

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



WILLIAM H. WILSON,)	
)	
Charging Party,)	Case No. SF-CE-4-H
)	
v.)	PERB Decision No. 420-H
)	
UNIVERSITY OF CALIFORNIA)	October 18, 1984
AT BERKELEY,)	
)	ON REMAND FROM THE
Respondent.)	COURT OF APPEAL,
)	FIRST APPELLATE
)	DISTRICT

Appearances: Andrew Thomas Sinclair, Attorney for William H. Wilson; Susan M. Thomas, Attorney for the Regents of the University of California.

Before Jaeger, Morgenstern and Burt, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (PERB or Board) on remand from the Court of Appeal, First Appellate District, in which the Court directed the Board to determine, inter alia, whether the policies of the University of California at Berkeley (UC or University) regarding employee organization access to its internal mail system are reasonable in light of all the surrounding circumstances, including federal postal statutes and regulations.

For the reasons set forth below, we conclude that the University's policies are not reasonable within the meaning of section 3568 of the Higher Education Employer-Employee

Relations Act (HEERA or Act) and all the surrounding circumstances, including federal postal statutes and regulations, and find that UC violated subsections 3571(a) and (b) of the Act when it withdrew the right of employee organizations to use its internal mail system.¹

PROCEDURAL HISTORY

On November 16, 1979, William H. Wilson, as an individual and on behalf of the American Federation of State, County, and Municipal Employees, Local 371 (AFSCME or Union) filed an unfair practice charge against the University of California at

¹HEERA is codified at Government Code section 3560 et seq. All references are to the Government Code unless otherwise indicated.

Section 3568 provides:

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.

Section 3571 provides, in relevant part:

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

Berkeley alleging that the University violated HEERA sections 3568 and 3571(a), (b), and (d).

On June 17, 1980, a Public Employment Relations Board Administrative Law Judge (ALJ) issued a proposed decision finding that the University violated HEERA subsections 3571(a) and (b).

The University appealed the proposed decision to the Board itself.

On November 25, 1981, the Board issued PERB Decision No. 183-H affirming the hearing officer's proposed decision.

The University appealed PERB Decision No. 183-H to the First District Court of Appeal, arguing, inter alia, that delivery of employee organization mail free of charge through the University's internal mail system was precluded by the federal "Private Express Statutes" (39 U.S.C. sections 601-606; 18 U.S.C, sections 1693-1699) and the rules promulgated thereunder by the United States Postal Service (Postal Service or USPS) (39 C.F.R. sections 310 and 320) protecting the federal postal monopoly and regulating private delivery of mail.

On February 17, 1983, the Court issued its decision (139 Cal.App.3d 1037). The Court found that Article III, section

employees because of their exercise of rights guaranteed by this chapter.

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

3.5 of the California Constitution² precluded PERB from refusing to enforce HEERA rights on the ground of federal preemption in the absence of an antecedent court ruling. However, the Court held that PERB was not precluded from determining "whether the state statute . . . and the federal postal laws and regulations can be harmonized." (139 Cal.App.3d at 1042.) Thus, the Court remanded the case to the Board to determine:

. . . whether the University's regulations denying union access to the internal mail system are reasonable in light of all the surrounding circumstances, including federal postal requirements. (139 Cal.App.3d at 1042.)

²Article III, section 3.5 provides:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless such statute is prohibited by federal law or federal regulations.

In making this determination, the Court indicated that PERB may:

. . . properly consider circumstances emphasized in this writ proceeding but yet to be evaluated: e.g., the University's use of its mail system to disseminate an employee newsletter expressing management's views on labor-management issues; the University's distribution of literature through the internal mail system soliciting charitable contributions deemed official business under the auspices of the Chancellor; the union's access to other means of communicating with custodial employees; the burden which would be placed on the University's internal mail system. (139 Cal.App.3d at 1042, fn 6.)

On March 18, 1983, in response to the remand order of the Court of Appeal, the Board issued PERB Decision No. 183a-H, in which it remanded the record to the Chief Administrative Law Judge to conduct a hearing "for the purpose of taking additional evidence as to whether the University's regulations concerning the use of its internal mail system by employee organizations are reasonable within the meaning of section 3568 of [HEERA]." The Board directed the Chief Administrative Law Judge to solicit evidence concerning the following issues:

1. To what extent are the materials charging party seeks to distribute "letters" within the meaning of the federal postal regulations?
2. What compensation, if any, does the University receive for delivery of employee organization materials?

3. What relationship, if any, exists between the University's mail system and United States postal routes?

4. Does the University utilize its mail system to disseminate management material pertinent to employer-employee relations?

5. Does the University permit the use of its mail system by charitable and other nonemployee organizations?

6. What burden, if any, would be placed on the University's mail system if it were made available to employee organizations?

Administrative Law Judge (ALJ) Jim Tamm conducted a hearing to solicit additional evidence, and on June 2, 1983, made factual findings directly responsive to the questions posed by the Board in Decision No. 183a-H.

Both the University and the Charging Party have filed exceptions to some of the factual findings made by the ALJ.

FACTS

Both the original proposed decision of the hearing officer and the proposed decision issued pursuant to the Board's Order in Decision No. 183a-H are attached hereto. We have reviewed these factual findings, and finding them free from prejudicial error, adopt them as the findings of the Board itself.³³

³³The University reasserts a motion, which was denied by ALJ Tamm, to exclude all evidence concerning delivery of mail at Lawrence Livermore National Laboratory (LLNL). The University contends that, since the unfair practice charge in this case concerns the University's denial of access to the UC mail system at the Berkeley campus, evidence concerning other

DISCUSSION

HEERA section 3568 represents a codification by the California Legislature of longstanding precedent under the National Labor Relations Act (NLRA)⁴ granting employee organizations the right of access to an employer's property for organizational and representational purposes. See Morris, *The Developing Labor Law* (2d Ed. 1983), Chap. 6; Republic Aviation Corporation (1945) 324 U.S. 793 [16 LRRM 620]; Stoddard-Quirk Mfg. Co. (1962) 138 NLRB 615 [51 LRRM 1110]; Beth Israel Hospital (1978) 437 U.S. 483 [98 LRRM 2727].⁵

The language of section 3568 is virtually identical to that of subsection 3543.1(b) of the Educational Employment Relations

.....
campuses or facilities of the University is irrelevant. We disagree. The Court of Appeal's Order in this case requires the Board to determine "whether the University's regulations denying union access are reasonable in light of all the surrounding circumstances, . . ." Thus, as the ALJ noted, it was not the intention of the Court of Appeals to limit evidence to only one UC facility but, rather, to look at the entire system. While the unfair practice charge in this case is limited to the Berkeley campus, evidence concerning LLNL is probative of the overlap of USPS and UC mail routes and helps paint a picture of the functioning of the UC mail system as a whole.

⁴29 U.S.C 151 et seq.

⁵However, unlike the court-created access rights under the NLRA, those under HEERA are expressly statutory.

Act (EERA).⁶ In Richmond Unified School District/Simi Valley Unified School District (8/1/79) PERB Decision No. 99, the Board analyzed the statutory phrase "other means of communication" as set forth in EERA subsection 3543.1(b), and concluded that employee organizations were entitled to have access to internal mail systems. The Board's decision was based on its view that the means of access specified in subsection 3543.1(b) were not intended by the Legislature to be exhaustive, a view which is consistent with interpretations of similar statutory language contained in the Meyers-Miliias-Brown Act (Government Code section 3500 et seq.). Richmond Unified School District/Simi Valley Unified School District, supra; 45 Ops. Atty. Gen. 138. We reaffirm this finding, and conclude

⁶The EERA is codified as Government Code section 3540 et seq. EERA subsection 3543.1(b) provides:

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

Although no parallel section governing access rights exists in the State Employer-Employee Relations Act (SEERA), Government Code section 3512 et seq., this Board, in State of California (Dept. of Corrections) (5/5/80) PERB Decision No. 127-S, determined that such rights could be implied. See also State of California (Dept. of Transportation) (7/7/81) PERB Decision No. 159b-S.

that the phrase "other means of communication" in HEERA section 3568 entitles employee organizations to have access to the University's internal mail system free of charge⁷ subject to "reasonable regulation."

In its brief before the Board, the University does not dispute that section 3568 creates a right of access to internal mail systems, but asserts that a total ban on employee organization access to its internal mail system is a "reasonable regulation" within the meaning of section 3568. In its view, denial of access to the internal mail system is reasonable because alternative means of communication exist by which employee organizations may communicate with their members, because access to its internal mail system would place an "undue burden" on the system, and because, in any event, United States postal statutes and regulations prohibit the University from carrying unstamped employee organization material through its internal mail system.

Alternative Means of Communication

The University argues that it is reasonable to deny employee organizations access to the internal mail system because alternative means of communication exist.

⁷We have previously held that the exercise of statutory access rights cannot be conditioned upon the payment of fees to an employer (Regents of the University of California, Lawrence Livermore National Laboratory (4/30/82) PERB Decision No. 212-H), and we so hold today.

In Richmond Unified School District/Simi Valley Unified School District, supra, and in a number of subsequent cases, the Board has considered the meaning of the term "reasonable regulation" as it appears in EERA subsection 3543.1(b) and HEERA section 3568. Long Beach Unified School District (5/28/80) PERB Decision No. 130, Marin Community College District (11/19/80) PERB Decision No. 145; Regents of the University of California (Lawrence Livermore National Laboratory), supra; Regents of the University of California (UCLA Medical Center) (8/5/83) PERB Decision No. 329-H. Thus, after analyzing both federal cases concerned with the right of access under the NLRA and federal constitutional cases governing the right of access to public facilities, the Board concluded:

On the basis of our understanding of the statutory purposes of EERA, in conjunction with our review of analogous principles of labor and constitutional law, we conclude that school employer regulation under section 3543.1(b) should be narrowly drawn to cover the time, place and manner of the activity, without impinging on the content unless it presents a substantial threat to peaceful school operations. Richmond Unified School District/Simi Valley Unified School District, supra, at p. 19. (Emphasis added.)

