, and whether the rules are narrowly drawn to avoid overbroad, unnecessary interference with the exercise of statutory rights." (Proposed Decision at pp. 52-53.)[10]

Applying this standard to the facts of the instant case, we in part affirm and in part reject the conclusions of the hearing officer as set forth below.[11]

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[10]The hearing officer correctly summarized the federal cases regarding access for organizational purposes, and their relationship and extent of applicability to the public sector setting. The cases cited by the Regents, notably McDonald Douglas Corporation v. NLRB (8th Cir. 1973) 472 F.2d 539 [82 LRRM 2392) are instructive, insofar as they make it clear that military sensitivity and the classified nature of the work undertaken by an employer must be considered in determining whether regulations limiting a presumptive access right are reasonable or not. This is the manner in which the hearing officer analyzed the case at bar, and, in reviewing his proposed decision, we have paid particular attention to ensuring that due deference is paid to these vital considerations.

[11]It should be noted that only the particular aspects of the access policy of the Regents found in violation by the hearing officer are before us. Charging Parties did not except to the hearing officer's finding that, in other particulars, the access restrictions are reasonable. We thus make no finding regarding additional portions of the Regents' access policy.

With respect to the 48-hour notice rule for access to meeting facilities in the open areas of the Lab, we agree with the hearing officer that this is unreasonably restrictive and that an unspecified shorter notice period is therefore appropriate. While some such advance notice may be reasonable, and the parties may well be able to mutually determine that in discussions, the Regents have failed to demonstrate that national security or other operational needs mandate 48 hours advance notice for use of facilities in open areas.

We also affirm the hearing officer's finding that the requirement that employee organizations utilizing escort services of the Regents pursuant to security regulations reimburse the University for the cost of such service is an unreasonable, unjustified tax on the exercise of statutory rights, and hence must be struck down. In addition to the reasons set forth by the hearing officer, which in themselves provide a sufficient basis for invalidating the reimbursement requirement, we note that the Regents failed to demonstrate that other entities who make on-site visits and are accompanied by administrative escorts or protective service officers are required to reimburse the University, and thus this restrictive tax may well be imposed discriminatorily.

We also affirm the hearing officer's finding that charging parties should be allowed some access to the lunchroom in the "321" exclusion area. We do not fully agree with the hearing

officer's characterization of the lunchroom as " . . . an island of non-production activity easily severable from the remaining activities in that area." However, the record reflects that, while not "easily" severable, the lunchroom can be downgraded more easily than adjacent production areas. Windows and doors can be draped, warning signs posted, and the adjacent conference room cleared, albeit with some difficulty. As noted by the hearing officer, the lunchroom is a facility of particular importance to the Laborers, for a substantial number of their constituents congregate there on their non-work time. The Regents point out that employees could travel to nearby meeting facilities in the open area in approximately five minutes. However, when considered in light of the additional fact that these employees receive only 30 minutes for lunch, this means that employees would spend fully one-third of their lunch period travelling to and from a meeting in the open area, which would leave only 20 minutes to conduct the meeting itself. As the hearing officer noted, in-plant culinary facilities are of special importance to employees whose movement about the plant is constrained by time or other considerations. Ford Motor Company v. NLRB (1979) 441 U.S. 488, 498 [101 LRRM 2222 at 2226]. We are not oblivious to the burden imposed upon the Regents by the necessity to downgrade this exclusion area in order to facilitate meetings. Thus, the Regents are free to reasonably regulate use of this area by

employee organizations. Charging Parties have suggested that they be allowed access to the lunchroom once a month. We would not find this to be an unreasonable burden on the Regents. The Regents may also require reasonable advance notice from organizations. We find that the interests of both the employer and the employee organizations can be met by such a policy.

We do not agree with the hearing officer that the statutory access presumption requires that the University allow employee organization representatives to apply for "Q" clearance. The record reflects that the University considers grievance representation to be a "business or programmatic purpose" and hence that, when it can be demonstrated that access to a particular site within the limited or exclusion area is reasonably necessary for grievance and safety representation, such access has been and will be granted. As Charging Parties and the hearing officer note, this grant of access has drawbacks, in that it requires more extensive advance notice than would access by a person with a "Q" clearance, and requires escorting and monitoring of union representatives. It is beyond dispute that a person possessing "Q" clearance could more quickly and easily gain access to the Lab; indeed, such clearance might save the Regents time and money, for it would obviate the need for, and hence the costs associated with, downgrading such areas and escorting non-"Q"-clearance visitors. However, in light of all the facts and

circumstances, we do not find the unwillingness of the Regents to allow application for "Q" clearance by union representatives to be an unreasonable restriction on organizational access. First, we note that the process of screening persons for "Q" clearance takes from 5 to 9 months. While the Regents failed to introduce specific evidence regarding the cost of said procedure (which, in any event, likely varies drastically from case to case) it would undeniably be extremely costly. Further, the record did not reflect that the need to visit a particular limited or exclusion area for grievance processing arises with frequency. Only one such visit was attested to by Charging Parties, who concede that grievances are generally handled by meetings with employees in open or controlled areas and that access to employees is generally facilitated by the Regents. The availability of alternative sites for processing of grievances and safety complaints provides a basis for our finding of reasonableness regarding this aspect of the Regents' access policy. This factor is related to another which persuades us that providing an opportunity to qualify for "Q" clearance to union representatives is not mandated by the statute. The telephone, duplicating, and other equipment systems serviced by non-employees, "Q"-cleared invididuals are not portable; they cannot be moved to the unrestricted portions of the Lab for service and then returned. For the Regents to go through the advance notice, downgrading, and escort

procedure for maintenance and repair of vital equipment might cause entire sections of the facility to be rendered inoperative for substantial periods of time on a regular basis, and thus the opportunity to obtain "Q" clearance for persons frequently performing maintenance and repair work is vital to the smooth operation of the Lab. Employees with whom union representatives must consult to process grievances and safety complaints are able to move to nonrestricted areas, and thus the instances in which a visit by a union representative to a limited or exclusion area would be necessary will be relatively uncommon and can be dealt with through the downgrading and escort procedure. We thus find a reasonable basis for differentiating between providing "Q" clearance for those outside contractors who maintain unmoveable equipment located within the limited or exclusion areas and providing it for union representatives under the circumstances here presented.[12] For the reasons set forth above, we do not find that the Regents' current practice regarding access to the limited and exlusion areas of the Lab for grievance processing and handling of safety complaints is unreasonable under the statute, and hence we reject the hearing officer's finding and overrule the requirement in his order that the University

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[12]We thus disavow the hearing officer's finding that the University, by allowing non-employee contractors who service on-site equipment to apply for "Q" clearance, has engaged in impermissible discrimination within the meaning of the Act.

provide to union representatives the opportunity to qualify for "Q" clearance.

Having found that Charging Parties and other employee organizations enjoy a presumptive right of access to the Lab, which is unreasonably restricted by the Regent's access policy in the particulars noted above, we find a clear nexus between the University's restrictions and the exercise of statutory rights by employees and employee organizations. We find the aspects of operational necessity cited by the employer insufficient to outweigh the interests of Charging Parties regarding the particular aspects of the access policies found violative herein and hence, under Carlsbad, supra, find that the Regents violated subsections 3571(a) and (b) by imposing those aspects of their access policy.

ORDER

Upon the foregoing findings of fact, conclusions of law, exceptions and briefs of the parties, and the entire record in this case, and pursuant to Government Code section 3563.3 of the Higher Education Employer-Employee Relations Act (HEERA), it is hereby ORDERED that the Regents of the University of California and the Lawrence Livermore National Laboratory and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Arriving at a determination of policy or course of action concerning matters within the scope of representation without first giving notice to employee organizations and, upon

request, discussing those matters pending the selection of an exclusive representative;

(b) Adopting a policy or course of action regarding relations with employee organizations that affects the reasonable opportunity of those organizations to represent their members in employment matters, without first giving notice to employee organizations and, upon request, discussing those policies pending the selection of an exclusive representative;

(c) Denying employee organizations the right of access at reasonable times to areas in which employees work, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of rights guaranteed by the HEERA, including, but not limited to:

(1) Requiring 48-hours' advance notice from employee organizations to use institutional meetings facilities in open, unsecured areas;

(2) Restricting reasonable organizational access to the lunchroom in the "321" exclusion area;

(3) Assessing employee organizations for the escort costs related to the exercise of the right of access to areas in which employees work and to the use of institutional facilities for meetings;

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

(a) Reinstate the policy of giving advance notice to employee organizations of contemplated changes in terms and conditions of employment within the scope of representation in order to allow said organizations to make presentations of their views prior to respondent arriving at a determination of policy or course of action.

(b) Within five (5) workdays after the date of service of the final decision in this matter, prepare and post copies of the NOTICE TO EMPLOYEES attached as an appendix hereto signed by an authorized agent of the employer for at least thirty (30) workdays at its University headquarters office in Berkeley, California, and in conspicuous places at the Laboratory locations where notices to employees are customarily posted. It must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material;

(c) At the end of the thirty-five (35) workdays from date of service of this decision, notify the San Francisco Regional Director of the Public Employment Relations Board in writing of what steps the employer has taken to comply with the terms of this decision.

By: Barbara D. Moore, Member

John W. Jaeger, Member

"Member Tovar's partial dissent begins on page 24"

Member Tovar, dissenting in part:

My difference with the majority is limited to their conclusion that the Regents, by failing to provide prior notice to and conduct formal meet and confer sessions with nonexclusive representatives regarding contemplated changes in employment conditions, violated subsection 3571(b). I would instead reverse the hearing officer and dismiss the charge.

As in its decision in California State University, Sacramento (4/30/82), PERB Decision No. 211, the majority continues to argue that rights of nonexclusive representatives which were statutorily created via the Brown Act continue to exist despite the fact that the Legislature has expressly repealed that act's coverage of employees now within the ambit of the HEERA.

As I indicated in my dissent in California State University, Sacramento, supra, I agree generally with the majority's contention, as stated herein, that the effect of HEERA is not to "consign nonexclusive representatives to a state of powerless limbo." However, the specific right of an employee representative to engage in meetings and discussions pursuant to some regulated scheme is a right which I feel must result from express legislative direction. The Brown Act expressly provides for such a scheme of meeting and conferring at section 3530. The majority acknowledges, of course, that this section has no force or effect regarding employees covered

by the HEERA. So, too, the HEERA expressly provides at section 3570 that higher education employers have a duty to meet and confer with exclusive representatives on all matters within the scope of representation. I am unaware, however, of any statute of this state which imposes upon higher education employers the duty to provide prior notice and an opportunity to meet and confer regarding changes in employment conditions to nonexclusive representatives of higher education employees.

My conclusion in this regard is not one which merely follows mechanically from the absence of an express legislative provison. Rather, I feel that the absence of any express mention of such a right for nonexclusive representatives is an indication that the Legislature's intention was that the program of exclusive representation set forth in the HEERA should be the preferred scheme of labor relations in California higher education.

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 in Unfair Practice Case No. SF-CE-2-H, Laborers Local 1276, LIUNA, AFL-CIO and Alameda County Building and Construction Trades Council v. Regents of the University of California, Lawrence Livermore National Laboratory, in which all parties had the right to participate, it has been found that the District violated Government Code sections 3571(a) and 3571(b). (Certain portions of the charge against the employer were dismissed because no violation was found.)

As a result of this conduct we have been ordered to post this Notice, and will abide by the following. We will:

1. CEASE AND DESIST FROM:

(a) Arriving at a determination of policy or course of action concerning matters within the scope of representation without first giving notice to employee organizations and, upon request, discussing those matters pending the selection of an exclusive representative.

(b) Adopting a policy or course of action regarding relations with employee organizations that affects the reasonable opportunity of those organizations to represent their members in employment matters, without first giving notice to employee organizations and, upon request, discussing those policies pending the selection of an exclusive representative.