Thus, while we have weighed the existence of other means of communication when determining whether access regulations are reasonable, we have only done so where the employer has introduced evidence that a particular means of access will

cause "disruption" to the normal functioning of the employer's business and the rules "are narrowly drawn to avoid overbroad, unnecessary interference with the exercise of statutory rights." Regents of the University of California (Lawrence Livermore National Laboratory), supra, at p. 15.

In this case, the University makes no argument that permitting employee organizations to have access to the internal mail system will disrupt the functioning of the University, nor does it assert that its regulation is "narrowly drawn." Rather, it argues that the mere existence of other means of communication transforms its outright denial of the right to use the internal mail system into a "reasonable regulation." We do not agree. The means of access set forth in section 3568 are independent statutory rights and, therefore, the right of an employee organization to use any particular means of access may not be defeated simply because alternative means exist. Were this not the case, an employer could, for example, deny employee organizations the right to use "mailboxes" or "institutional facilities" merely because an adequate number of "bulletin boards" exist. Such was hardly the intention of the Legislature when enacting section 3568.

Undue Burden

Next, the University contends that affording employee organizations access to the internal mail system would cause an undue burden on the system.

In the original proposed decision, the ALJ found the University's contention that providing access would be unduly burdensome was "speculative at best," noting that, if access were not permitted, the UC mail system would still be required to deliver employee organization mail sent via the U.S. mails to various campus locations not serviced directly by the Postal Service. The ALJ also rejected the University's contention that access would cause delays in the delivery of mail. He noted that such delays occurred mainly at the central distribution center where mail is sorted for delivery to campus locations. AFSCME's practice had been to bypass the central location and place its communications directly in supervisors' boxes for distribution to custodians at various campus buildings.

At the supplemental hearing before ALJ Tamm, the University offered the testimony of Marvin Eckard, the supervisor of the Berkeley mail system, to establish that the system would be unduly burdened if employee organizations were permitted access to the system. Eckard testified that, in his opinion, if employee organizations were permitted access to the internal mail system, the result would be an increased burden on the system. Eckard admitted that if U.S. postage were affixed to incoming employee organization mail, the UC mail service would still have to deliver those materials no matter how burdensome delivery was on the system. However, he felt that because

employee organizations would not have to bear the cost of postage if afforded access to the internal mail system, they would naturally tend to send a proportionally greater volume of mail through the UC system than they would if they were required to send that mail through normal postal channels. He cited no evidence to support this conclusion. Calvin Andre, a witness for the Charging Party and an employee of LLNL, testified that his organization would tend to send more communications if it did not have to pay postage costs. Weighing this evidence, ALJ Tamm concluded that:

The picture painted by Eckard generally supports a finding that any increase in mail would place additional burden on the system. Yet an increase in employee organization mail is no more burdensome than an increase in mail sent by any University department. Furthermore, if U.S. postage were affixed, all of the employee organization mail would be accommodated. It is therefore concluded that none of the new evidence demonstrated that employee organization mail would unduly burden the mail system.

The University argues that Tamm's conclusions fail to take into account the fact that, since the Postal Service delivers directly to 50 locations on the Berkeley campus, access to the internal mail system would automatically increase the burden on the system in terms of sorting, binding, and delivering mail.

We agree with the University that, to the extent that the Postal Service delivers directly to campus locations without the UC mail service having to handle that mail, any transfer of

responsibility from the USPS to the UC mail service, would tend to add some burden to the UC mail system in terms of responsibility for processing that portion of the mail previously handled exclusively by the USPS. However, the mere fact that the University might have to process some unspecified additional amount of mail does not, ipso facto, prove that such an increase would be excessively burdensome.

The University's evidence to support its contention that employee organization access to the internal mail system would be excessively burdensome on the system is based entirely on the predictions of Marvin Eckard and Calvin Andre, who testified that, in their opinions, employee organizations would tend to send more communications through the internal mail system if it cost less than using the U.S. mails. In our view, opinion evidence of this sort is simply insufficient to establish that affording access to the internal mail system would so burden the system that it is reasonable to deny access altogether. Indeed, we fail to see how this evidence even establishes that affording access would cause a substantial increase in the volume of mail carried by the UC mail service.

Moreover, we find that the "floodgate" theory asserted by the University on appeal is unsupported by the record. There was no evidence introduced to show that, during the period of time when AFSCME Local 371 had been granted access to the

University's internal mail system, an undue burden on the system resulted. On the contrary, the evidence demonstrates that the University's delivery of employee organization materials did not cause an appreciable increase in the volume of mail. Nor has the University introduced evidence that, in the period since it suspended the right of employee organizations to use the mail system, thus requiring those organizations affix postage to their letters, there has been a decrease in the volume of employee organization mail. In short, as the ALJ found, the University's contention that carriage of employee organization material will excessively burden the system is entirely speculative.

Similarly, because of the speculative nature of the University's argument, there is no convincing evidence that permitting employee organizations to have access to the internal mail system would create any additional financial burden on the University. It is undisputed that the University is required to process incoming U.S. mail free of charge irrespective of the volume of mail received.⁸ The record reflects that the UC mail system finances the cost of

⁸The evidence does indicate that the U.C. mail service assesses individual University departments a surcharge for handling outgoing U.S. mail. Since employee organizations are not departments of the University, they would have no occasion to process outgoing U.S. mail through the University's internal mail system.

processing incoming U.S. mail through a budgetary allocation from the UC general fund. Thus, if employee organizations were required to send all mail to their members through the U.S. mails, UC would be required to bear the cost of processing that mail. If, on the other hand, employee organizations were permitted to use the internal mail system free of charge, the University would still be required to bear the processing costs out of its general fund. Thus, irrespective of the method of delivery, the University would be required to underwrite the cost of processing incoming employee organization mail.

Only if it could be demonstrated that private carriage of employee organization mail has, in fact, created an undue burden on the internal mail system would we be inclined to look more favorably upon UC's argument. However, the University's decision to deny employee organizations any right whatsoever to use the internal mail system before it accumulated evidence of an increased burden on the system fundamentally undermines its position. Indeed, such is the risk any employer takes when it constructs rules of access which are overbroad.

Federal Postal Statutes and Regulations

The University's main argument is that federal postal statutes and regulations prohibit it from carrying unstamped employee organization materials through its internal mail system and, therefore, its denial of access is reasonable. For

the reasons set forth below, we reject the University's argument.

Article I, section 8, clause 7 of the United States Constitution authorizes Congress to establish "post offices and post roads." This provision of the Constitution has long been interpreted as giving the federal government a monopoly over the delivery of letters. Associated Third Class Mail Users v. USPS (D.C. Cir. 1979) 600 F.2d 824, cert. den. (1979) 444 U.S. 837; National Association of Letter Carriers, AFL-CIO v. Independent Postal System of America, Inc. (19th Cir. 1972) 470 F.2d 265; Ex Parte Jackson (1878) 96 U.S. 727; 21 Op. Att'y Gen. (1896). The "Private Express Statutes" (39 U.S.C, section 601-606; 18 U.S.C, section 1693-1699, 1724) generally prohibit the delivery of "letters" along "post routes" by anyone other than the United States Postal Service, but establish certain statutory exceptions to the Postal Service's monopoly over the delivery of letters. Pursuant to these statutes, the USPS has developed rules permitting private carriage of letters by individuals and entities. (39 C.F.R. 310 and 320.)

In this case, AFSCME seeks to have the University deliver various official union communications through its internal mail system. These communications include: (1) general notices of union activities; (2) union publications including newsletters; (3) materials concerning AFSCME's position on collective

bargaining and election issues; (4) notices of changes or modifications in University rules, regulations, and benefits affecting members of AFSCME; and (5) other materials generally concerned with the business of AFSCME and its members. To the extent that these communications are "letters" within the meaning of the Private Express Statutes and the regulations promulgated thereunder,⁹ they may be carried privately by the University only if carriage falls within one of the "exceptions" or "suspensions" established by 18 U.S.C, sections 1694 and 1696 and 39 C.F.R, sections 310.2 and 320. The only exceptions or suspensions that are relevant to this case are the "Private Hands Without Compensation" exception (39 C.F.R. 310.3(c)), the "Letters of the Carrier" exception (39 C.F.R. 310.3(b)), and the suspension for "certain letters of college and university organizations" (39 C.F.R. 320.4).¹⁰ **10**

⁹"Letters" are comprehensively defined at 39 C.F.R, section 310.1. It is clear that, with the possible exception of union newsletters, all of the communications involved herein are "letters" within the meaning of the Private Express Statutes.

¹⁰The other "exceptions" are for letters accompanying cargo (39 C.F.R, section 310.3 (a)), letters sent by special messenger for a particular occasion (39 C.F.R, section 310.3(d)), and the private carriage of letters to a location where they then enter the mail stream (39 C.F.R, section 310.3(e)). The other "suspensions" are for certain data processing materials (39 C.F.R, section 320.2(a)), international-ocean carrier-related documents (39 C.F.R, section 320.5), extremely urgent letters (39 C.F.R. 320.6), and advertisements accompanying parcels or periodicals (39 C.F.R, section 320.7) .

The Private Express Statutes prohibit the private carriage of mail over "post routes." 18 U.S.C, section 1696(a). Title 39 CFR 310.1(d) defines "post routes" as "routes on which mail is carried by the U.S. Postal Service." The term "post routes" also includes any two places between which the mails are regularly carried. 18 U.S.C, section 1696(a); USPS Advisory Opinion PES 77-28.

The record establishes that at the Berkeley campus, the delivery routes of both the Postal Service and the University mail service are substantially similar, inasmuch as both organizations use most of the same surface streets. The Postal Service delivers directly to approximately 50 locations on the Berkeley campus and the UC mail service delivers to those same 50 locations, plus an additional 100 locations. When mail sent through the U.S. mails is addressed to a location not serviced by the Postal Service, delivery is made to a central campus location, and from that location it is carried to its final destination by the UC mail service. While it would be possible for the UC mail system to use routes not utilized by the Postal Service in order to deliver mail to those campus locations to which there is no direct delivery by the USPS, thereby avoiding "post routes" within the meaning of the Private Express Statutes, we find that such a requirement would place an impractical burden on the UC mail system. Accordingly, we find that delivery by the UC mail system at the Berkeley campus

crosses postal routes, and private carriage, if permissible, must fall within one of the exceptions or suspensions of the Private Express Statutes set forth above.¹¹**11**

Private Hands Without Compensation Exception

Title 18 U.S.C, section 1696(c) provides, in relevant part, that the Private Express Statutes "shall not prohibit the conveyance or transmission of letters or packets by private hands without compensation. . . ." The regulation governing the Private Hands Without Compensation exception is codified at 39 C.F.R, section 310.3(c). It provides:

The sending or carrying of letters without compensation is permitted. Compensation generally consists of a monetary payment for services rendered. Compensation may also consist, however, of non-monetary valuable consideration and of good will. Thus, for example, when a business relationship exists or is sought between the carrier and its user, carriage by the carrier of the user's letter will ordinarily not fall under this exception; or, when a person is engaged in the transportation of goods or persons for hire, his carrying of letters "free of

11In contrast to the evidence concerning the Berkeley campus, it appears that at Lawrence Livermore National Laboratory, the USPS does not deliver to any area within the "secured area" of the Laboratory. Hence, private carriage of letters by the UC mail system within those areas of the Laboratory not serviced by the Postal Service would apparently be permissible since the internal mail system does not carry mail along USPS post routes. However, the unfair practice charge in this case concerns the Berkeley campus and we, therefore, need not determine at this time whether private carriage of letters at LLNL is permissible.

charge" for customers whom he does charge for the carriage of goods or persons does not fall under this exception.¹²

Both the courts and the Postal Service itself, consistent with the present wording of 39 CFR 310.3(c), have uniformly concluded that "compensation" may take either a monetary or non-monetary form.

In United States v. Thompson (1846) 28 F.Cas. 97, 98, the District Court of Massachusetts held that the exception did not permit a private carrier of merchandise to carry packages over postal routes "although no charge was made for letters as such." The Court based its finding that good will constituted "compensation" on the fact that the "tenor and scope [of the Act was] . . . to prevent such competition with the post office department."

Similarly, in 1896, the Attorney General concluded that the

¹²Prior to October 11, 1979, 39 C.F.R, section 310.3(c) permitted "[t]he sending or carrying of letters if no charge for carriage is made by the carrier." (Emphasis added.) The regulation was modified to state that "compensation may also consist . . . of non-monetary valuable consideration and of good will." The Postal Service explained that the purpose of the regulation revision was

. . . to clarify, rather than to change, the Postal Service's established position, reflected in previous Advisory Opinions, that "compensation" could take the form of non-monetary valuable consideration and of good will. (See 43 Fed. Reg. 60615, 60618 (Dec. 28, 1978); Advisory Op. PES 76-4 Recon., p. 3.)

"express or implied obligation" between railroad lines to carry mail was "compensation." 21 Ops. U.S. Att'y Gen. 394, 401.

In Advisory Opinions PES 76-4 and 76-4 Reconsidered, the USPS determined that the Salem Oregon School District violated the Private Express Statutes when it delivered an employee organization's mail without postage in accordance with the provisions of a collective bargaining agreement. The agreement provided that the school district could bill the employee organization for reasonable costs incurred, although, at the time the advisory opinion was issued, the District had waived collection of the fee. The USPS held that consideration arose not only from the express terms of the agreement, but from the very nature of the collective bargaining process itself. As such, private delivery of mail, whether charges were levied or not, was outside the Private Hands Without Compensation exception.¹³

Subsequently, in Advisory Opinion PES 76-17, the USPS reached the same conclusion with respect to the Detroit School Board's practice of carrying the letters of 14 unions to their members. In that case, the practice was based on an established policy of the school board, rather than on a

¹³The position of the Postal Service in Advisory Opinions 76-4 and 76-4 Reconsidered is presently being challenged before the United States District Court for the District of Columbia in National Education Association v. Bolger, Case No. 82-2320. As of the writing of this Decision, the Court has not issued its decision.

collective bargaining agreement. The USPS found that the practice created:

. . . an established benefit for all of the unions whether or not set out in their collective bargaining agreements. Terms and conditions of employment include not only those specifically written into agreements, but also those which stem from the employment relationship and are mutually accepted by labor and management, even though not set out in agreements.

On July 2, 1982, in response to a request made by the University of California directly concerning the instant case and PERB's Order in Decision No. 183-H, the USPS issued its Advisory Opinion PES 82-9.

There, the Postal Service announced several positions which substantially depart from its previous opinions and which, as discussed infra, we find to be legally infirm.

First, the Postal Service further expanded the definition of "compensation," asserting that "compensation arises from the employment relationship itself" even where the employee organization is not an exclusive representative. As the Postal Service explained:

The actual or hoped-for benefits to the employer-carrier may be conceived to exist in increased good will on the part of employees or their representatives, in the forbearance of demands for other benefits, or in the facilitation of a continuing relationship.

Whether or not it is expressed in these terms between the employer-carrier and the employee-shippers, we consider the reality

of the situation to be that it is a service provided by the former in exchange for the latter's services. We think that this is equally true of an employee organization regardless of whether it stands in a formal, legally-recognized relationship with the employer. Adv. Op. PES No. 82-9, p. 5-6.

More significantly, the Postal Service directly considered the question of whether consideration was present where a state agency (i.e. PERB) had ordered an unwilling employer to carry employee organization mail as a matter of statutory right.

The Postal Service found that because the state furnishes a major portion of the University's income, consideration exists even where an administrative agency orders the University to carry the mail. Thus, the USPS found that:

. . . the state, through the appropriation of public funds, furnishes a major portion of the university's income. In so doing, it compensates the university for performing the duties which it instructs it to perform, including the carriage of the letters of employee organizations. . . . Adv. Op. PES 82-9, at p. 6.

And, in a footnote, the Postal Service continued:

Our conclusion would not be different if we were to treat the state, rather than its instrumentality, the university, as carrier. In that situation, the employment relationship would exist directly between the members of the union and the state. Adv. Op. PES 82-9, at p. 6.

Thus, the Postal Service concluded that:

. . . it would be entirely inconsistent with the revenue-protection purpose of the Statutes to accept the principle that a duty imposed by statute is performed by "private

hands without compensation." While the legislative purpose behind this exception is not clearly stated, it seems evident that it must have been intended to permit the gratuitous carriage of letters that may be voluntarily undertaken out of friendship.

Since the carriage contemplated here is in no sense a gratuitous act, we conclude that the "Private hands without compensation" exception does not apply. Advisory Opinion PES 82-9, p. 6.

Hence, in Advisory Opinion PES 82-9, the Postal Service took the position that "compensation" within the meaning of the Private Express Statutes and regulations exists in the instant case, even where it is conceded that no "consideration," in either a monetary or in a non-monetary form, passes between the primary parties to the relationship (i.e. between the University as carrier of mail and the Union as the sender of the mail). Rather, the Postal Service found that consideration may be found in any situation where the carrier is in some way "compensated" by an outside source for the carriage of mail. Since the internal mail system is funded by the Legislature, any cost incurred as a result of PERB's order is "compensated" by a legislative appropriation.

As the Court of Appeals noted in its remand decision, the official interpretation of statutes and regulations by a federal agency, though not controlling, is entitled to great deference. Udall v. Tallmann (1965) 380 U.S. 1 [13 L.Ed.2d 616]; Zenith Radio Corp. v. United States (1978) 437 U.S. 443;

Udall v. USPS (2d Cir. 1973) 480 F.2d 4; Wilkinson v. Workers Comp. Appeals Board (1975) 19 Cal.3d 491. The administrative determinations of this agency are entitled to a similar level of deference. San Mateo City School District, et al. v. PERB (1983) 33 Cal.3d 850; Moreno Valley Unified School District v. PERB (1983) 142 Cal.App.3d 191. For this reason, the Court of Appeal remanded the instant case to the Board to determine whether the Private Express Statutes and the access provisions of HEERA could be harmonized.

The Postal Service's position, that "compensation" need not be monetary and may take other forms, is clearly consistent with the Private Express Statutes and regulations. However, we find that the Postal Service's position, as articulated for the first time in Advisory Opinion 82-9, that the Private Hands Without Compensation exception is inapplicable where the private carriage of letters is ordered as a matter of statutory right by an administrative agency, is unsupportable in two respects: first, it erroneously assumes that the assertion of statutory access rights under HEERA causes consideration to pass between the employer and the employee organization, and is inconsistent with the plain meaning of the term "consideration" as set forth in the Postal Service's own implementing regulation; second, it concludes that private carriage of employee organization mail undertaken as a result of an administrative agency's order is "compensated" merely because

the University's internal mail system is funded by the State Legislature.