(c) Denying employee organizations the right of access at reasonable times to areas in which employees work, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of rights guaranteed by the HEERA, including, but not limited to:

(1) Requiring 48-hours' advance notice from employee organizations to use institutional meeting facilities in open, unsecured areas of the Laboratory;

(2) Restricting reasonable organizational access to the lunchroom in the "321" exclusion area;

(3) Assessing employee organizations for the escort costs related to the exercise of the right of access to areas in which employees work and to the use of institutional facilities for meetings.

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

(a) Reinstate the policy of giving advance notice to employee organizations of contemplated changes in terms and conditions of employment within the scope of representation in order to allow said organizations to make presentations of their views prior to respondent arriving at a determination of policy or course of action.

Dated:

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, and the LAWRENCE LIVERMORE NATIONAL LABORATORY,

By _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

LABORERS LOCAL 1276, LIUNA, AFL-CIO; ALAMEDA COUNTY BUILDING AND CONSTRUCTION TRADES COUNCIL, Charging Parties, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA; LAWRENCE LIVERMORE NATIONAL LABORATORY, Respondent.	UNFAIR PRACTICE Case No. SF-CE-2-H PROPOSED DECISION (2/25/81)

Appearances: Thomas Rankin for Laborers Local 1276, LIUNA, AFL-CIO; Stewart Weinberg for Alameda County Building and Construction Trades Council; and Susan M. Thomas for Regents of the University of California and Lawrence Livermore National Laboratory.

Before: Barry Winograd, Hearing Officer.

INTRODUCTION

This case raises two unique questions of statutory interpretation under the Higher Education Employer-Employee Relations Act of 1978 (hereafter HEERA or Act).[1] The first question presented is whether the Regents of the University of California and the Lawrence Livermore National Laboratory, operated by the Regents, violated the Act by unilaterally

[1]Government Code section 3560 et seq. All statutory references in this decision are to the Government Code unless otherwise indicated.

eliminating pre-HEERA procedures for notifying and meeting with employee organizations about contemplated changes in terms and conditions of employment. The charging parties are not exclusive bargaining agents and thus concede they are not seeking to "meet and confer" as that term is defined in the HEERA. Nevertheless, they argue that without advance notice and the formal opportunity to meet and discuss employment matters before the selection of an exclusive representative, the charging parties will be denied a reasonable opportunity to represent employees as they have been represented in the past, under the George Brown Act (sec. 3525 et seq.), HEERA's statutory predecessor. The employer contends that its unilateral actions--which did not entirely bar substantive discussions with the charging parties--were lawful management decisions consistent with the limited rights of non-exclusive representatives under the Act.

The second question presented in this case concerns the application of section 3568 of the Act:

> 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.

As the evidence demonstrated, much of the Laboratory's work is military-related nuclear weapons research and development. In

this context, the PERB is called upon to determine "reasonable" access to the workplace when there is a conflicting employer claim that national security justifies elaborate restrictions upon organizational access.

Based on the findings and analysis set forth hereafter, it is concluded that the employer violated the Act by unilaterally eliminating advance notice to employee organizations of pending changes in terms and conditions of employment. However, there is insufficient evidence that other procedural alterations in holding meetings with the charging parties have interfered with a reasonable opportunity to represent their members. As to the access issue, it is concluded that although the employer may establish certain restrictive conditions because of national security interests, some of the conditions adopted are unreasonable limitations on the statutory access right of employee organizations.

PROCEDURAL HISTORY

This proceeding is based on a second amended charge, filed jointly on April 11, 1980, by the Laborers International Union, Local 1276, AFl-CIO, and by the Alameda County Building and Construction Trades Council. Previous charges had been filed in August 1979 and February 1980. Various pre-trial motions for particularization and to dismiss this case also preceded the second amended charge.

The second amended charge alleged, inter alia:

1. That respondent unilaterally eliminated and changed procedures for meetings and discussions with employee organizations, including a post-HEERA refusal to give notice of proposed changes in employment conditions;

2. That respondent refused to discuss several alterations in substantive terms and conditions of employment prior to their actual implementation;

3. That respondent promulgated unlawful access restrictions affecting employee organizations representing workers at the Laboratory, to wit:

> (a) The access regulations require that non-employee representatives give two workdays notice of visits to employees; (b) Said regulations restrict meetings to non-work hours; (c) Said regulations restrict access to certain areas of the laboratory. For example, access is not permitted in employee break areas, certain lunch rooms, the auditorium, and other locations; (d) Said regulations require that non-employee organizers be accompanied by representatives of the Labor Relations and Personnel Office of the employer upon visits of non-employee organizers to employees at the Laboratory; (e) The Laboratory retains the right to decide which "non-employee organizers" are acceptable to visit employees at the work site. (Second Amended Charge at p. 1(a).)

4. That respondent's access rules were applied in a discriminatory fashion since other non-employees have access to the Laboratory without such restrictive conditions;

5. That respondent interfered with the delivery of a labor newspaper mailing to Laboratory employees.

The charging parties claim that the conduct described above violated sections 3571(a), (b) and (d) of the Act.[2]

The respondent's answer, filed April 30, 1980, conceded that the University no longer gives advance notice to employee organizations of pending changes in terms and conditions of employment, and also admitted access restrictions as to portions of the Laboratory facility. Additionally, respondent asserted various affirmative defenses, including: (1) that PERB lacks jurisdiction over events arising prior to July 1,

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[2]Section 3571, in relevant part, states:

> 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.
>
> . . . . . .
>
> (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.

1979; (2) that a refusal to meet and confer with an employee organization other than an exclusive representative is not a violation of the Act; (3) that Laboratory access policies are reasonable, and subject to superseding federal regulation; and, (4) that the charging parties had improperly amended their initial charge in this case to include untimely allegations that arose more than 6 months prior to the filing of the amended charge and, moreover, raised issues that were not related to the subject matter of the initial charge filed in August 1979. (In its answer, respondent did not dispute that both the employer and the employee organization are within the statutory definition of those terms for jurisdictional purposes under the Act. (Sec. 3562(g), (h).)

After a pre-trial conference on August 6, 1980, a hearing before this hearing officer was conducted on August 11, 12 and 13, 1980, with final briefs being submitted on December 15, 1980.

On December 22, 1980, after the conclusion of the hearing and the briefing, the hearing officer requested that several elements of the second amended charge be withdrawn by the charging parties in order to simplify the issues and disposition in this case. This request was made because portions of the earlier charge were not addressed in the charging parties' briefs and thus no longer appeared to be in dispute. On January 6, 1981, the charging parties withdrew

certain specified paragraphs in the second amended charge pursuant to this request. Most of the issues withdrawn involved alleged changes in substantive employment terms without meeting and discussions with the charging parties.[3]

FINDINGS OF FACT

A. The Employer's Policies Regarding Meetings with Employee Organizations.

Prior to the passage of the HEERA, the Laboratory and the University regularly gave notice of proposed changes in terms and conditions of employment to employee organizations recognized as employee representatives under the predecessor George Brown Act. Notice was provided about systemwide University employment issues, as well as about matters of local concern at the Laboratory. Respondent's pre-HEERA readiness to seek organizational comment prior to actual implementation of management proposals was demonstrated by documentary evidence introduced at the hearing, including evidence of yearly wage proposals solicited by respondent and of the memorialization of dialogue at George Brown Act "meet and confer" sessions. Under that legislation, employer and employee representatives had

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[3]One other issue in this case, regarding use of the Laboratory's internal mail system, was not presented at the hearing as both parties stipulated to be bound by the decision of the PERB itself in a case raising the same legal issue. See Case No. SF-CE-4-H.

"meet and confer" sessions to consider organizational views prior to the employer "arriving at a determination of policy or course of action." (Sec. 3530.)[4] Often, pre-HEERA meetings included the presence of non-employee organizational representatives who participated at a personnel office location outside the Laboratory's highest security areas. On some occasions, once a meeting was over, Laboratory officials prepared a summary of the back-and-forth discussion that occurred. The summaries did not represent a statement of agreements reached, but expressed the respective positions taken at the meetings.

The Laboratory's policies changed after the effective date of the HEERA. Early in July 1979 the Laboratory's labor relations department issued a memo on relations with employee organizations. Copies of this memo were sent to the charging parties. This memo stated that there would be a change in the

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[4]Section 3530 provides:

> The state by means of such boards, commissions, administrative officers or other representatives as may be properly designated by law, shall meet and confer with representatives of employee organizations upon request, and shall consider as fully as such representatives deem reasonable such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

previous practice by eliminating "meet and confer" sessions with employee organizations about proposed changes in employment conditions. This alteration was intended to reflect the fact that under the HEERA an employer could only "meet and confer" with an exclusive representative. (Sec. 3562(d).)[5] The memo said the change was justified in order for the employer to avoid being charged with unlawful favoritism or de facto recognition of an employee organization. Last, the memo expressed management's desire to improve personnel relations with individual employees. In the future, according to the memo, announcement of changes would be made to individual employees. The contrast in the Laboratory's position before

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[5]Section 3562(d) states:

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

and after the effective date of HEERA was summarized in the memo:

> The Laboratory management believes that employee input is more helpful and effective when unfiltered by third party representation. Thus, after July 1, the Laboratory management will continue its practice of notifying employees of any intention to modify or adopt policies which would significantly affect employees' wages, hours and conditions of employment. Before adopting such changes, management will actively solicit input and receive suggestions from employees on the proposed changes.

Testimony at the hearing indicated that prior to the effective date of the HEERA the Laboratory had not actively solicited the input of individual employees in the fashion described above. For example, individual employees in years past were not invited to submit annual wage increase proposals. It is uncontested that the policy change announced in July was made without advance notice to employee organizations and that, thereafter, respondent did not formally discuss its new policy with the charging parties.

A November 1979 letter from University Vice-President Archie Kleingartner to an attorney for one of the charging parties in this case, Thomas Rankin, attempted to clarify the University's policy after objections had been made. The letter stated that the University was still willing to meet and to have discussions with employee organization representatives after notice was given to individual employees. In this

letter, respondent made no commitment to give notice to employee organizations, and was not specific about the nature of the meetings that could take place. The employer did, however, reiterate that the meetings it was willing to have were not the same as meet-and-confer sessions that it would have under the HEERA with an exclusive representative of employees. Mr. Kleingartner further indicated that no meeting summaries would be provided by the University as had been done on occasion in the past. This change was justified as a means of avoiding an implication of contractual agreement or of respondent officially recognizing a non-exclusive organization as a bargaining agent.

Testimony at the hearing amplified the differences before and after the Act. Witnesses for both the charging parties and the respondent agreed that changes made in meeting procedures were essentially matters of form. Specifically, aside from elimination of advance notice and the absence of post-meeting summaries, agendas were no longer routine, fewer persons often attended meetings, locations within security areas were utilized, and the "tone" of meetings became more informal. One witness for the Laboratory summed up the difference by describing the pre-HEERA practice as having all the trappings of collective bargaining, but that respondent attempted to remove those trappings after the HEERA went into effect.

The testimony showed, however, that respondent's apparent

objective to alter past practice was not fully realized. In each instance of an alleged change in substantive employment terms and conditions after the effective date of HEERA, the charging parties in this case eventually did get actual notice from employees at the Laboratory. Once aware of a plan, the organization had an opportunity to comment prior to the ultimate implementation of the announced change. The testimony also showed that organizational representaives and business agents did participate in discussions, that locations outside secured areas were available for use, that meeting purposes were designated in advance, and, that correspondence was sent reflecting organizational views on pending proposals.[6]

In sum, the charging parties may have thought they were eliminated from day-to-day labor relations by the initial Laboratory memo of July 1979. And, thereafter, they may have been confused and unsettled by the Laboratory's attempt to unilaterally "de-formalize" meeting procedures. But, the

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[6]There are several examples of charging parties' involvement in the record. In one instance, an agent for the Building Trades Council had conversations with a labor relations officer about wage rates for a certain class of employees. The Laborers also submitted salary data to the Laboratory as part of the annual wage survey prepared by the employer. In another situation, the Laboratory met with employee representatives to consider their comments about evaluation procedures for workers in the materials fabrication division. And, after a charging party inquiry, one of the charging parties was invited to submit ideas for an extensive compensation and classification study, and to discuss with the employer any recommendations that might be developed.

evidence demonstrates that the charging parties were free to speak up once they heard of a proposal via the employee grapevine, and that Laboratory officials were invariably responsive to charging parties' comments or requests for information.