The Postal Service's first contention fundamentally misconstrues the nature of statutory access rights as they traditionally exist in labor relations legislation. HEERA, like EERA, SEERA, and the National Labor Relations Act, grants employee organizations access and representational rights which exist independent of the collective bargaining process. See Richmond Unified School District/Simi Valley Unified School District, supra; Long Beach Unified School District, supra; Marin Community College District, supra (EERA); Regents of the University of California, UCLA Medical Center, supra, Regents of the University of California (Lawrence Livermore National Laboratory), supra (HEERA); State of California (Department of Corrections), supra (SEERA); Republic Aviation Corporation, supra (NLRA). Thus, for example, employee organizations need not negotiate with an employer in order to have the right to distribute leaflets to employees, use employees bulletin boards, or to represent them in grievances. Employee organizations possess access rights irrespective of whether they are exclusive representatives or, as in this case, nonexclusive representatives. Since the right of access is a statutory right, it exists whether the employer and the employee organization have a formal, informal, good, bad, or no relationship at all. Thus, access rights are not, as the Postal Service suggests in Advisory Opinion 82-9, gained as a

result of the "forbearance of demands for other benefits" or "granted" by an employer with an intent to increase "good will" or "facilitate a continuing relationship" with an employee organization. Such rights, therefore, may be distinguished from those which arise solely from the collective bargaining process, and which are created as a result of the exchange of consideration between the parties to an agreement. Hence, the Postal Service is simply incorrect, and, indeed, beyond its area of expertise, when it finds that the assertion of statutory access rights causes consideration to flow between an employee organization and an employer.

Moreover, the Postal Service's view that consideration is present whenever an employee organization avails itself of its statutory access rights is inconsistent with the common law definition of the term "consideration" and the whole thrust of the law of contracts. Thus, it is a fundamental precept of the common law that "neither the promise to do, nor the actual doing of that which a promisor is by law . . . bound to do, is . . . consideration." 14 Cal. Jur.3d 304; Moore v. Bartholomae Corp. (1945) 69 Cal.App.2d 474; Bailey v. Breetwor (1962) 205 Cal.App.2d 287 [23 Cal.Rptr. 740]; Henry v. Lake Mill Lumber Co. (1956) 139 Cal.App.2d 620 [293 P.2d 909]; Schaadt v. Mutual Life Ins. Co. (1906) 1 Cal.App.2d 238 [29 Cal.Rptr. 750].¹⁴

¹⁴See also, California Civil Code section 1605, which defines consideration as:

Simply stated, where a legal obligation already exists between the parties, no consideration passes between them when one party undertakes to perform its preexisting duty--in this case the statutory obligation imposed upon the University by section 3568 of HEERA to afford employee organizations access to its internal mail system. Thus, PERB's order would not cause "consideration" to flow between the parties affected by that order.

Nor do we agree with the Postal Service's position, as articulated in Advisory Opinion 82-9, that the University would be "compensated" within the meaning of the Private Express Statutes for its carriage of employee organization mail simply because its internal mail system is funded by a legislative appropriation.

In every Postal Advisory Opinion construing the Private Hands Without Compensation exception other than Advisory Opinion 82-9¹⁵, it is explicitly stated that consideration must arise from the relationship between the carrier and the

Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor. . . . (Emphasis added.)

¹⁵See, e.g., Advisory Opinions 76-4, 76-9, 76-12, 76-15, 76-17, 77-8.

sender. As the Postal Service stated in Advisory Opinion PES 76-15, at p. 3:

The Postal Service has consistently held that the Private Hands without compensation exception does not apply in a situation in which the carriage of letters, although ostensibly performed without compensation, is nevertheless offered because of a business or other economic relationship between the carrier and those for whom he carries letters. [Citations omitted]. In each case, it was determined that the relationship between the parties gave rise to a form of consideration flowing to the carrier, which made the exception inapplicable. (Emphasis added.)

Similarly, when determining that free carriage of employee organization mail by the Detroit School Board was compensated, the Postal Service stressed the consideration flowing between the parties to an ongoing economic relationship:

[T]he delivery services rendered for the unions clearly constitute a term or condition of employment, in the form of a consideration to the unions. In return for this and other considerations, the Detroit School Board receives legal consideration from the unions, namely, the services of the persons whom the unions represent, and also the good will of the unions. Accordingly, we believe that the element of consideration is present in this case. (Emphasis added.) Adv. Op. 76-17.

In Advisory Opinion 82-9, however, the Postal Service found that here the State, rather than the employee organization, would provide compensation to the University for carriage of mail.

Indeed, the Postal Service's theory, as articulated in Advisory Opinion 82-9, would foreclose application of the

Private Hands without Compensation exception in any situation where an entity other than a private individual agrees to carry mail. After all, any institution which agrees to carry mail without charge on behalf of another person or institution must fund from its own assets the operational costs of such carriage. Where the entity is public, its funding will inevitably derive from a legislative or other tax-based source.¹⁶ Therefore, under the Postal Service's interpretation, even if a public institution agrees to carry the mail purely out of gratuitous friendship, the "compensation" it would receive in the form of budgetary allocations would preclude application of the Private Hands exception.¹⁷ Thus, the Postal Service's interpretation in Advisory Opinion 82-9 would render the Private Hands exception, virtually meaningless.

The University asserts that, while access rights in this case are asserted as a matter of statutory right, at some

¹⁶where the institution is private, of course, the source of funding will be derived from a private source (i.e., corporate assets) .

¹⁷Compare, however, Advisory Opinion PES 77-8, where the USPS found that the Private Hands Without Compensation exception was applicable to the decision of the Indianapolis School Board to carry food stamp circulars on behalf of a community organization, notwithstanding the fact that implicit in the school board's agreement to carry the circulars was a decision to underwrite the cost of delivery. To the extent that the School Board received revenue from a legislative body, its agreement to carry mail would be "compensated" in a manner indistinguishable from this case.

future point when an exclusive representative is selected, the parties might seek to negotiate the right to use internal mail systems. Hence, at that time, consideration might inure to the University as a result of the process of reaching a collective bargaining agreement with the exclusive representative. Although the Board has held that access rights are negotiable (Healdsburg Union High School District and Union School District/San Mateo City School District (1/5/84) PERB Decision No. 375), such negotiations only concern the time, place, and manner of access. As discussed above, the employee organization is not required to negotiate in order to assert its basic statutory right of access. Indeed, as in this case, the employee organization need not be an exclusive representative to assert its statutory access rights. Thus, in our view, the assertion of the basic right of access is independent of the collective bargaining process.

In sum, the Postal Service's position, as articulated in Advisory Opinion 82-9, is contrary to the plain meaning of its own implementing regulations and a well-reasoned approach to the law of contracts and labor relations. We, therefore, conclude that the carriage of Union materials through the University's internal mail system falls within the Private Hands Without Compensation exception and, as such, is not prohibited by the Private Express Statutes.

Letters of the Carrier Exception

Title 18 U.S.C, section 1594 provides:

Whoever, having charge or control of any conveyance operating by land, air or water,

which regularly performs trips at stated periods on any post route, or from one place to another between which the mail is regularly carried, carries, otherwise than in the mail, any letters or packets, except such as relate to some part of the cargo of such conveyance, or to the current business of the carrier, or to some article carried at the same time by the same conveyance, shall, except as otherwise provided by law, be fined not more than \$50. (Emphasis added.)

The implementing regulation of the Letters of the Carrier exception is set forth at 39 C.F.R, section 310.3(b). It provides:

(1) The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them. If the individual actually carrying the letters is not the person sending the letters or to whom the letters are addressed, then such individual must be an officer or employee of such person (see section 310.3(b) (2) and the letters must relate to the current business of such person.

(2) The fact that the individual actually carrying the letters may be an officer or employee of the person sending the letters or to whom the letters are addressed for certain purposes does not necessarily mean that he is an officer or employee for purposes of this exception. The following factors bear on qualifications for the exception: the carrying employee is employed for a substantial time, if not full time (letters must not be privately carried by casual employees), the carrying employee carries no matter for other senders, the carrying employee is a regular salaried employee and shares in all privileges enjoyed by other regular employees (including employees not engaged primarily by the letter carrying function), including but not limited to salary, annual vacation

time, absence allowed for illness, health benefits, workmen's compensation insurance, and retirement benefits.

(3) Separately incorporated carriers are separate entities for purposes of this exception, regardless of any subsidiary, ownership, or leasing arrangement. When, however, two concerns jointly operate an enterprise with joint employees and share directly in its revenues and expenses, either of the concerns may carry the letters of the joint enterprise.

Generally, the Letters of the Carrier exception permits a person or entity to deliver its own letters to another address or to pick up letters addressed to it from a another person or entity. Where the carrier is an institution rather than an individual, letters addressed to its employees must concern the "current business" of that institution. In other words, the Letters of the Carrier exception does not permit an employer to carry personal letters addressed to its employees. See Advisory Opinions PES 74-22, 76-12, 76-14; 76-17, 82-16.

In Advisory Opinion PES No. 76-4, Reconsidered (1/15/82), supra, the Postal Service determined that the Letters of the Carrier exception is inapplicable to the carriage of union mail through a school district's internal mail system. In the opinion of the Postal Service, the exception was not applicable because letters addressed to employees in their capacity as members of an employee organization did not concern the "current business" of the carrier school district. As the Postal Service stated:

We think it clear that interrelated though their activities and goals may be, the District and the Association are legally distinct entities in every sense, the Association's letters to its members can in no sense be regarded as sent by or addressed to the carrier-District, and the exception is therefore inapplicable.¹⁸

In Advisory Opinion 82-9, relying on its rationale in Advisory Opinion 76-4 Reconsidered, the Postal Service determined that the Letters of the Carrier exception did not apply to the facts of this case, since employee organization materials were not related to the "current business" of the University of California.