There was other testimony regarding the impact on the charging parties arising from the changes in meeting procedures. The charging parties claimed worker disaffection, membership loss, attendance drop-off at union meetings, and recruitment problems. These factors, to the extent actually demonstrated by the evidence, appeared to affect the Laborers and to have very little or no discernible effect on the Building Trades Council.

The nature of the evidence introduced to show destructive impact was uniformly hearsay evidence about disaffected or disappointed employees. Other evidence such as a loss of attendance at membership meetings and a drop in membership and recruitment figures, was not tied by any direct evidence to the events in question in this case. Further, the respondent introduced evidence demonstrating that membership loss in the Laborers local had actually preceded the effective date of the HEERA and that the figures did not reveal any greater rate of loss after that date. The charging parties did not offer any rebuttal to this evidence. For the reasons discussed below (at p. 48), there is no need to resolve the conflict over whether

the impact of respondent's actions was quantifiable.

B. The Laboratory's Access Policies.

The Lawrence Livermore National Laboratory is owned by the United States government and is operated under a management contract with the Regents of the University of California. The main Laboratory facility at issue in this case is located in Livermore, California.[7]

The Laboratory extends over a 640-acre area and constitutes, during its working hours, a small-scale city environment involving more than 7,000 employees in a wide range of occupational activities. About half of the Laboratory's activity concerns advanced nuclear weapons research and development. Another major field of work involves energy development.

Additionally, there are support operations necessary for an enterprise of great size and scope. For example, cafeterias have been established throughout the Laboratory. The Laboratory maintains its own mail room and mail delivery systems. There are taxi and bicycle fleets for internal transportation. A

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[7]There is an adjunct facility, also known as Site 300, located about 15 miles from the main Livermore operation, used for high explosive experiments relating to weapons design. Some evidence was introduced about access practices in connection with this secondary facility, but there is no suggestion that the ultimate resolution in this case should apply differently to that facility than to the main operation in Livermore.

fire department is prepared to handle on-site problems. In the event of injury or illness, a fully staffed medical clinic with trained rescue and paramedical personnel is available.

Although the charging parties have challenged the Laboratory's access policies, they have not challenged either the necessity for some national security restrictions nor, with one exception discussed below (at pp. 24-25), the applicability of those restrictions to any particular situs. The procedural system established by the Laboratory for regulating employee and non-employee access to Laboratory operations is set forth in detail in a stipulation between the parties and need only be summarized briefly here.

The basic means used to regulate access to and movement within the Laboratory is a system of area divisions and perimeter controls, coordinated through issuance of identification badges and the use of escorts under some circumstances. In addition to some "open," unsecured administrative areas, there are three basic security areas at the Laboratory: "controlled areas" of minimum security, "limited areas" of moderate security, and "exclusion areas" of maximum security. The Laboratory is divided into a series of distinct work zones, with internal barriers and checkpoints limiting the free movement of personnel from one sub-area to the next. Color-coded badges are used to identify a person's security status and the areas to which access is permitted.

Employees beginning work at the Laboratory are given initial clearance for a controlled area, and their ultimate top security clearance, known as "Q" clearance, is only granted after an investigation by the Federal Bureau of Investigation and/or the Department of Energy. A "Q" security clearance investigation may take from five to ten months to be completed.

Prior to receiving "Q" clearance an employee may gain entry to a limited area, but only upon an authorized request for that employee's presence and an appropriate escort. On some occasions, an escort into a limited area will be provided by a "Q" cleared Laboratory official. On other occasions, as well as on visits to exclusion areas, protective service officers of the Laboratory's own police department will provide escort service. Employee movement within the Laboratory is based on the "need to know" principle, thereby restricting the access of "Q" cleared employees to areas of the Laboratory for which their top secret clearance does not apply.

Non-employee access and movement is also based on a badge and escort procedure, following authorized requests for a visitor's access. Non-employee visits, as a general matter, are limited to those with a business or programmatic purpose related to on-going activity at the Laboratory. The testimony of security and management officials at the Laboratory indicates that union grievance representation, for example, falls within the Laboratory's understanding of a business or

programmatic purpose. Workplace health and safety disputes requiring on-site representation also fall within the scope of this rule. Meetings for organizational solicitation, however, are not considered to be business-related.

In order for a non-employee to enter the Laboratory, a series of preliminary steps and procedures must be followed, under the direction of the Laboratory's police and security staff. These processing measures include an authorized request, badge issuance, designation of appropriate escorts, and, when necessary, downgrading of exclusion areas to limited area status to allow uncleared visitor access. Several steps are involved in the security sweep undertaken to downgrade an exclusion area. These steps include cordoning-off that area from contact with top secret classified personnel, covering or removing all top secret material and equipment between the point of access and the ultimate Laboratory destination to ensure no visibility by the visitor, posting of warning signs, and coordinating available escort services to accompany the uncleared individual.

The time needed for badge processing, sweeps and downgrading varies in relation to the complexity and scope of the visit. Although processing can theoretically be completed in less than a half-day in a simple case, the security staff prefers at least 48-hours' advance notice for both union and non-union Laboratory visitors. This allows adequate time for

the total clearance and downgrading procedure, compensates for the backlog of badge applications sometimes confronting the Laboratory's security staff, and permits escort coordination on days when a large number of non-employees are present.

Additionally, there is a special category of non-employee visitors to the Laboratory facility known as "site subcontractors." These individuals provide service for telephone, photocopy, vending machine, computer, and other Laboratory equipment and facilities. In light of their periodic need for access to a variety of Laboratory locations, regularly used site subcontractor personnel are routinely processed for "Q" clearance. Hence, even though a phone repairperson is not an actual Laboratory employee, the repairperson may have a "Q" clearance. Indeed, in some cases, "Q" cleared subcontractors have access to areas that even "Q" cleared Laboratory employees do not possess.[8] Still, when site subcontractor personnel are used, an authorized request is necessary and they must check-in at the appropriate sub-area pass gate within the Laboratory.

Three different access regulations were applicable at the

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[8]The only individuals with open-ended access throughout the Laboratory are certain police and emergency personnel, as well as the Director and Associate Director. Department and division heads are restricted to their own work areas, although they may be cleared to serve as "authorized requestors" for the purpose of bringing non-employees into the area.

Laboratory prior to the effective date of the HEERA. Laboratory officials testified that these policies were still in effect at the time of the hearing in this case.[9] The three access policies may be summarized as follows:

1. The June 30, 1977 access regulations for representatives of construction union employees.

This policy allows employee representatives to have access to a controlled area construction site on Laboratory grounds upon presentation of a letter to the Laboratory's Labor Relations Manager from a designated officer of the Building and Construction Trades Council. In some instances, the name of the representative will be on an established access list maintained in the central badge office to faciliate processing. Assuming the representative's name is on a list, access to a controlled area will be granted, with the individual accompanied by a representative from the Plant Engineering Department (that is, a non-police employee). On other occasions when a union representative can enter a limited area, the additional accompaniment of a protective service officer is required as

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[9]Some testimony by the charging parties indicating that at least one of the policies--regulations governing access by representatives of construction craft trade unions--had been superseded by more stringent regulations was denied by the Laboratory. Also, the allegations of new, more stringent regulation for construction site access were not supported by sufficient evidence of any actual instance where the Building Trades Council, representing diverse crafts, suffered from an access policy different from the one purportedly in effect.

well as a minimum 48-hours' advance notice of the visit request. This access regulation is not intended to allow access for mere contacting of employees, but is designed for grievance or related situations involving on-site disputes. Other meetings with employees can be arranged pursuant to the Laboratory's time, place and manner regulations, discussed below.

2. The March 22, 1978 policy for granting access to employee organizations.

This access policy requires 48-hours advance notice for access to controlled areas, as well as a reasonable relationship between the request and the investigation of a complaint or grievance concerning work site conditions. The policy limits representative access to two non-employees and requires that these representatives be accompanied in controlled areas by a member of the Laboratory's Labor Relations Department and, if appropriate, a member of the Laboratory department involved. Unlike the contractor craft union rules, the policy contains no reference to access to limited areas of the Laboratory.

3. Laboratory time, place and manner regulations of August 1, 1977.

The regulations governing the time, place and manner for use of Laboratory meeting rooms and facilities limit non-employee access, as a general rule, to open, unsecured areas of the Laboratory. Advance notice of non-employees

invited to attend or participate in such meetings is required 48 hours prior to the meeting. Other portions of the regulations, not at issue in this proceeding, cover the posting of bulletin board materials, the use of sound amplification equipment, the distribution of literature on Laboratory premises, and the use of Laboratory equipment in the course of organizational meetings.

4. The access policies established by the CSEA order.

At the time this case went to hearing, respondent's access policies were also being challenged by the California State Employees Association (hereafter CSEA). (See PERB Unfair Practice Case No. SF-CE-7-H.) Subsequently, an order was issued in that proceeding based on stipulated findings of fact submitted by CSEA and respondent. (See Decision No. HO-U-82. The notice of the order is attached to this decision as an exhibit.) The CSEA findings are virtually identical to the stipulated findings in this case. The hearing officer's proposed order in the CSEA case was not contested by respondent and it became final on September 3, 1980.[10]

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[10]Although the parties in the CSEA case were close to an agreed upon decision and order when this case went to hearing, and respondent moved to continue this hearing on the basis that the imminent order in the CSEA case would modify the challenged access rules here, thus negating the need for an access hearing, respondent was unwilling to allow advance disclosure of the CSEA proposed order. The continuance motion was therefore denied without prejudice to a later renewal of the

Throughout the pre-trial conference, the hearing, and the briefing process in this proceeding, respondent has repeatedly made concessions in reference to the CSEA access case. These concessions included statements that the terms ultimately arrived at in the uncontested CSEA order modified the previous policies and would be applicable to the charging parties in this case. Respondent has also argued that the CSEA findings and order are within the scope of administrative notice for this hearing officer for the purpose of ruling upon and dismissing the access charge filed by the charging parties here. In light of the extensive factual similarities between the cases, and respondent's concessions, such notice is appropriate.[11]

The CSEA order expanded the number of meeting rooms and facilities available for the use of employees with

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motion. No further effort to continue this case was made prior to the close of the hearing.

At the pre-trial conference the charging parties also suggested that the agreed upon CSEA order could itself be an unfair practice since employee organizations other than CSEA had no advance notice or opportunity to comment about the change in policy. However, the charging parties did not formally amend the charge in this respect, nor have they filed a new charge, and the suggested issue is not properly before this hearing officer.

[11]Special briefing was solicited on the terms of the CSEA order after initial briefs were submitted in this case. The charging parties expressed objections to parts of the CSEA order. However, neither party requested that the hearing be re-opened to take evidence regarding either the CSEA order or respondent's position that the earlier policies were thereby superseded to the extent limitations on statutory access rights were lifted.

non-employees present. Under the terms of that order eight meeting rooms or auditoriums in secured areas throughout the Laboratory can be requested by employee organizations for use during non-working time. Generally, 48-hours' advance notice is required for such access, and there are limitations that a particular room or facility may be used only a certain number of hours (or days) within a weekly or monthly period. Further, there are limitations that no more than two non-employee representatives shall be present at a time as well as a restriction to no more than one non-employee guest speaker. Finally, access to certain facilities described in the order, located in limited areas of the Laboratory, can only be allowed if accompanied by administrative escorts or protective service officers employed by the Laboratory. To the extent a protective service officer is needed for such access, the employee organization, under the CSEA order, is required to reimburse the Laboratory for costs incurred.

To facilitate access, the CSEA order provides that ten employee representatives may be listed with the Laboratory for regular access. Again, one-day visitor badges for such persons are available on 48-hours' written notice, with one week's written notice required to prepare a visitor badge for a non-employee representative not included on the list.

The CSEA order does not, however, establish means of access

by employee organizations to exclusion areas of the Laboratory. This issue arises not only in conjunction with claims by the charging parties that it is discriminatory to deny such access for grievance purposes, but also arises from a further issue raised by the Laborers challenging the need for national security restrictions in one part of a Laboratory exclusion area.

Specifically, the Laborers, which represents a large number of machinist employees concentrated in the "321" exclusion area, seeks access to the lunchroom in that area for the purpose of employee meetings and general organizational contact.

Machinists working in that area and elsewhere at the Laboratory usually have a 30-minute lunch period. (The lunch period finding in the CSEA case was 45 minutes.) Many of the machinist employees use the "321" lunchroom because of the time it would take to go to a cafeteria in another area. Occasionally, other contractor employees without "Q" clearance have lunch there, accompanied by an escort.

The evidence showed that the "321" area is comprised of several buildings. The lunchroom in the "321" area is in a building separate from the ongoing research and production work by machinists in other parts of the "321" area. Observation through the lunchroom windows can be blocked by curtains already installed. A Laboratory security official testified that the processing time to downgrade the lunchroom to limited

area status would take up to two hours. A small conference room, with a separate entry, is the only other room in the building that houses the lunch facility. There was no testimony that the lunchroom is the location of national security activity in the regular course of Laboratory research and development projects.

The testimony in connection with the impact of the access policies at the Laboratory was, as with the question of the impact of its meeting and discussing policies, a subject of hearsay reference disputed by the Laboratory. Union officials testified that workers were reluctant to meet with the union under the adverse circumstances of the Laboratory's access rules. In particular, the charging parties were critical of rules allowing labor relations department escorts who might oversee or overhear the interchange with the union official. Charging parties also criticized the difficulty in gaining access to workers at or near the job site where they might most easily be found, for example, during a brief lunch period. The Laborers' union office is located in Tracy, California, about 25 miles from the Laboratory site. In order to accommodate workers wishing to attend union meetings, the Laborers have sometimes rented a facility at a local hotel in Livermore. Although the charging parties have by phone and by letter formally requested (and been denied) expanded access since the effective date of the Act, there was no direct evidence

introduced that any physical attempt was made to gain post-HEERA access.

CONCLUSIONS OF LAW

A. Jurisdictional objections.

Respondent's jurisdictional arguments can be disposed of briefly. First, contrary to the employer's claim, the charging parties have not alleged unfair practices arising before the July 1, 1979 effective date of the HEERA. Certain events occurring before that date--for example, the promulgation of access regulations--are part of the charge because they continued in full force and effect after that date. The mere fact that they had been issued earlier does not immunize those actions from later review under new legislative standards. Santa Monica Community College Dist. v. Public Employment Relations Bd. (1980) 112 Cal.App.3d 684, 690, fn. 3.

Second, the charging parties' amendments to the initial charge were timely and were properly related to the original subject matter, thereby rendering the six months' limitation period of section 3563.2(a) inapplicable. The initial charge clearly raised the Laboratory's post-HEERA revised policy on relations with employee organizations and even attached the new policy as an exhibit in response to a motion for particularization. The claim of unreasonable access regulation was also clearly raised: ". . . the public employer has denied

to the Charging Party access to employees at reasonable times to areas in which employees work." Allegations made in later amendments, following pre-hearing motions by the respondent, incorporated events entirely related to the first charge filed in August 1979. Construing these later allegations as within the scope of the original charge avoided protracted, multiple proceedings. Also, there has been no prejudice to respondent as a result of litigating issues raised in the second amended charge. The amendments, therefore, were properly received and heard. NLRB v. Jack LaLanne Management Co. (2d Cir. 1976) 539 F.2d 292, 294-295 [92 LRRM 3601].[12]

Third, the defense that superseding federal regulation justifies the employer's actions (and bars a challenge under the HEERA to the reasonableness of respondent's rules) must yield to article III, section 3.5 of the California Constitution. That provision prohibits PERB from refusing to apply the HEERA "on the basis that federal regulations prohibit the enforcement of such a statute," unless an appellate court has so ruled.

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[12]Where appropriate, comparable provisions of the National Labor Relations Act (NLRA), as amended, 29 U.S.C. section 151 et seq., and as construed, may be used to guide interpretation of California public labor relations statutes. See, e.g., San Diego Teachers Assn. v. Superior Court (1970) 24 Cal.3d 1, 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616. The Board itself, when known as the Educational Employment Relations Board prior to July 1, 1978, adopted this general rule. Sweetwater Union High School District (11/23/76) EERB Decision No. 4. Under the NLRA, a six-month limit also applies to the filing of unfair practice charges. See section 10(b), 29 U.S.C. section 160(b).

B. The employer's revised policy regarding notice to and meetings with employee organizations.

The charging parties claim that the Laboratory's unilateral adoption of a revised policy on notice to and meetings with employee organizations constituted violations of sections 3571(a), (b) and (d) of the HEERA. (See fn. 2, ante.)[13] They argue that these changes deprive the charging parties of a reasonable opportunity to represent employees as they had in years past. Respondent counters that although it will meet and discuss substantive proposals affecting employment conditions upon the organization's initiative--as the Kleingartner letter in November 1979 clarified--there is no legal obligation to provide advance notice of proposed changes, nor to have meetings and discussions as formal as those that existed prior to the effective date of the HEERA. The employer argues that until selection of the exclusive representative it has unilateral authority to establish the rules governing representation procedures. Analysis of these respective positions follows.

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[13]The charging parties have not alleged that the Laboratory's conduct violated section 3571(c), which provides that it shall be unlawful for an employer to "refuse or fail to engage in meeting and conferring with an exclusive representative." The charging parties have specifically stated that they do not claim meet and confer rights that apply to exclusive representatives under the Act. (Charging Parties' Brief at p. 8.)

The first step in support of the charging parties' position relies upon several portions of the HEERA to demonstrate legislative intent to create representation rights for employee organizations prior to the time an exclusive representative has been selected. Without a continuing right of representation, any claim to maintaining procedural formalities must fail.

One portion of the Act relied upon by the charging parties is section 3565:

> 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. 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.)

The independent clauses in section 3565 distinctly separate representation from the specific function of meeting and conferring. And, by definition in the Act, only an exclusive representative can "meet and confer" with the employer. (Sec. 3562(d).) No such restriction is placed on the right of representation per se. Indeed, one portion of the Act apparently permits an individual or a non-exclusive employee group to represent employees in the adjustment of grievances after the selection of the exclusive negotiating agent. (Sec. 3567.)

The charging parties also point to language in section 3560(e) of the Act, which sets forth the legislative purpose 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 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. (Emphasis added.)[14]

A further indication of legislative intent to extend representation rights to employee organizations prior to achieving exclusivity is found in section 3562(g):

> 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. (Emphasis added.)

Obviously, one method of representation under the Act is through meeting and conferring, but the definition of

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[14]Another legislative finding recognizes that there is a "fundamental interest in the development of harmonious and cooperative labor relations between the public institutions of higher education and their employees." (Sec. 3560(a).)

organizational purpose provides for representation (or, "dealing with") on a wider plane.

The charging parties summarize their case by observing that the HEERA, as the Legislature expressly noted, represented an extension of collective negotiating rights already enjoyed by other public school employees in California to employees of public higher educational institutions:

> All other employees of the public school systems in the state have been granted the opportunity for collective bargaining and it would be advantageous and desirable to expand the jurisdiction of the board created thereunder to cover the employees of the University of California, Hastings College of the Law, and the California State University and Colleges. These institutions of higher education have their own organizational characteristics. (Sec. 3560(b).)[15]

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[15]Expansion of bargaining rights to exclusive representatives in higher education was part of a long-term trend in California:

> During the hearings following enactment of the George Brown Act public employee unions continued to grow in size and to press their claims that public employees should enjoy the same bargaining rights as private employees so long as such rights did not conflict with the public service. The George Brown Act, originally a pioneering piece of legislation, provided only that management representatives should listen to and discuss the demands of the unions. Apparently the failure of that act to resolve the continual controversy between the growing public employees' organizations and their employers led to further

The charging parties contend that it would be illogical to extend broader, more expansive negotiating rights to higher education organizations (rights that parallel those of other public school organizations), and, at the same time, to deny those organizations the non-exclusive rights of good faith meeting and discussion that they previously enjoyed under the George Brown Act. It is the charging parties' view that these lesser rights continue as established representation practices pending the selection of an exclusive representative.

Although the Board itself has not yet considered the argument advanced by the charging parties in this case, the PERB has made a ruling in a similar situation arising under the State Employer-Employee Relations Act. (Sec. 3512, et seq., hereafter SEERA). In Professional Engineers in California Government (3/19/80) PERB Decision No. 118-S (hereafter PECG), the Board considered a claim that a non-exclusive employee organization was improperly deprived of the right to meet and discuss gubernatorial wage proposals prior to adoption of the budget for the 1978-1979 fiscal year. The Board ultimately held that the discussions between the employer and the

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> legislative inquiry. Moreover, subsequent enactments of other states, which granted public employees far more extensive bargaining rights, further exposed the limitations of the George Brown Act. (Glendale City Employees' Assn., Inc. v. City of Glendale (1975) 15 Cal.3d 328, 335.)

employee organization were sufficient to satisfy the State's duty under the SEERA. But, the Board only reached that final conclusion by deciding that there was a preliminary right of the non-exclusive representative to meet and discuss the issue with the employer. As the Board stated:

> If we were to adopt respondent's argument that non-exclusive 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. (PECG at p. 8.)

The Board concluded that,

> the obligation imposed by the statute on the state employer with respect to non-exclusive representatives is to provide a reasonable opportunity to meet and discuss wages with them prior to the time the employer reaches or takes action on a policy decision. (PECG at p. 10; emphasis added.)

Respondent maintains, however, that the PECG precedent is not applicable because the SEERA, in section 3515.5, expressly provides that non-exclusive representatives have "the right to represent their members in their employment relations with the state" until an exclusive representative is recognized. Identical language distinguishing pre- and post-exclusivity rights is not present in the HEERA. Absent such language, respondent argues that the extent of representation allowed is a unilateral management prerogative. Without speculating as to

the reasons the Legislature may have fashioned generally similar statutes in slightly different ways, it can still be concluded that the difference relied upon by the employer does not excuse respondent from a duty to provide a "reasonable opportunity" for the non-exclusive representative to discuss employment relations.

First, under both the SEERA and the HEERA it is the right of employees that are fundamental to the representation purposes of the legislation. The variation in statutory language does not alter this basic premise. This approach is consistent with the fact that in both the SEERA and the HEERA there is no requirement that employees select an exclusive representative.

Second, the statutory design, read as a whole, amply demonstrates that the Legislature chose to add to the basic employee rights "to form, join and participate in . . . organizations . . . for the purpose of representation" the further right that an exclusive representative may be selected "for the purpose of meeting and conferring" with the employer.[16]

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[16]Section 3527 of the George Brown Act, unlike section 3565 of the HEERA, does not establish a "meet and confer" purpose adding to the "purpose of representation." Section 3527 states:

> Except as otherwise provided by the Legislature, state employees shall have the right to form, join, and participate in the activities of employee organizations of

In order to give real meaning to the Legislature's choice of language expanding representational rights under the HEERA to include exclusive meet and confer rights, a necessary legal conclusion is that an employee organization is not deprived of any and all voice on employment matters until it is chosen as an exclusive representative. This is especially so, when, as here, the charging parties have had a long representation relationship with management that included all the "trappings" of collective bargaining.