In our view, the position of the Postal Service applies an altogether too limited view of what constitutes the "current business" of the University of California. The purpose of HEERA is to ensure "the development of harmonious and cooperative labor relations between the public institutions of higher education and their employees." (HEERA subsection 3560(a)). Section 3565 of the Act affords employees the right to "form, join, and participate in the activities of employee organizations." It requires higher education employers to meet and confer with non-exclusive representatives (California State University, Sacramento (4/30/82) PERB Decision No. 211-H) and

¹⁸See also Ad. Op. 76-17, where the Postal Service held that employee organization letters do not relate to the current business of the school board carrier, but, rather, to the current business of the union with which the school board deals.

to negotiate with exclusive representatives over all matters within the scope of representation. (Section 3570). Employees have a right to file grievances and employee organizations have a right to represent employees in those grievances. (Section 3567; The Regents of the University of California (Berkeley) (5/16/83) PERB Decision No. 308-H.) It is an unfair labor practice for employers to interfere with these rights or otherwise discriminate or coerce employees in retaliation for the exercise of such rights. (Section 3571.) Hence, it is our opinion that the Legislature, by enacting a comprehensive system of collective bargaining for higher education employees of the State of California, has determined that labor relations matters are the "current business" of the University.

Moreover, the few court decisions which have considered the Letters of the Carrier exception have held that, where an interdependent relationship exists between the parties to a business relationship, the exception may apply notwithstanding the fact that they are separate entities.

In United States v. Erie Railroad Co. (1914) 235 U.S. 513 [59 L.Ed. 335], the U.S. Supreme Court held that the Letters of the Carrier exception applied to the carriage of letters for a telegraph company by a railroad pursuant to an agreement between the two companies. In determining that the exception applied, the Court stated:

[W]hile the companies in many respects are independent, they are also, in some

respects, at least, dependent. . . .
[W]hile it may be said that there is a
railroad business in which the telegraph
company has no concern, that is, business
distinctly railroad, yet it is also so far
concerned with the telegraph business as to
make its efficient and successful operation
of interest to it.

In United States v. Southern Pacific Co. (D.C. Az. 1928) 29
F.2d 433, a District Court concluded that the "Letters of the
Carrier" exception (as codified at 18 U.S.C, section 307
(1926)) did not apply to the carriage of letters by the
Southern Pacific Company for another independent corporation,
the Southern Pacific Company of Mexico. Because the two
companies operated independently of each other and did not
share a "direct interest," the Court held that, unlike the U.S.
v. Erie Railroad Co. case, the letters of the Mexico line could
not be considered those of the carrier Southern Pacific Company.

Thus, these cases support the view that the Letters of the
Carrier exception may apply to two independent entities where
carriage would enhance a relationship in which each has a
"direct interest." In this case, as noted above, such an
interdependent relationship is created by the very nature of a
collective bargaining statute like HEERA.

We conclude that, by affording employee organizations the
right to use the internal mail facilities of higher education
employers, the Legislature has evidenced an intent to make
labor relations matters the "current business" of the

University. Accordingly, we find that the Letters of the Carrier exception applies to the carriage of employee organization letters through the internal mail system of the University of California.

Suspension of Private Express Statutes for Certain University Organizations

Title 39 CFR section 320.4 provides that the operation of the Private Express Statutes

. . . is suspended on all post routes to permit colleges and universities to carry in their internal mail systems the letters of their bona fide student or faculty organizations to campus destinations. This suspension does not cover the letters of faculty members, students, or organizations other than bona fide student or faculty organizations of the college or university. Colleges and universities choosing to provide their student or faculty organizations access to their internal mail systems are responsible for assuring that only letters of bona fide student or faculty organizations addressed to campus destinations are carried. (See section 310.4) For purposes of this suspension, "internal mail systems" are those which carry letters on, between, and among the various campuses of a single college or university and operate in accordance with the Letters of the carrier exception in 39 CFR 310.3(b).

This suspension of the operation of the Private Express Statutes was added in 1979 (44 Fed. Reg. 52835). Although it has had no judicial application, it has been the subject of discussion in several USPS Advisory Opinions.

In Advisory Opinion 76-4 Reconsidered, supra, the Postal Service rejected the assertion that this suspension was

applicable to the delivery of union mail in a school district. In rejecting this contention, the Postal Service commented on the purpose of the rule:

In the Notice of Proposed Rulemaking which preceded issuance of the Suspension for certain letters of college and university organizations (43 F.R. 60615-23, December 28, 1978), we emphasized that while some student and faculty organizations—those which would be affected by the existence of the suspension—are not legally part of the university, they frequently are regarded as "performing important functions in the operation of the academic community," and "often supported in a number of ways by the college or university proper." It was this type of university organization, such as the school newspaper or intramural sports league, that the Postal Service had in mind when it issued the suspension. Again, in the absence of the suspension only the letters of organizations legally a part of the university could be carried without restriction. Our purpose was to avoid making distinctions among campus organizations based on circumstances, primarily independent incorporation, which are largely immaterial to their functioning as part of the life of the campus. Ad. Op. 76-4 Recon., at p. 11.

Thus, the purpose of the rule is to permit the use of the internal mail system by organizations which are not legally part of a college or university and, therefore, not able to avail themselves of the "Letters of the Carrier" exception, but which are recognized as "performing important functions in the operation of the academic community."

In Advisory Opinion 82-9, supra, the Postal Service concluded that union mail could be carried in the internal mail

system under this suspension only to the extent that a union was considered a "bona fide faculty organization." As the Postal Service explained:

In PES No. 76-4 Reconsidered, where we concluded that the suspension does not apply to the carriage by school districts of labor union materials, we explained that the suspension was designed to cover only student and faculty organizations because they are at the "core of 'university community¹ organizations.'" We noted that the suspension might cover the carriage of faculty union materials "only by virtue of the breadth of the term 'faculty organizations' and not because faculty unions are 'truly an integral part of the life of the university.'" Ad. Op. PES 82-9, at p. 8.

Since, in this case, AFSCME represents non-faculty employees, the Postal Service concluded that it was not a "faculty organization" within the meaning of the suspension.

It appears, therefore, that at the present time, the Postal Service has not ruled out the possibility that a labor organization representing faculty members at a college or university could use the internal mail system under the suspension. It does, however, seem to require that the organization represent faculty members and not other employees.

In University of Missouri at Columbia-National Education Association v. Dalton, et al. (W.D. Mo. 1978) 456 F.Supp. 985, the Court held, inter alia, that a university violated the equal protection clause of the Fourteenth Amendment of the U.S. Constitution by denying a labor union access to its

internal mail system based on its conclusion that only organizations which "enhanced" the university would be permitted such access. Citing numerous United States Supreme Court decisions, the Court determined that it was unconstitutional for the university to discriminate in favor of one type of employee organization against another.

Similarly, we cannot see how it is constitutionally permissible for the Postal Service to promulgate a regulation which distinguishes between a labor organization which represents "faculty members" and one which represents other categories of employees. We, therefore, conclude that the Postal Service's determination that the suspension does not apply to an employee organization which represents non-teaching employees of the University is, at the very least, constitutionally suspect and not entitled to the deference ordinarily owed to its opinions. Accordingly, we find that the suspension should apply to employee organizations which represent nonfaculty employees as well as faculty members.

CONCLUSION

We have found that section 3568 of HEERA entitles AFSCME to use the internal mail system at the University of California, Berkeley. In addition, we have found that private carriage of employee organization materials through the University's internal mail system does not conflict with the federal Private Express statutes and regulations. Accordingly, we find that

the University's regulation prohibiting employee organization access to its internal mail system is unreasonable within the meaning of section 3568. Thus, we find that the University violated subsection 3571(a) and, derivatively, subsection 3571(b) of the Act by denying AFSCME Local 371 access to its internal mail system and shall order the University to permit AFSCME Local 371 to have access to the internal mail system.

However, because we recognize that affording employee organizations access to the internal mail system might result in some additional burden on the system, we shall order the University to meet with AFSCME to discuss a system of presorting, binding or partial delivery of mail.¹⁹

Further, we note that the University has expressed concern that, in the past, the internal mail system has utilized supervisory employees to deliver employee organization materials. While we agree with the University that an employer has the right to require that its supervisory employees maintain neutrality with respect to the organizational activities of rank and file employees (State of California (Department of Forestry) (9/21/81) PERB Decision No. 174-S), we

¹⁹For example, the record indicates that in the past, AFSCME officials had delivered mail directly to various campus buildings, where they were delivered to employees by supervisory employees. This method of delivery bypassed the UC mail system's central distribution center where, the record establishes, most delays in the system have occurred.

do not see how the mere carriage of mail by supervisory employees will affect their neutrality.²⁰

ORDER

Based on the foregoing Decision and the entire record in this matter, the Public Employment Relations Board hereby ORDERS that the University of California shall:

A. CEASE AND DESIST FROM:

1. Denying AFSCME its rights under the Higher Education Employer-Employee Relations Act by refusing it access to the internal mail system;

2. Denying employees their rights under the Higher Education Employer-Employee Relations Act by refusing employee organizations access to its internal mail system.

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

1. Grant AFSCME access to its internal mail system for the purpose of communicating with employees of the University of California. Use of the mail system shall be without charge.

2. Meet with AFSCME to consider means by which any burden which may be caused by delivery of its mail through the internal mail system may be ameliorated. The parties are

²⁰However, the University is always free to restructure its mail system so as to utilize nonsupervisory employees to carry employee organization materials, so long as reassignment of personnel does not interfere with the access rights established by this Decision.

directed to consider such actions as presorting, prebinding, or centralized drop-off of mail. Such rules shall be reasonable, shall not defeat the right of employees to receive communications from employee organizations, and are subject to approval of the Regional Director consistent with subpart B(4) of this Order.

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

4. Within 35 days of the date this Decision is no longer subject to reconsideration, report to the San Francisco Regional Director of the Public Employment Relations Board of the actions taken to comply with this Order. Report thereafter to the Regional Director in accordance with her instructions.

Members Morgenstern and Burt joined in this Decision.



APPENDIX

NOTICE TO ALL 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-4-H, William H. Wilson v. University of California, Berkeley, in which all parties had the right to participate, it has been found that the University of California violated the Higher Education Employer-Employee Relations Act, Government Code subsections 3571(a) and (b) by denying employee organizations the right to use its internal mail system.

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

A. CEASE AND DESIST FROM:

1. Denying the American Federation of State, County, and Municipal Employees, Local 371 its rights under the Higher Education Employer-Employee Relations Act by refusing access to the University's internal mail system;

2. Denying employees their rights under the Higher Education Employer-Employee Relations Act by refusing employee organizations access to the University's internal mail system.

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

1. Grant AFSCME access to the internal mail system for the purpose of communicating with employees of the University of California. Use of the mail system shall be without charge.

2. Meet with AFSCME to consider means by which any burden which may be caused by delivery of its mail through the internal mail system may be ameliorated. The parties are directed to consider such actions as presorting, prebinding, or centralized drop-off of mail. Such rules shall be reasonable and shall not defeat the right of employees to receive communications from employee organizations.

Dated:

UNIVERSITY OF CALIFORNIA, BERKELEY

By _____,
Authorized Representative

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



WILLIAM H. WILSON,)
)
Charging Party,)
) Unfair Practice
v.) Case No. SF-CE-4-H
)
UNIVERSITY OF CALIFORNIA AT) Proposed Decision
BERKELEY,)
Respondent. } (6/17/80)

Appearances: Andrew Thomas Sinclair, Attorney (Sinclair & Clancy) for William H. Wilson; Susan M. Thomas, Attorney for Regents of the University of California at Berkeley.

Before: Gerald A. Becker, Hearing Officer.

PROCEDURAL HISTORY

On November 16, 1979, William H. Wilson, as an individual and on behalf of the American Federation of State, County and Municipal Employees, Local 371, (hereafter Charging Party or Local 371) filed this unfair practice charge against the University of California at Berkeley (hereafter University). As subsequently amended, the charge alleges that the University violated Government Code sections 3568, 3571(a), (b) and (d)¹ by prohibiting the Charging Party from distributing organizational literature through the mail system in the Department of Facilities Management.

¹All statutory references are to the Government Code unless otherwise specified.

The hearing in this matter was held before the undersigned on January 28, 1980, and the matter was submitted for decision on April 30, 1980.

FINDINGS OF FACT

The University maintains internal, centralized mail services for academic, staff and systemwide offices. Services provided by the Berkeley campus mail section include delivery of interdepartmental, inter-campus and incoming U.S. mail to campus departments. It also collects outgoing interdepartmental, inter-campus and U.S. mail.

The U.S. Postal Service delivers U.S. mail directly to approximately 50 locations on the Berkeley campus. Incoming U.S. mail which is not delivered directly is picked up by campus mail carriers from the Berkeley post office early each morning. It then is taken to the campus mail section (the main campus distribution center) and sorted by department name for campus delivery. Along with intra-campus mail, it then is delivered to the departments on a regular schedule.

Inter-campus mail must be stamped. However, no U.S. postage is paid for internal University mail on the Berkeley campus nor is there a recharge against University department or office budgets for use of this mail system. Rather, the mail system is funded through the University budget. In fiscal year 1978-79, the campus mail system processed almost 13 million

pieces of mail with a budget of \$213,000. The budget for fiscal year 1979-80 was reduced to \$180,000. Also fewer employees are working in the campus mail system than in 1978-79.

Except for the delivery of incoming U.S. mail, University policy provides that campus mail services are for official University use only. Outside individuals and organizations are not allowed to use campus mail services. If an outside organization attempts to use the campus mail system for a distribution on campus of such things as political literature or commercial advertisements, the campus mail system notifies the sender that the mail will not be processed.

Since 1967, University policy also has prohibited employee organizations from using the campus mail system to communicate with employees. However, through unfamiliarity with this University policy, it was not enforced in the Berkeley campus custodial services department.

Prior to January 1979, **the** central custodial office had mailboxes for individual campus buildings. The building leader (in charge of all custodians in a particular campus building) would pick up the mail for his building and distribute it to the custodians working there.

After January 1979, the main custodial office was moved to a different location. There now are mailboxes only for custodial supervisors, who are the next step up from building

leaders in the line of supervision and may supervise custodial services for as many as 15 campus buildings. Since January 1979, custodial supervisors have picked up and distributed mail for the buildings under their supervision, bypassing the building leaders.

Both before and after January 1979, building leaders and then supervisors distributed unstamped mail from employee organizations. However, on May 18, 1979, Robert Gilmore, senior superintendent of physical plant and manager of custodial services, attended a collective bargaining orientation meeting presented by the University for supervisory personnel. At this meeting he learned it was a violation of University policy to allow use of the University mail system by employee organizations. He then held a supervisors' meeting and told his custodial supervisors not to deliver mail from employee organizations unless it is regular stamped, U.S. mail.

Sometime after July 1, 1979, after the Higher Education Employer-Employee Relations Act (hereafter HEERA)² became effective, Local 371 attempted to distribute organizational literature through the custodial supervisors as it previously had done. The organization was told that supervisors could not

²Government Code section 3568 et seq.

deliver the mail unless it had a U.S. stamp on it. Mr. Wilson then recovered the mail and he and other custodians attempted to deliver the literature personally to custodians at the various campus buildings. It took Mr. Wilson about three hours to cover ten buildings himself. Not all buildings where custodians work received the literature.

On October 30, 1979, Wilson, who was then president of Local 371, had a meeting with Philip Encinio, the University manager of employee relations and development, and Debra Harrington, an employee relations representative, about the prohibition on use of the University mail system. At this meeting Encinio confirmed the fact that Local 371 could not, under University policy, use the mail system.

One outside organization, the United Way charity, has been permitted by the chancellor's office to use the campus mail system for a once-a-year fund raising effort. The fund raising is deemed to be an "official University use" and the chancellor's office is billed by the campus mail division for the cost of processing United Way's literature.

The University also uses its campus mail system to inform employees of its views respecting collective bargaining. Last year, in its monthly employee newsletter, "the UC Employee," a seven-part series was published setting forth the University's analysis of the new collective bargaining law as well as its

position that it "does not endorse collective bargaining nor view it as either desirable or inevitable."

As of July 1, 1979, there were approximately 280 custodians and 9 custodial supervisors on the Berkeley campus. Local 371 has approximately 140 to 150 members on the campus, most of whom are custodians. Local 371 has a list of its members' home addresses but the list is not accurate because members may move without giving a new address.

Local 371 has filed a request for recognition under HEERA for a unit of custodians at the Berkeley campus. To support its request for recognition, Local 371 solicited authorization cards from both members and non-members.

In November 1979, after being refused use of the campus mail system, Local 371 sent notice of an organizational meeting, two weeks ahead of time, to its members through the U.S. mail. However, due to delays of the sort which often occur in the University's processing of U.S. mail, some of the members did not receive their copies of the notice at their buildings until after the meeting was held.

University witnesses testified that in their opinion it would be burdensome if employee organizations were permitted to use the campus mail system due to budget and staff cuts, and increased work load. But the University witnesses could offer no evidence to support their opinions.

Respecting distribution of employee organization literature by custodial supervisors, based on the testimony of Mr. Gilmore, the manager of custodial services, it is found that it was not burdensome in the past for custodial supervisors to **distribute** this literature. In fact, Local 371's past practice of placing its literature directly in custodial supervisors' boxes is less a burden on the campus mail system, since no processing or sorting is required at the central mail location, than is the case with stamped, U.S. mail.

Local 371 has some alternative means of contact with its members. It can get a computer listing of custodians and their departments from the University and reach them by U.S. mail. Employee organizations may reserve University rooms for meetings. It may post notices on some 45 bulletin boards in custodial offices. There also is a University "poster route" by which, for a fee, the University will post notices on 66 bulletin boards throughout the campus. Finally, employee organizations are permitted to leaflet outside campus buildings or in parking lots.

ISSUE

Did the University violate Government Code section 3571(a), (b) or (d) by not permitting Charging Party to use its internal mail system for delivery of unstamped, organizational literature?

DISCUSSION AND CONCLUSIONS OF LAW

Section 3568 provides that:

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.

In a decision interpreting an almost identical provision in the Educational Employment Relations Act (section 3543.1(b) of "EERA"³), the PERB held that the phrase, "other means of communication," includes school district mail systems.

Richmond Unified School District (8/1/79) PERB Decision No. 99. Interpreting basically similar statutory language under EERA, the Richmond decision serves as precedent in interpreting section 3568 of HEERA. Professional Engineers in California Government (PECG) v. State of California (3/19/80) PERB Decision No. 118-S, at p. 11.

The University argues, however, that the circumstances of the case are distinguishable and thus the Richmond holding is inapplicable.

3. Government Code section 3540 et seq. The only difference between the two statutory provisions, of which the University makes a point but the hearing officer finds to be irrelevant, is that in section 3568 of HEERA the phrase "subject to reasonable regulations" comes at the beginning, rather than in the middle as in section 3543.1(b) of EERA.