A recent Court of Appeal decision supports the Board's reasoning. In Professional Engineers in Cal. Government v. Department of Transportation (1980) 114 Cal.App.3d 93, the court held that a meet-and-confer controversy arising under the George Brown Act had become moot with the passage of the SEERA. The court also found that, under the SEERA, the proper employer respondent was the Governor, or his agent, not the Department of Transportation. Regardless, the court recognized that non-exclusive employee organizations had the right to represent their members pending the selection of the

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> their own choosing for the purpose of representation on all matters of employer-employee relations. State employees also shall have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the state.

negotiating agent, and that the state employer had been continuing to do so. "Such communication," said the court, "seems consistent with SEERA." (Id., 114 Cal.App.3d at p. 99.)

If there was no right to representation under the HEERA before selection of an exclusive representative, different classes of public employees subject to comparable legislation would find themselves with substantially different statutory rights. Absent a clear legislative mandate in favor of this outcome, the statutory language, structure and history argues that employee rights should be fully protected.

The next step in the charging parties' analysis requires a showing that the "reasonable opportunity" to exercise non-exclusive representation rights extends to the procedural elements of the meeting and discussion process.

On this point the PECG decision is again instructive, even though the charging party in that case alleged a refusal to meet and discuss a substantive issue. Implied in the Board's ultimate standard of requiring a "reasonable opportunity" to meet and discuss is that notice and good faith discussion be provided to ensure that the "anomalous result" of eliminating essential rights under prior legislation would not occur.

Reference may be made to two sections of the George Brown Act to illustrate the existence of procedural practices that should be part of a continuing right of representation.

For example, section 3530 of the George Brown Act defines

the pre-HEERA meet and confer relationship, providing that:

> The state by means of such boards, commissions, administrative officers or other representatives as may be properly designated by law, shall meet and confer with representatives of employee organizations upon request, and shall consider as fully as such representatives deem reasonable such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action. (Emphasis added.)

The significance of this language is apparent--an employee organization must be given advance notice if it is to request an opportunity to fully present its views prior to an employer's decision.

In order to stabilize the labor-management relationship, section 3532 of the George Brown Act also provides that rules and regulations may be drafted governing the representation selection and communication process. Among the reasonable rules and regulations that the state may adopt, after consultation with employee organizations, are means of "furnishing non-confidential information pertaining to employment relations to employee organizations." (Sec. 3532(e).)[17]

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[17]Section 3532 states, in full:

> The state may adopt reasonable rules and regulations for the administration of employer-employee relations under this chapter.

Judicial interpretations of the George Brown Act have affirmed the employer's obligation to meet and discuss employment conditions in good faith. Lipow v. Regents of the University of California (1975) 54 Cal.App.3d 215; State Assn. of Real Property Agents v. State Personnel Bd. (1978) 83 Cal.App.3d 206. And, as a general principle, good faith implies, as under federal law, that action by the employer will be preceded by notice to and meeting with the employee organization. Lipow v. Regents of University of California, supra, 54 Cal.App.3d at 226, citing NLRB v. Katz (1962) 369 U.S. 736. Indeed, a failure to provide advance notice and an opportunity for consultation is considered bad faith per se on the part of the employer. (Ibid; accord San Mateo Community College District (6/18/79) PERB Decision No. 94.)

> Such rules and regulations may include provisions for (a) verifying that an organization does in fact represent employees of the state, (b) verifying the official status of employee organization officers and representatives, (c) access of employee organization officers and representatives to work locations, (d) use of official bulletin boards and other means of communication by employee organizations, (e) furnishing nonconfidential information pertaining to employment relations to employee organizations, (f) such other matters as are necessary to carry out the purposes of this chapter.
>
> For employees in the state civil service, rules and regulations in accordance with this section may be adopted by the State Personnel Board.

Decisions under the Meyers-Milias-Brown Act (sec. 3500, et seq.), analyzing provisions similar to those in the George Brown Act, not only apply the good faith duty to discussion of wages, hours and other terms and conditions of employment, but extend the duty. Thus, good faith consultation is required prior to promulgation of rules governing the procedural aspects of the bilateral relationship, including administrative matters comparable to the furnishing of information set forth in section 3532. See, e.g., Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802, 821, citing International Assn. of Fire Fighters Union v. City of Pleasanton (1976) 56 Cal.App.3d 959, 976.[18]

The scope of discussion thereby required is consistent with the general rule under federal law that an employer's refusal to negotiate over the ground rules for substantive negotiations is evidence of a refusal to bargain in good faith. As the NLRB said in General Electric Co. (1968) 173 NLRB 253 [69 LRRM 1305]:

> . . . such preliminary matters are just as much part of the process of collective bargaining as negotiation over wages, hours etc. (Id., 176 NLRB at p. 257.)

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[18]California public sector labor law also recognizes that,

> "an existing and acknowledged practice" affecting conditions of employment has the same dignity as "an existing agreement or rule." (Vernon Fire Fighters v. City of Vernon, supra, 107 Cal.App.3d at 817,

And, the Board itself has adopted a good faith test governing negotiation over preliminary ground rules. See, e.g. San Ysidro School District (6/19/80) PERB Decision No. 134; Stockton Unified School District (11/3/80) PERB Decision No. 143.

The respondent contends, however, that the charging parties are still given a "reasonable opportunity" to meet and discuss proposed changes in employment conditions because the employer's informal practice of allowing organizational input satisifes any legal duty owed by respondent. In fact, the evidence does show that employee organizations in this case received actual notice one way or another of proposed substantive changes at the Laboratory. On these substantive employment matters, the employee organizations also had an opportunity, if exercised, to offer their views and insights. However, allowing the respondent to unilaterally determine procedural meeting conditions would diminish an essential organizational need to meet and discuss in good faith the basic operating terms of the bilateral relationship. And, permitting

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> quoting International Assn. of Fire Fighters Union v. City of Pleasanton, supra, 56 Cal.App.3d 959, 972.)

For this reason, established practices should not be changed without providing an employee organization notice and an opportunity to consult with the employer prior to a decision being made. (Id.)

respondent's conduct to remain unchecked would require an excessively narrow reading of the PECG decision and of statutory rights under the HEERA.

For example, as implied in the PECG decision, and as evident from past practice, in order for an employee organization to have a lawful opportunity to express its views there needs to be some prerequisite assurance that the employee organization will know those subjects about which its views can be expressed--that is, a requirement of advance notice. Without notice, the business of representation can become a cat-and-mouse game in which the employee organization may face the danger of coming in after the fact, too late to make a difference, or too late to even state a position on a *fait accompli*.

The role played by advance notice in the representation relationship was aptly described in the following testimony by union business agent Marlin Tolbert about his participation in evaluation procedure discussions with respondent:

> RECROSS-EXAMINATION
>
> Q. (by Mr. Weinberg) As to this last topic explored by the hearing officer, do I understand you spoke to Mr. Lateiner [Laboratory labor relations official] about the subject of evaluations, then you reported to -- or did you report the content of your discussion with Mr. Lateiner to your members?
>
> A. Yes, I did. I discussed it with them.
>
> Q. Did they indicate to you that they had already received the same or similar information from management?

A. Yes.

Q. And you were receiving it after they had received it. Is that correct?

A. Well, the entire subject was secondhand I'd received it.

Q. Did they indicate that there had been discussions by them, or some of them, with management concerning the subject matter of the number of evaluations and the change?

A. Yes.

Q. How did you then the conclusion that there was no point in going on?

A. From the discussions with the membership.

Q. Did you, or do you, feel that, had you entered that area at an earlier level, it might have made a difference in, perhaps, the quality of your representation of the unit?

A. Just the involvement itself would make the difference.

Q. Why?

A. That's the purpose of representation as far as, you know, the union's concerned: to get involved, to initially get involved, to know what is going on, to be informed, to inform those that's uninformed.

Q. And, instead, the way it's working is you find out after the fact.

A. Absolutely.

Q. Has this been brought up to you by your members?

A. As I stated earlier, I hate to admit it, yes, it has. (Reporter's Transcript, vol. I, pp. 98-99; emphasis added.)

An abrupt alteration of employee organizational status, as in this case, could seriously interfere with the ability of the organization to represent Laboratory employees and, as an extension, to be selected by those employees as an exclusive representative in the future. The tension and frustration resulting from this change in status and procedure would hardly be consistent with the statutory purpose of the HEERA to promote harmonious and cooperative relationships.

Nevertheless, the Laboratory suggests special reasons why the obligation of advance notice, in particular, should not be imposed in this case.

One reason respondent puts forward is that it would be unduly burdened by the obligation to give notice to employee organizations. This burden allegedly exists because of the change in circumstances from the George Brown Act era to the HEERA's recognitional procedures. Respondent asks PERB to take notice of the Board's administrative proceedings in representation cases to observe that a large number of organizations have sought representation rights under the HEERA, including overlapping petitions for recognition in many negotiating units. Still, these facts do not demonstrate a burden in this case.

The evidence indicated that few unions were involved in Laboratory employment relations prior to the effective date of the HEERA--perhaps six organizations, at most--and that no

additional unions have expressed representational interests since the effective date of the Act. The burden of notice at the Laboratory, therefore, has not changed as a result of the recognition process. Also, respondent's burden claim finds no support in any effort made by respondent to discuss this problem and work it out in other than unilateral fashion, assuming the employer's claim is made in good faith. Additionally, it is clear that the employer's post-HEERA practice of giving notice to individual employees of desired changes in employment matters, and of inviting input from those employees, represents a burden thousands of times greater than the burden of giving notice to the charging parties. In any event, to the extent advance notice is required, the employer is not barred, after good faith consultation, from arriving at reasonable guidelines as to how, when, and to whom notice shall be given.

A second objection made by the respondent is that providing advance notice to some employee organizations will constitute a prohibited form of unlawful favoritism to those organizations, in violation of section 3571(d) of the Act. In essence, that provision bars employer action that would encourage employees to join one organization in preference to another. The charging parties in this case, however, were not asking for any special favors that would be denied other organizations. It is also obvious that any inference of support that arguably would

flow from giving advance notice to employee organizations prior to exclusivity, would just as easily flow from the prospect of allowing discussions with employee organizations--a process that the University welcomed as a continuing practice in the Kleingartner letter of November 1979. The HEERA, in the end, restricts unfair interference and support, but does not restrain equal treatment. Again, reasonable employer guidelines arrived at in good faith can resolve issues of possible unfairness. Absent a showing that the charging parties are seeking something other than equal provision of statutory rights the employer's favoritism defense must be rejected.[19]

Although the respondent's principal defenses are rejected, there is still insufficient evidence to establish that the employer's actions, other than the unilateral decision to deny advance notice to employee organizations, interfered with a "reasonable opportunity" for the employee organizations to express their views on proposed substantive changes.

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[19]The employer contends that its unfair support defense is consistent with the PERB holding in Department of Corrections (5/5/80) PERB Decision No. 127-S. That decision, however, does not help the employer and actually augments the position of the charging parties. In Department of Corrections the Board held that office and trustee privileges favoring some employee organizations and not others, and not available for all because of operational limitations in the state prison system, could be discontinued by the employer. The privileges at stake in Department of Corrections were not statutory rights

Specifically, there is insubstantial evidence regarding consistent, prior practices of meeting size, participants, location, agendas, and summaries, and a definite relationship of those elements of meeting format to the "reasonable opportunity" of employee organizations to voice matters of concern to them.[20] Although it would be difficult for an employee organization to reliably exercise its opportunity to comment without having regular means of advance notice, there is no evidence that regular scheduled meetings, particular locations or rigorous agendas were inherently necessary to the exercise of meeting and discussion rights. Nor, indeed, is there evidence that the Laboratory will refuse in bad faith to consult with organizations, to meet with employee organization members

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as in this proceeding. In any event, the state employer in that case did meet and consult after giving advance notice of the proposed changes to the employee organizations affected by the discontinued privileges, and even delayed implementation of those changes upon organizational request. No such reasonable notice or opportunity was afforded the charging parties in this case prior to the time the employer changed its notice and meeting procedures.