First, the University argues that there is no longstanding past practice of allowing employee organizations to use the mail system as in Richmond. However, in Richmond the PERB expressly stated:

PERB's finding that section 3543.1(b) authorizes organizational access to school mail systems is not limited to those situations where past practice by the District has "opened the forum" [T]his Board concludes that a "past practice" limitation would be contrary to legislative intent. The statute does not restrict organizational access to any communication medium on the basis of past practice, but simply permits use of "other means of communication" with only the qualification that access be subject to "reasonable regulation." (Footnote omitted.)

(Richmond Unified School District, supra, at p. 13.)

The University next argues that unlike the school mail systems at issue in Richmond, the University internal mail system is not an effective or efficient means of communication with employees. The University cites examples in the record of delays in processing mail by the University.

The fact of the matter is that delays in the University's internal mail system occur mainly at the central distribution center where incoming mail is sorted for delivery to campus locations. Local 371's practice has been to bypass the central location and instead place its communications directly in supervisors' boxes for distribution to custodians at the various campus buildings. There is no evidence in the record

that this "shortcut" method of distribution is not efficient and effective.

Furthermore, the PERB's holding in Richmond is not premised on the relative efficiency of internal school mail systems. Rather, at the outset it is unqualifiedly stated:

As a threshold matter, PERB finds the Legislature intended to include use of internal school mail systems as one of the employee organization access rights authorized by section 3543.1(b) of EERA.

But, the University argues, if supervisors must deliver employee organization literature, their supervisory duties will be disrupted and an anomalous situation will be created in which supervisors, some of whom may belong to competing organizations, would be providing a "leafletting service" for rival employee organizations.

The University's position that custodial supervisors would be unduly burdened by having to deliver organization mail is speculative at best. If not permitted, much of this mail probably would be sent by U.S. mail and be delivered by supervisors anyway. Before the advent of HEERA, these same supervisors distributed employee organization literature and there is no evidence it was burdensome. In fact, the manager of custodial services was of the opinion that it had not been burdensome in the past.

The argument that supervisors may belong to competing

employee organizations is unpersuasive. The same situation exists with respect to delivery of stamped organizational mail which supervisors would continue to distribute. Furthermore, there existed the same possibility in the Richmond case of competing loyalties among the employees who delivered organization mail to school sites, but this possibility did not appear to trouble the PERB. It is further noted that under sections 3580-3581.7, although supervisors under HEERA may belong to the same employee organization as do employees they supervise, they are precluded from participating in representational activities of nonsupervisory employees, which fact serves to minimize their interest in organizational literature they might deliver to nonsupervisory custodial employees.

The University next argues that if it is required to allow employee organizations to use its internal mail system, under the "opening of the forum principle"⁴ it would have to similarly open use to all other kinds of groups "whose goals are not essential to the business of the University," thereby further burdening its internal mail system. Other than the fact that the University could present no evidence beyond mere

⁴See Danskin v. San Diego School District (1946) 28 Cal.2d 536 [171 P.2d 885]; Wirta v. Alameda-Contra Costa Transit District (1967) 68 Cal.2d 51 [64 Cal.Rptr. 430]; Stanson v. Mott (1976) 17 Cal.3d 206 [130 Cal.Rptr. 697].

speculation that its mail system would be overburdened by employee organization use, the simple answer to this argument is that if employee organizations are interpreted to have a statutory right under section 3568 to use the University's mail system, that right is not subject to divestment just because its enforcement might collaterally create the same right for other groups. Further, there would seem to be a rational basis for the University to distinguish communications to employees concerning their working conditions and employment relations with the University from communications from other groups with no University connection.

The University next contends that employee organizations have many alternative methods of communicating with employees, thus the prohibition of unstamped mail is a reasonable regulation of the use of University mails under section 3568.

The same alternatives presumably existed within the school districts involved in the Richmond case, but the PERB nevertheless found similar restrictions on use of the school mail system to be impermissible. Certainly, the employee organizations in Richmond had a statutory right under section 3543.1(b) of EERA to use bulletin boards. "Leafletting" employees on nonwork time also must be permitted. Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620]; Los Angeles Teachers Union v. Los Angeles City Board of Education

(1969) 71 Cal.2d 551, 560 [78 Cal.Rptr. 732]. Also, as in the present case, in Richmond the employee organizations were permitted to distribute communications themselves to their members' worksites. Richmond, supra, at pp. 7-8.

The only alternative available to Local 371 which arguably was unavailable to the employee organizations in Richmond is the right to communicate with employees at their worksites via stamped U.S. mail.⁵ But the fact of the matter is that both stamped and unstamped mail get treated the same way in the University's mail system. The burden on the University is the same in either case. The only difference is that Local 371 would be required to pay U.S. postage for its mailings. Additionally, if Local 371 were allowed to continue its past practice of bypassing the University's main mail distribution center and instead placing its communications directly in custodial supervisors' boxes for distribution at custodial work sites, the University's mail system would be less burdened than if it had to handle the mail as U.S. postage in its main distribution center.

Given these circumstances, it can hardly be said that the University's present policy is a reasonable regulation of the

⁵In fact, there is no indication one way or the other in Richmond as to whether employee organizations could communicate with employees at their worksites via U.S. mail.

use of the mail system. Furthermore, as the PERB said in Richmond, supra, at p. 28, fn. 11, "The existence of an alternative means of distribution does not absolve the districts of responsibility . . . ," nor is there any "valid school interest to justify the distinction."

The University further contends, however, that it must require employee organizations to stamp their mail in order to comply with the federal Private Express Statutes and Regulations.⁶ But as the PERB stated with respect to a similar defense raised in Richmond, supra, the PERB is empowered to interpret and enforce the provisions of HEERA. Whether there is a conflict between section 3568 of HEERA and the federal law is a matter for a different tribunal, and not resolvable in an unfair practice charge brought under HEERA. Cf. Richmond, supra, at p. 14, fn. 6.

Finally, the University argues that insofar as the unfair practice charge alleges that prohibition of Local 371's use of the internal mail system was a unilateral change, the charge is barred by the six-month statute of limitations in section 3563.2(a) since the University's prohibition against employee organization use of the mail system dates back over 13 years.

⁶18 U.S.C, sec. 1693 et seq., 39 U.S.C, sec. 901 et seq.; 44 C.F.R, sec. 310 et seq.

However, this proposed decision does not rest on the basis that the University committed an unlawful, unilateral change. Indeed, Local 371 does not include in its charge an allegation that the University's denial of access to the mail system violated Local 371's right to negotiate under section 3571(c). Rather, Local 371's statutory right of access under section 3568 is at issue. Furthermore, this statutory right did not exist until July 1, 1979, the effective date of HEERA, and the charge was filed within six months thereafter, on November 16, 1979. Under the University's theory, the six months limitation period would have run more than 12 years before the statutory right accrued, and Local 371, no matter how diligent, would never be able to file a timely unfair practice charge to protect its statutory right. Such an inequitable result will not be inferred here. Cf. Communication Workers v. NLRB (2d Cir. 1975) 520 F.2d 411 [89 LRRM 3028, 3031].

Conclusion

Having found the University's attempts to distinguish the present situation from the PERB's Richmond precedent to be non-meritorious, it is concluded that Local 371 is statutorily entitled under section 3568 to use the University's internal mail system. It follows that the University violated section 3571(b) by denying Local 371 its right to use this internal mail system.

In addition, some harm occurred to custodial employees' **statutory** right under section 3565 to participate in employee **organization** affairs by receiving communications from **Local 371**. Accordingly, as in Richmond, supra, at pp. 29-30, a **violation** of section 3571(a) also is found.

As to the alleged violation of section 3571(d), as in Richmond, supra, at pp. 30-1, there is no evidence that the **University attempted** to exert control over Local 371 or **undermine** its support as an entity. Thus, the alleged **section 3571(d)** violation is dismissed.

REMEDY

Section 3563.3 gives the PERB broad powers to remedy unfair **practices**, specifically including the power to issue cease and **desist** orders.

Since it has been found that the University unreasonably **denied** Local 371 access to its internal mail system, it will be **ordered to** cease and desist from denying such access for the **purpose of** communication with employees at the University of **Berkeley** campus. As in Richmond, supra, the cease and desist **order will apply** in favor of all employee organizations as well **as Local 371**.

In addition, it is appropriate that the University be required to post a notice incorporating the terms of the order. Posting of such notice will provide employees with notice that the University has acted in an unlawful manner and is being required to cease and desist from such unlawful activity. It

effectuates the purposes of the HEERA that employees be informed of the resolution of this controversy and will announce the University's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69. In Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587, the California District Court of Appeal approved a posting requirement. The U. S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Regents of the University of California violated Government Code section 3571(a) and (b) by denying employee organizations access to the University's internal mail system on the Berkeley campus. Therefore, it is ordered that the University shall:

- A. CEASE AND DESIST FROM:
1. In violation of Government Code section 3571(b), unreasonably denying employee organizations access to its internal mail system for the purpose of communicating with employees at its Berkeley campus;
 2. In violation of Government Code section 3571(a), interfering with employees' right to participate in employee organization affairs by receiving communications from such organizations.

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

1. Within seven days after this proposed decision and order becomes final, post copies of Appendix "A" attached hereto for forty-five consecutive calendar days at its headquarters office and in all locations at the Berkeley campus where notices to employees are customarily posted;

2. At the end of the posting period, notify the San Francisco Regional Director of the Public Employment Relations Board in writing of the actions it has taken to comply with this Order.

The alleged violation of Government Code section 3571(d) is hereby dismissed.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order will become final on July 7, 1980 unless a party files a timely statement of exceptions and supporting brief within twenty (20) calendar days following the date of service of this decision. Such statement of exceptions and supporting brief must actually be received by the Executive Assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on July 7, 1980 in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing

upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.

DATED: June 17, 1980

GERALD A. BECKER
Hearing Officer

2. What compensation, if any, does the University receive for delivery of employee organizational materials?

3. What relationship, if any, exists between the University's mail system and United States postal routes?

4. Does the University utilize its mail system to disseminate management material pertinent to employer-employee relations?

5. Does the University permit the use of its mail system by charitable and other nonemployee organizations?

6. What burden, if any, would be placed on the University's mail system if it were made available to employee organizations?

At the hearing the parties presented evidence only on the issues raised by the Board in its remand order. Based on this evidence, the undersigned makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Question #1. The document which gave rise to this charge was a one-page notice regarding a union nomination meeting. Charging party, however, also seeks to send the following through the campus mail system.

a. General notices of union activities including meetings, meet and confer sessions and other concerted activities.

b. Union publications including newsletters having to do with union-related activities.

c. Materials concerning Local 371's position on the benefits of collective bargaining and the rights of employees protected under the collective bargaining laws, including union-related election materials, information and advice.

d. General notices of changes or modifications in University rules, regulations and benefits affecting members of Local 371.

e. Other materials generally concerned with the business of Local 371 and members thereof.

These materials would be addressed to individual employees at particular locations. It is not contemplated, however, that Local 371 would use the University mail to send to individual employees communications which are concerned only with business of those individual employees unless there was no other means of contacting them.

Question #2. The University has consistently refused to deliver employee organization materials, therefore, no new evidence was received regarding compensation for delivery of such materials.

Evidence was received regarding charges imposed by the University upon various University departments and units for use of the mail system. In this regard the Berkeley campus is unique to the University system. At every campus except

Berkeley,¹ units or departments that utilize the intra-campus² mail system are recharged for that service. There is no recharge at Berkeley. The recharge system at other campuses is as follows. At some campuses each unit or department that receives intra-campus mail gets charged a monthly rate, depending upon volume. For example, each unit that receives from 0 to 500 pieces of mail per day would be charged a certain monthly rate, while those receiving over 500 pieces per day would be charged a higher monthly rate. Some campuses measure volume in terms of outgoing mail, others by incoming mail, while still others use a combination of both. Some campuses measure volume by the weight of the mail rather than the number of pieces of mail. Another method is to charge a "drop charge." This is a flat fee per month just for having mail dropped within the department. This has nothing to do with the volume of mail handled for that department.

At the time of the hearing the entire cost of handling

¹The record was unclear what recharges were made at the Lawrence Livermore National Laboratory (hereafter LLNL).

²intra-campus mail is mail delivered through the internal campus mail system. This requires no U.S. postage. This should be distinguished from mail being sent outside the campus confines known as inter-campus or outside mail. This inter-campus or outside mail does require U.S. postage. On the Berkeley campus all mail being sent to other Northern California campuses is delivered via University couriers and is therefore still considered intra-campus mail, not requiring U.S. postage.

intra-campus mail on the Berkeley campus was funded by general state funds through the mail division's annual budget.

Marvin Eckard, the manager of the mailing division at the Berkeley campus, testified that he was in the process of developing a method of charging departments but that nothing had yet been instituted on the Berkeley campus.

On all campuses, including Berkeley, the user of inter-campus or outside mail requiring U.S. postage is charged for the postage plus a surcharge. All users are also charged for special services such as bulk processing.

Question #3. Evidence was received regarding overlap of -postal routes and the University mail system on the Berkeley campus and LLNL.

On the Berkeley campus, the U.S. postal service picks up and delivers directly to over 50 locations. The University mail system also services each of those locations served by the postal service. The University system delivers mail to approximately 100 additional locations which do not receive direct delivery from the postal service. Maps outlining the two delivery routes demonstrate that the University, by necessity, utilizes most of the same surface streets within and around the University which are utilized by the postal service.

Regarding the LLNL, there was testimony that the postal service does not deliver to any location within the secured area of the Laboratory. There was also testimony that a small

percentage of LLNL employees work at sites outside the secured area. Mail to those sites would therefore be carried on surface streets. There was no evidence showing those surface streets were also used by the postal service for delivery of mail.

Question #4. The parties stipulated that certain materials were sent by management to rank-and-file employees via the internal mail system on the Berkeley campus. Among those materials was a publication of the Berkeley campus personnel office entitled "U.C. Employee." Within that publication there were, among other things, articles regarding bargaining units, PERB elections, improvement to personnel services offered, benefits increases, job freezes, salary increases, vacations, and special performance awards. Many of these articles not only report objective facts but also offer the views of the personnel office on the subject.

Charging party also entered evidence as to the LLNL. At that site a publication titled "Tuesday A M Update" is distributed via the mail system. Within that management publication were articles regarding bargaining units, collective bargaining training of supervisors, public sector strikes, amendments to unit petitions, summaries of grievance cases, PERB elections, union authorization cards, declining union membership, unfair practice charges, and many others offering management views on employer-employee relations issues.

Question #5. The only example of charitable and other non-employee organization use of the mail system on the Berkeley campus was the United Way campaign discussed in the earlier administrative law judge's decision. The only new evidence regarding this issue was that in 1982 the procedure for distributing the United Way letters and materials was changed so that they are now distributed to United Way representatives in a group meeting. The letters and materials are then hand-carried by representatives to their departments and then distributed to employees. Representatives who cannot attend the meeting are asked to pick up their department's letters and materials from a central office. Those that are not picked up are then sent to the United Way representatives through the campus mail.

Charging party offered evidence from the LLNL to show that in November 1979 an organization called the Lawrence Livermore Laboratory Women's Association (hereafter Women's Assoc.) was allowed to send notices of a meeting and a newsletter through the internal mail system at LLNL. Additionally, in February 1983 the Bank of America was allowed to use the mail system to distribute instruction and application information for an automated teller which had been installed at the LLNL facilities. The information from the bank was preceded a day earlier by an administrative memo from the LLNL business services unit explaining that an automated teller had been

installed on the facility for use by LLNL employees. The memo also informed employees that representatives from the bank would be at LLNL for the following week to answer questions and assist employees with the machine operation.

Charging party also introduced an October 1979 memo from the LLNL compensation/benefits unit. That memo notified employees of services offered employees by Crocker Bank. The memo instructed employees that further information was available at the employee benefits section.

Marvin Eckard testified that if the materials from the bank and the Woman's Assoc, had been mailed at the Berkeley campus they would not have been delivered because it would have constituted a violation of University policy.

Question #6. To prove that distributing employee organization mail would create a burden, the University offered testimony of Marvin Eckard. This, testimony reflected budget cuts, reductions in workforces and increases in the amount of mail required to be processed.

Eckard testified that in his opinion the number of mailings of employee organizations would increase if organizations had free access to the system, thus putting a greater burden on the system. This was supported by testimony of Calvin Andre, a witness for the charging party. Andre testified that his organization would utilize the system more heavily if it didn't have to pay postage.

Eckard did admit, however, that if U.S. postage was affixed, the University would have no choice but to accommodate the employee organization mail.

CONCLUSIONS

Question #1. Federal postal regulations generally define a "letter" to be a message directed to a specified person or address which is recorded in or on a tangible object.³ There are, however, exceptions to this definition. Newspapers, periodicals and signs or posters which are primarily intended to be posted for reading by more than the addressee are not considered letters.

Although there may be occasions where the charging party's materials fall within an exception to the definition of letters, the majority of the mailings would be addressed to individual employees and would therefore be considered letters within the postal regulations.

Question #2. Because the University has refused to deliver employee organization materials it has received no compensation for doing so. At Berkeley where the instant case arose, University users are not charged for intra-campus mail service. If inter-campus or outgoing mail requires U.S. postage, the users are charged for the postage plus surcharge. Users are

³39 CFR Part 310, section 310.1.

also charged for special services such as bulk processing. At every other campus in the system, and possibly at LLNL,⁴ University users of the system are charged for the intra-campus mail service.

Question #3. Postal regulations define postal routes in part as "routes on which mail is carried by the postal service."⁵ This includes public roads and letter carrier routes as established for the collecting and delivering of mail. The University and U.S. postal service pick up and deliver to 50 identical locations creating virtually complete overlaps of routes used. Although the University services an additional-100 locations, the routes used also substantially overlap U.S. postal routes.

Question #4. As also found by the administrative law judge in the original hearing, articles and newsletters disseminated to employees by management via the University mail system do include management positions on issues pertinent to employer-employee relations.

Question #5. On the Berkeley campus, the University does not allow use of the internal mail system by charitable or other non-employee organizations. The only evidence of this

⁴Eckard was unaware of the practice at LLNL.

⁵39 C.F.R, sec. 310.1(d).

ever happening was when the United Way was allowed to use the mail system under the direct sponsorship of the chancellor's office.

At LLNL, the University has allowed outside organizational use of the mail system as evidenced by the 1983 mailing of the Bank of America and the 1979 mailings of the Women's Assoc. There was no testimony that these mailings were under the direct sponsorship of the University. It is therefore found that at LLNL the University has, on at least three occasions between 1979 and the present, allowed use of the mail system by non-employee organizations. The 1979 mailing regarding Crocker Bank was sent by a department of LLNL, and therefore is not evidence of use of the mail system by an outside organization.

Question #6. The picture painted by Eckard generally supports a finding that any increase in mail would place additional burden on the system. Yet an increase in employee organization mail is no more burdensome than an increase in mail sent by any University department. Furthermore, if U.S. postage were affixed all of the employee organization mail would be accommodated. It is therefore concluded that none of the new evidence demonstrated that employee organization mail would unduly burden the mail system.

These recommended findings of fact and conclusions of law regarding the new evidence submitted are being forwarded

directly to the Board itself for its consideration, together with the existing record.

DATED: June 2, 1983

JAMES W. TAMM
Administrative Law Judge