[20]In fact, the only express policy change, in addition to elimination of advance notice, was the Kleingartner letter's announcement that meeting summaries would no longer be provided. Testimony varied and was imprecise as to the other changes, possibly reflecting the on-again, off-again disposition of Laboratory officials regarding a sharp break from past practice. As to meeting summaries, respondent's objection is not entirely unfounded if summaries for non-exclusive representatives are to be viewed as binding contracts with recognitional implications. If they are not so viewed, then the importance of the summaries is diminished since either side is free to write confirmations of discussions for the historical record.

and representatives, to arrange convenient locations, or to accept suitable topics for substantive discussions. For example, following the adoption of limited area meeting locations in the CSEA access order, meetings need not take place by excluding non-employee representatives within security areas.

To the extent the charging parties may have been confused by the respondent's initial efforts to adjust to the HEERA, the actual practice after July 1979 demonstrated the Laboratory's readiness to meet on substantive matters and to accommodate the physical needs of the charging parties. Aside from the notice issue which remained a disputed subject, the informal practices respondent attempted to establish inevitably gave way to persistent organizational efforts to make employee views known to the employer. These expressions occurred over the phone and in person, within and outside security areas, and with and without organizational representatives.

Hence, the violation found in this case, and the remedial order, is related only to eliminating and failing to give advance notice. It is that aspect of the preexisting practice that is directly tied to the "reasonable opportunity" of the employee organization to represent its members prior to the selection of an exclusive representative. Although the Laboratory will be ordered to reinstate the practice of advance notice, it need only meet and discuss in good faith, upon

request, other meeting "ground rules."

For the reasons set forth above, it is found that respondent violated sections 3571(a) and 3571(b) of HEERA by unilaterally changing the past practice of providing advance notice of proposed changes in employment terms and conditions. It is obvious that there was a nexus between respondent's actions depriving employee organizations of advance notice and the exercise of employee organizational rights under the HEERA.[21] Under established precedent, and for the reasons stated above, it is also reasonable to find some inherent harm to employees and to employee organizations in the denial of advance notice, and in such a major policy change without any prior discussion with the organizations affected by that change. San Francisco Community College District (10/12/79) PERB Decision No. 105.[22] Further, to justify its action, respondent has not come forward with any defense reasonably based on operational need or legal requirement.

The hearing officer, however, dismisses the charging

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[21]The test applied by the hearing officer in this case to find a violation of section 3571(a) is derived from the Board's test for finding similar violations under the Educational Employment Relations Act (sec. 3540 et seq.), as established in Carlsbad Unified School District (1/30/79) PERB Decision No. 89.

[22]In light of this conclusion, the hearing officer finds that it is unnecessary to resolve the conflict in testimony over whether there was any quantitative negative impact on the charging parties, in terms of membership loss, recruitment difficulties, and so on.

parties' claim that the employer violated section 3571(d). A conclusion that the employer has unlawfully dominated, interfered with, or otherwise supported or favored one organization in a way that encourages preference for that organization over another is not supported by the evidence in this case. All employee organizations apparently were treated the same way. Contrary to the claim of the charging parties, PERB precedent in Santa Monica Community College District (9/21/79) PERB Decision No. 103 (aff. (1980) 112 Cal.App.3d 684), is inapplicable. That case involved discriminatory employer treatment between two unions competing for representation in the same negotiating unit. The employer's action in Santa Monica, granting some employees a wage increase that was denied other employees, had the natural and probable effect of encouraging preference for one organization while discouraging representation by the other. No comparable facts are in evidence in this case.

C. The Laboratory's Access Policies.

The charging parties' case against the Laboratory's access policies is premised on section 3568 of the Act:

> 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, mail boxes 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. (Emphasis added.)

The charging parties argue that the Laboratory's policies are overbroad restrictions on these employee organizational rights, and that the Laboratory applies discriminatory standards in the treatment of non-employee access to Laboratory premises. Since the charging parties have not challenged the basic necessity for protection of the Laboratory's national security work activities, those activities must be treated as a given in any analysis of section 3568 as it applies to the facts of this case.

The Laboratory offers three main arguments in opposition to the charging parties' access claims:

1. That the statutory presumption in section 3568 does not apply at all because of the national security nature of the work at the Laboratory.

2. That the Laboratory's policies, in light of the CSEA order expanding the degree and scope of access, are reasonable regulations because they provide adequate alternatives to direct access to areas in which employees work.

3. That respondent does not discriminate in its treatment of non-employee access to the Laboratory.[23]

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[23]Respondent also claims that the unions are without standing to complain about the Laboratory's access policies because they have not actually tested the policies since the

For the reasons set forth below, each of these arguments is rejected as a complete defense, although it is also concluded that certain regulations adopted by the University are reasonable under the circumstances of this case.

As to respondent's initial argument, HEERA's statutory access presumption applies for several reasons. First, the language of section 3568 expresses no exception. Section 3568 does not say, for example, reasonable access "except" in certain situations of national security. Rather, the statute establishes "the right of access at reasonable times to areas in which employees work" and makes that right subject only to reasonable regulation.

Second, there are sound bases for the presumption itself, as already recognized by the Board in similar situations under the Educational Employment Relations Act (hereafter EERA). See Richmond Unified School District (8/1/79) PERB Decision No. 99; Long Beach Unified School District (5/28/80) PERB Decision No. 130; Marin Community College District (11/19/80) PERB Decision

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HEERA went into effect. This objection is dismissed at the outset. The existence and effectiveness of the policies are not contested by respondent. Nor is there doubt that the controversy is sharp and definite, as evidenced by letters, phone calls and other communications between the parties, as well as by testimony of Laboratory officials describing the policies used at the time of the hearing. Forcing the charging parties to attempt to take the access they claim as of right would create a needless confrontation with police and security officials at the Laboratory.

No. 145. A comparable presumption has been applied by PERB in the interpretation of the SEERA. See Department of Corrections, supra. Additionally, past practice under the George Brown Act also allowed for employer regulations granting organizational access as a means of promoting the right of representation. (See sec. 3532 (c), 45 Ops.Cal.Atty.Gen. 74 (1965).)

As construed by the Board, the statutory access presumption favors non-disruptive communications, consistent with statutory intent to develop harmonious and cooperative labor relations in the public sector. The presumption serves to reduce, if not entirely eliminate, case-by-case disputes over whether access to a particular facility is appropriate. At the same time, the presumption also allows the necessary flexibility to arrive at reasonable regulations. Finally, the statutory presumption in the public sector, as this Board has already recognized, reflects unique concerns relevant to public access to public facilities; concerns that are not the same as those of a private employer for protection of private property interests. See Department of Corrections, supra, at pp. 7-8.

Third, the employer need not fear that applying the presumptive "right of access" will give employee organizations a blank check as to the circumstances under which that right is exercised. Accommodation to valid employer concerns is still appropriate under the HEERA, as the Board itself has demonstrated in decisions under EERA and SEERA. This exercise

of labor board expertise is especially fitting in this situation, involving as it does the serious, uncontested concerns of the Laboratory for national security protection of its work.

Instead of eliminating the access presumption, the questions to be answered are whether the regulations established by the employer are properly related to justifiable concerns about disruption of the Laboratory's mission, and whether the rules are narrowly drawn to avoid overbroad, unnecessary interference with the exercise of statutory rights. See Richmond Unified School District, supra, at p. 19.

The approach just described is not the same as that of the National Labor Relations Board, an alternative analytical method relied upon by the employer in an attempt to shift the presumption to favor the Laboratory. The NLRB's access precedent is designed to protect private property and management interests, and it places the burden of proving the need for access on labor organizations.

As the Supreme Court recently observed, assessing the established federal rule:

> While Babcock indicates that an employer may not always bar nonemployee organizers from his property, his right to do so remains the general rule. To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation.

> That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the Babcock accommodation principle has rarely been in favor of trespassory organizational activity. (Sears, Roebuck & Co. v. San Diego County District Council of Carpenters (1978) 436 U.S. 180, 205, referring to NLRB v. Babcock & Wilcox Co. (1956) 351 U.S. 105.)

In light of this existing body of law, it is significant that the Legislature crafted section 3568 as it did.[24] As already noted, the access presumption avoids the wholesale adoption of private sector precedent to public higher education employment relations. It provides a deterrent to repeated disputes and allows flexible adjustment to the diverse needs of the higher educational system in the state. The access presumption is consistent with the historic right of public sector employee organizations, under section 3532, as well as EERA and SEERA, to on-site access for representation activity. Perhaps it is also no accident that the Legislature acted here, approving a general rule for the HEERA, shortly after the California Supreme Court's decision sustaining a presumption in favor of organizational access in Agricultural Labor Relations Bd. v. Superior Court (1976) 16 Cal.3d 392.

Another reason that National Labor Relations Act access

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[24]The Board should also consider the implications of differences in statutory terms when the language of the NLRA is not the same as that of a law administered by the Board. Carlsbad Unified School District, supra.

precedent is not automatically appropriate is that, in fact, there is a better NLRA analogy; that is, precedent that has regulated employee solicitation and distribution at the workplace. Thus, there is a presumptive invalidity, under the NLRA, that applies to employer prohibitions on employee solicitation during working time, as well as to regulations that inhibit distribution of organizational literature during non-working time in non-working areas. See, e.g., Republic Aviation (1945) 324 U.S. 793, citing with approval Peyton Packing Co. (1943) 49 NLRB 828 [12 LRRM 183]; also see Stoddard-Quirk Mfg. Co. (1962) 138 NLRB 615 [41 LRRM 1110]. These NLRB presumptions have been used as instructive guidelines in decisions by the Board. See, e.g., Long Beach Unified School District, supra, at p. 7.

Even though the NLRB access precedent relied upon by the Laboratory is not determinative here, there is still good reason to find, as respondent argues, that certain rules adopted by the Laboratory, and incorporated in the CSEA order, are reasonable regulations.

Preliminarily, it should be noted that the regulations initially subject to the charge in this case, promulgated in 1977 and 1978, were refined and to a large extent superseded by the later order in the CSEA case. In that case the Laboratory essentially conceded the invalidity of portions of the earlier policies challenged here. Although the employer has argued, in

its present defense, that the CSEA order does expand and enhance organizational rights under the previous policies, and that the employer would not now grant access on terms less favorable than those set forth in the CSEA order, the respondent still contends that disapproval of any part of the CSEA order is beyond the purview of this case. There are problems, however, with the Laboratory's objection.

First, there is the obvious contradiction of using the CSEA order only as a shield when it is in the respondent's self-interest, but allowing no further examination of faults in the order. Second, the employer incorrectly maintains that the issues in the CSEA case were not expressly at stake or argued in this hearing. But, the underlying charge in the CSEA case raises issues that are virtually identical to the complaints brought before the PERB by these charging parties. Additionally, the stipulated factual findings that form the underlying premise of the CSEA order, and that provide a stipulated basis for the conclusions in this case, are also virtually identical.

In any event, even with a sufficient factual basis in the record to analyze the CSEA order in terms of the charging parties' allegations, most of the regulations set forth in that order are affirmed.

On the basis of the findings in both cases, it is apparent that the Laboratory does have valid concerns that support

reasonable regulations restricting open-ended access to the facility. Substantial evidence was introduced demonstrating the appropriateness of some degree of advance notice, of disclosure of purpose, of standards for acceptability of visitors, of limits on accessible areas, and of the use of escorts from one point to another within the Laboratory.[25]

Therefore, the Laboratory's new regulation allowing expanded access to eight specified areas is found to be a reasonable regulation since it permits meetings to occur throughout the Laboratory, in rooms of varying size, during non-working time from morning to night. Similarly, the notice requirements and the frequency-of-use limits established by the Laboratory are, in general, appropriate accommodations to extensive, time-consuming security procedures and to institutional space limitations. It may turn out that specific number-and-timing restrictions will be found unreasonable in

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[25]As the employer has noted in its brief, there is precedent in the private sector giving special weight to the type of national security concerns of the Laboratory here. See McDonnell Douglas Corp. v. NLRB (8th Cir. 1973) 472 F.2d 539 [82 LRRM 2393]. There is also precedent balancing access needs in relationship to the burden that would be imposed on production, even where access to an isolated area might otherwise be proper. See NLRB v. Sioux City Barge Lines (8th Cir. 1973) 472 F.2d 753 [82 LRRM 2488]. On the other hand, under the NLRA, war-time security needs may not be used to justify disparate treatment of union and commercial solicitation. United Aircraft Corp. (1946) 67 NLRB 594 [18 LRRM 1009]. The evidence of discriminatory treatment of union representatives in this case is discussed at pp. 62-64, above.

the future under circumstances not at issue in this case. However, the charging parties have offered little that would overcome the reasonableness of the Laboratory's basic adjustment of its national security concerns to the statutory rights of the employees. In fact, in its briefs in this case, the charging parties have expressed limited approval with the rooms made available in the CSEA order, proposed their own 48-hour notice rule for uncleared visitors to security areas, suggested that once a month access to the "321" lunchroom is sufficient, and accepted as justified the use of administrative or police escorts.

On the whole, in light of the evidence presented, the balance struck by the Laboratory's new access system in the CSEA order represents a great advance over the previous policies that formed the basis of the original charge in this case. Except for the specific policies noted below, the charging parties' initial access claims have been eliminated or reasonably resolved by respondent's modifying concessions in the form of the CSEA order.

In four respects, however, this hearing officer finds a violation of employee organization access rights.

The first problem with the Laboratory's policy is that the 48-hour notice rule for access to various meeting facilities applies not only to those in limited areas, but, under the 1978 time, place and manner rules, to other facilities located in

open, unsecured areas of the Laboratory. There are no facts offered in either the CSEA case, or in this case, demonstrating why 48-hours' notice is necessary in open areas. Presumably, some degree of public access is allowed and the considerations of badge processing and downgrading are not involved. A shorter amount of time would probably be reasonable under these circumstances. For example, in Long Beach Unified School District, supra, the Board upheld a one-day notice rule for organizational access inside a public school.

Second, a review of the evidence indicates that the charging parties should be allowed some access to the lunchroom facility in the "321" exclusion area. Although the lunchroom is within a larger exclusion area, the testimony shows that it is an island of non-production activity easily severable from the remaining activities in that area. The severance is feasible because the lunchroom is near a corner of the entire "321" exclusion area, because the lunchroom can be shut off by curtains from outside classified activity and observation, because the room has a separate entry, and because the process of downgrading the facility to a limited area is neither protracted nor unfamiliar to Laboratory personnel. Additionally, permitting occasional access to the "321" lunchroom area is supported by the fact that many of the machinists work in that area, take their brief, 30-minute lunch in that facility, and do not use more distant facilities elsewhere on Laboratory premises.

The employee preference for this lunchroom, and the significance attached to access by the Laborers, is consistent with the Supreme Court's recognition that in-plant culinary facilities are of special importance to employees who are restricted in their ability to go elsewhere. Ford Motor Co. v. NLRB (1979) 441 U.S. 488, 498.

In light of the notice and frequency-of-use restrictions found to be reasonable in connection with other Laboratory locations in controlled and limited areas, it would pose little burden to the Laboratory to add reasonable access to the "321" lunchroom to those facilities listed in the CSEA order.

A third problem area is that the CSEA order imposes a financial restriction that must be decided adversely to the employer. The CSEA order provides that employee organizations utilizing the limited area facilities, and requiring administrative or protective service escorts, must reimburse the Laboratory for the escort costs incurred. The charging parties have objected to this specific provision. Neither the CSEA stipulated statement of facts, nor any facts introduced in this proceeding, support this reimbursement regulation. The absence of such evidence is especially important given the statutory presumption that attaches to the right of access.

As a general rule, the access presumption can be limited only by operational circumstances facing the employer. And,

the operational circumstances of the Laboratory are adequately protected by the limits in the CSEA order on suitable meeting areas within the Laboratory, on the frequency and duration of their use, and on the amount of advance notice required for access. Further, there was no showing of a past practice to assess escort costs, thus highlighting the fact that only the statutory right under the HEERA, not operational circumstances, prompted the assessment of escort fees.

Moreover, there appears to be no allowance within the statutory framework of the HEERA for the imposition of a tax by the employer upon the exercise of employee organizational rights. Finding such a tax legal--especially without any factual basis to support it--would yield a potential area for repeated disputes between employers and employee organizations. Escort fees could also constitute a financial deterrent to employee organizations caught in the dilemma of wanting to use worksite facilities on a regular basis but not wanting to incur added costs for the exercise of their rights.[26]

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[26]Another provision of the CSEA order requires reimbursement for the cost of using Laboratory equipment during the course of an organizational meeting or conference. For example, a union presumably would pay for the operator of a movie projector, or coffee and doughnuts provided by the Laboratory's food services division. Unlike the escort fee that is equivalent to an entry toll, this equipment fee poses no restraint on the exercise of the basic statutory access right

Finally, a fourth aspect of Laboratory access regulation, not resolved by the terms of the CSEA order, is within the scope of the charge and appears to conflict with the Act. The specific issue is the charging parties' claim that they are prohibited from worksite access to employees within exclusion areas for grievance and other representation, and that such restriction is discriminatory. The Laboratory has responded that exclusion areas are matters of top secret concern, and that the Laboratory does not discriminate.

As the evidence introduced by the Laboratory showed, excluded areas are treated with the highest degree of protection for the work that takes place. Thus, uncleared non-employees do not have access to exclusion areas per se. Uncleared non-employees, in the company of an escort, may be given access to limited areas as a result of exclusion area sweeps and downgrading. Union officials are entitled to, and receive, comparable access--no more, no less, given their uncleared status. But this, again, is not the same as direct access to the exclusion area worksite.

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of the organization. In their final brief, the charging parties expressed no opposition to a rule allowing an equipment surcharge.

It is also worth observing, in terms of escorts and the charge filed, that the CSEA order provides for an escort orientation about employee rights under the HEERA. Proper escort instruction would be responsive to an organizational concern in this case and will offer some protection against unlawful surveillance of union activities and conversation.

Some non-employees, however, do have exclusion area access on business-related visits. This access is permitted because non-employees who regularly work at the Laboratory as site subcontractors have been given a "Q" clearance by respondent in conjunction with the federal government. Non-employees who are Q-cleared include telephone, photocopy, computer, and vending machine personnel.

Therefore, although there is no observable discrimination denying exclusion area access by an uncleared union official, there is an evident discrimination by the Laboratory in who may be given "Q" clearance. For this reason, a fair and appropriate resolution to this dispute requires the Laboratory to allow a reasonable number of union representatives to apply for maximum security "Q" clearance for access to exclusion areas.

Three further considerations justify this conclusion. First, the Laboratory already concedes that union access to a worksite area for grievance representation is permissible, subject to security downgrading, since the access is for a business or programmatic purpose within the definition used by Laboratory officials.[27] Second, it would be incongruous, if

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[27]This employer concession is in accord with the recent Supreme Court holding that non-disruptive access for grievance and safety representation is lawful union activity beyond the scope of California's criminal trespass laws. In re Catalano (1981) ___ Cal.3d ___ (February 11, 1981, Crim. 21445.)

not inhuman, to give a "sick" photocopy machine, vending machine maintenance, or the installation of a phone, a higher access priority than service to a grieving employee at the site where such service may be the most intelligent and helpful. This is especially so at a facility specializing in nuclear weapons research and development. Third, by allowing union representatives to have access to exclusion areas when given "Q" clearance, the Laboratory will actually be suffering a lesser time and resource burden than it would otherwise incur in each instance of union access that required downgrading to limited area status.

Based on the above, it is concluded that portions of the Laboratory's access regulations violate sections 3571(a) and 3571(b) of the Act. Long Beach Unified School District, supra; Marin Community College District, supra. It is beyond contest that there is a nexus between the regulations, employee rights, and employee organizational activity. Also, as the cases under EERA conclude, it is beyond dispute that employees and employee organizations unreasonably denied the statutory right of access to certain areas during non-working time suffer an inherent interference with their rights under HEERA. In this case, too, a separate violation may be premised on the discriminatory denial of employee organization access to exclusion areas. NLRB v. Stowe Spinning Co. (1949) 336 U.S. 226; Marin Community College District, supra. Laboratory operational needs have

been considered, but for the reasons discussed above, they do not entirely support the access policy as now revised.

Specifically, the Laboratory's regulations establish an unwarranted 48-hour advance notice rule for use of meeting facilities in open areas, unnecessarily deprive unions of access to a certain area of the Laboratory (that is, the "321" lunchroom area), impose an unjustified economic burden upon the exercise of employee rights by requiring the payment of escort fees, and unfairly discriminate between union representation access and the access of some non-employee visitors to exclusion areas of the Laboratory.

It should also be noted, for the reasons set forth previously (at p. 49), that no violation of section 3571(d) is found arising out of the Laboratory's access policies. The discrimination at issue does not involve different unions, but is discrimination between one type of non-employee access for commercial purposes and non-employee access for union purposes.

REMEDY

Section 3563.3 of the Act provides that:

> 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 backpay, as will effectuate the policies of this chapter.

Based on the findings and conclusions reached above, it is appropriate in this case to order the respondent Regents and Laboratory to cease and desist from refusing to give the charging parties advance notice of contemplated changes in employment relations. There is no present need for the order to specify the scope of representation for notice and meetings. Past practice between the charging parties and the employer certainly gives sufficient indication of the employment relations issues that were considered within the scope of representation under the George Brown Act, and, under the HEERA, the statutory language gives further indication of the breadth of employee organizational concerns.

However, the hearing officer rejects the charging parties' proposal that respondent also be directed to cease its new practice of giving notice to individual employees of pending employment relations changes, and of soliciting employee comment about those changes. The meeting and discussion rights of the charging parties can be protected without such relief, and an order along the lines sought would probably be contrary to the statutory language of the Act itself. Under the HEERA, individual employees have the right to refuse to join or participate in employee organizations, subject only to organizational security arrangements established after the selection of an exclusive representative. (See sec. 3565.) Individual employees also have their own grievance adjustment

rights. (See sec. 3567.) And, there is no evidence that respondent is attempting to bypass an exclusive representative by negotiating with individuals. Prior to selection of an exclusive representative, and in light of the relief already provided, there is therefore no basis to preclude notification of individual employees about employment relations matters, or to bar solicitation of their suggestions.

In regard to the Laboratory access policies at issue in this case, the order directs respondent to cease and desist from denying employee organizations the right of access at reasonable times to areas in which employees work, and the right to use institutional facilities for meetings concerned with the exercise of statutory rights. Although a number of the access terms and facility-use conditions established in the Laboratory's policies, as modified and expanded by the CSEA order, have been found not to violate the Act, other aspects of those policies have been deemed unlawful. For this reason, the cease and desist order specifically directs respondent to refrain from requiring 48-hours' advance notice for use of meeting facilities in open, unsecured areas, to refrain from denying reasonable access to the "321" exclusion area lunchroom, to refrain from seeking organizational reimbursement for the escort services necessary to ensure secured use of limited areas, and to refrain from discriminating against the charging parties by denying them access to exclusion areas on the basis

allowed other non-employees on regular business-related visits to the Laboratory.[28]

It is also appropriate that respondent be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the employer indicating that it will comply with the terms of the order. The notice shall not be reduced in size. Posting such a notice effectuates the purposes of the HEERA by providing employees with notice that the controversy has been resolved, that the respondent has acted in an unlawful manner, and that the employer is being required to cease and desist from this activity and to restore the status quo. A notice is also consistent with the widespread distribution of Laboratory policy statements on the issues in this case. Labor relations precedent supports a posting order for the reasons just described. See, e.g., Placerville Union School District (9/18/78) PERB Decision No. 69; Pandol & Sons v. Agricultural Labor Relations Bd. (1979) 98 Cal.App.3d 580; NLRB v. Express Publishing Co. (1941) 312 U.S. 426.

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[28] In the interim period, until "Q" clearance is secured, the Laboratory should continue the existing policy for on-site grievance representation, including downgrading of appropriate facilities. If, after discussion with the charging parties, a better temporary solution is found, the Laboratory is of course free to improve the present system.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, and pursuant to Government Code section 3563.3 of the Higher Education Employer-Employee Relations Act (HEERA), it is hereby ordered that the Regents of the University of California and the Lawrence Livermore National Laboratory and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Arriving at a determination of policy or course of action concerning matters within the scope of representation without first giving notice to employee organizations and, upon request, discussing those matters pending the selection of an exclusive representative;

(b) Adopting a policy or course of action regarding relations with employee organizations that affects the reasonable opportunity of those organizations to represent their members in employment matters, without first giving notice to employee organizations and, upon request, discussing those policies pending the selection of an exclusive representative;

(c) Denying employee organizations the right of access at reasonable times to areas in which employees work, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of rights guaranteed by the HEERA, including, but not limited to:

(1) Requiring 48-hours' advance notice from employee organizations to use institutional meeting facilities in open, unsecured areas;

(2) Restricting reasonable organizational access to the lunchroom in the "321" exclusion area;

(3) Assessing employee organizations for the escort costs related to the exercise of the right of access to areas in which employees work and to the use of institutional facilities for meetings;

(4) Discriminating against employee organizations by denying their representatives access to exclusion areas on the basis allowed other security-cleared non-employees on regular, business-related visits to the Laboratory.

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

(a) Reinstate the policy of giving advance notice to employee organizations of contemplated changes in terms and conditions of employment within the scope of representation in order to allow said organizations to make presentations of their views prior to respondent arriving at a determination of policy or course of action.

(b) Within five (5) workdays after the date of service of a final decision in this matter, prepare and post copies of the NOTICE TO EMPLOYEES attached as an appendix hereto signed

by an authorized agent of the employer, for at least thirty (30) workdays at its University headquarters office in Berkeley, California, and in conspicuous places at the Laboratory locations where notices to employees are customarily posted. It must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material;

(c) Within forty-five (45) workdays from service of the final decision herein, notify the San Francisco Regional Director of the Public Employment Relations Board in writing of what steps the employer has taken to comply with the terms of this decision. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on Charging Party herein.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on March 17, 1981 unless a party files a timely statement of exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board at the headquarters office of the Public Employment Relations Board in Sacramento before the close of business (5:00 p.m.) on March 17, 1981 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: February 25, 1981

Barry Winograd
Hearing Officer

EXHIBIT

APPENDIX: Notice of Order in PERB Decision No. HO-U-82.

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

As a result of a hearing and submission of stipulated facts in Unfair Practice Case No. SF-CE-7-H, California State Employees' Association v. The Regents of the University of California, where both parties had the right to participate, and a decision having been rendered, we have been ordered to post this notice. We will abide by the following:

A. CEASE AND DESIST FROM:

Denying access by employee organizations to certain areas where employees work and to certain meeting facilities of the E. O. Lawrence Livermore National Laboratory in violation of the rights granted in Government Code section 3568.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE HIGHER EDUCATION EMPLOYER EMPLOYEE RELATIONS ACT:

1. Make the following facilities and equipment available for use by employee organizations during the hours indicated:

a. FACILITIES:

Hours	Facility
7:00 a.m. - 8:00 a.m. 11:30 a.m. - 1:00 p.m.	Building 123 (Main Auditorium)
7:00 a.m. - 8:00 a.m. 11:30 a.m. - 1:00 p.m. 5:00 p.m. - 6:00 p.m.	Building 123 (Conference Room A)

7:00 a.m. - 8:00 a.m. 11:30 a.m. - 1:00 p.m. 5:00 p.m. - 6:00 p.m.	Building 361 (Biomedical Auditorium)
7:00 a.m. - 6:00 p.m.	Trailer 2150 (Meeting Room)
7:00 a.m. - 6:00 p.m.	Trailer 4381 (Meeting Room 1004)
7:00 a.m. - 6:00 p.m.	Trailer 1477 (Meeting Room 104)
7:00 a.m. - 6:00 p.m.	Trailer 3901 (Conference Room)
7:00 a.m. - 6:00 p.m.	Building 314 (Mirror Room)

b. EQUIPMENT:

(i) Blackboards, screens, and overhead projectors which are present in any of the above-listed facilities.

(ii) Other equipment present in a facility, provided that employee organizations provide a qualified operator, employed by the Laboratory, to operate such equipment. Employee organizations shall reimburse the Laboratory for any costs incurred from the use of such other equipment or of Laboratory personnel to operate such equipment.

2. Make the above-listed facilities and equipment available subject to the following limitations and conditions:

a. Subject to reasonable regulations, consistent with the time limits set forth herein, Conference Room A (Building 123) shall be available, upon request, for use by employee organizations once each week. Notice of one week shall be given by an employee organization to reserve Conference Room A. After Conference Room A has been used once during a given week by any employee organization, it shall not be available for use by another employee organization until the following week.

b. Subject to reasonable regulations, consistent with the time limits set forth herein, the Main Auditorium (Building 123) and the Biomedical Auditorium (Building 361) shall each be available, upon request, for use by employee

organizations twice each week. Notice of one week shall be given to reserve either facility. After either of these facilities have been used twice by one or more employee organizations in a given week, such facility shall not be available for use by other employee organizations until the following week.

c. Subject to reasonable regulations, consistent with the time limits contained herein, the Meeting Room (Trailer 2150) shall be available upon request for use by employee organizations for eight hours each week, provided that no employee organization shall be granted access to the Meeting Room for more than four hours each week. Forty-eight hours notice shall be given to reserve the Meeting Room.

d. Subject to reasonable regulations, consistent with the time limits contained herein, Meeting Room 1004 (Trailer 4381) and 104 (Trailer 1477), the Conference Room (Trailer 3901), and the Mirror Room (Building 314) shall each be available for use by employee organizations. Upon request, an employee organization shall be granted access to three of the four facilities each week for a period not to exceed two hours per facility. Forty-eight hours notice shall be given to reserve each facility.

e. Employee organizations shall have access to any of the above-listed facilities only when such facilities have not been previously scheduled for use by Laboratory personnel.

f. No more than two non-employee representatives of an employee organization shall be present in a facility at one time. Non-employee representatives of an employee organization shall include persons who are not employed by the Laboratory and who are authorized to act on behalf of the employee organization as set forth in section 3562(g) of the HEERA. An employee organization may include no more than one non-emloyee guest speaker at a time as one of its two non-employee representatives so long as the guest speaker meets the Laboratory's security requirements and his/her presentation is limited to purposes consistent with the HEERA.

g. Use of the above-listed facilities by employee organizations shall be limited soley to usage consistent with the exercise of rights guaranteed by Government Code section 3560 et seq., as required by Government Code section 3568.

h. Requests for use of the above-listed facilities and equipment shall be made in writing to the Laboratory's manager of labor relations.

i. All use of the above-listed facilities and equipment shall be in conformance with security and/or property protection regulations, policies and/or practices required by the United States Government and/or the Laboratory's Security Department. Conformance with such regulations, policies and/or practices includes, but is not limited to, the following:

(i) Non-employee representatives of employee organizations may have access to Conference Room A (Building 123), the Main Auditorium (Building 123), and the Meeting Room (Trailer 2150) only if accompanied by administrative escorts or protective services officers (PSO's) employed by the Laboratory. Employee organizations shall provide 48 hours' written notice to the Manager of Labor Relations if the use of an administrative escort or PSO will be necessary.

(ii) Non-employee representatives of employee organizations may have access to the Biomedical Auditorium (Building 361), Room 1004 (Trailer 4381), Room 104 (Trailer 1477), the Conference Room (Trailer 3901) and the Mirror Room (Building 314) only upon the issuance of one-day visitor badges by the Laboratory's Security Department. Such badges shall indicate on their face the facility or facilities to which access has been granted and access by non-employee representatives shall be limited to such facilities.

(iii) Employee organizations may list up to ten non-employees per organization who may request access to facilities in the Laboratory's controlled area and who are employed by the employee organizations. Such lists shall be made available to the Laboratory's Security Department. One-day visitor badges for persons included on such lists shall be made available upon 48 hours written notice to the manager of labor relations. One week's written notice to the manager of labor relations shall be required to prepare a one-day visitor badge for a non-employee representative of an employee organization who is not included on such list. No more than four one-day visitor badges at any one time shall be issued to representatives of each employee organization.

j. Employee organizations shall reimburse the Laboratory for any costs incurred by the Laboratory resulting from the assignment of a protective services officer (PSO) to escort representatives of an employee organization into Limited

Areas of the Laboratory. The Laboratory shall provide an orientation for PSO's assigned to escort representatives of employee organizations in order to familiarize PSO's with their duties during such escort service, as well as with the rights set forth in Government Code section 3560 et seq.

k. Employee organizations who have members qualified to serve as administrative escorts in limited areas of the Laboratory may be allowed to use such members as administrative escorts subject to the following limitations:

(i) Administrative escorts may be used only during the hours 7-8 a.m., 11:30 a.m. - 1:00 p.m., and 5-6 p.m.; and

(ii) Employee organizations shall reimburse the Laboratory for any costs incurred as a result of an employee organizations' use of an administrative escort.

3. Upon request, the Laboratory shall make available each day, for the distribution of literature, a table in a visible location in the west cafeteria. Only literature relevant to and consistent with the rights set forth in Government Code section 3560 et seq. shall be distributed at such table. Written requests to reserve the table must be submitted to the manager of labor relations 48 hours in advance. The provisions of this paragraph shall in no way be interpreted to require the Laboratory to make more than one table per day available in the west cafeteria for the distribution of literature.

DATE:_____

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

BY:_____

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

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-2-H, Laborers Local 1276, LIUNA, AFL-CIO; Alameda Co. Bldg. & Const. Trades Council v. Regents of the University of California; Lawrence Livermore National Laboratory, in which all parties had the right to participate, it has been found that the District violated Government Code sections 3571(a) and 3571(b). (Certain portions of the charge against the employer were dismissed because no violation was found.)

As a result of this conduct we have been ordered to post this Notice, and will abide by the following. We will:

1. CEASE AND DESIST FROM:

(a) Arriving at a determination of policy or course of action concerning matters within the scope of representation without first giving notice to employee organizations and, upon request, discussing those matters pending the selection of an exclusive representative.

(b) Adopting a policy or course of action regarding relations with employee organizations that affects the reasonable opportunity of those organizations to represent their members in employment matters, without first giving notice to employee organizations and, upon request, discussing those policies pending the selection of an exclusive representative.

(c) Denying employee organizations the right of access at reasonable times to areas in which employees work, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of rights guaranteed by HEERA, including, but not limited to:

(1) Requiring 48-hours' notice from employee organizations to use institutional meeting facilities in open, unsecured areas of the Laboratory;

(2) Restricting reasonable organizational access to the lunchroom in the "321" exclusion area;

(3) Assessing employee organizations for the escort costs related to the exercise of the right of access to

areas in which employees work, and to the use of institutional facilities for meetings;

(4) Discriminating against employee organizations by denying their representatives access to exclusion areas on the basis allowed other security-cleared non-employees on regular, business-related visits to the Laboratory.

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

Reinstate the policy of giving advance notice to employee organizations of contemplated changes in terms and conditions of employment within the scope of representation in order to allow said organizations to make presentations of their views prior to the employer arriving at a determination of policy or course of action.

Dated: _____

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, and LAWRENCE LIVERMORE NATIONAL LABORATORY

By _____
Authorized Agent

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