



when it unilaterally changed the hazardous material (HAZMAT) duties of firefighters at the University of California at Davis (UCD) and the Lawrence Berkeley Laboratory (LBL) from first responder operations (FRO) to Technician, without providing the University Professional and Technical Employees, CWA Local 9119, AFL-CIO (UPTE) with notice or an opportunity to bargain over the change.

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript, and the University's exceptions. For the reasons that follow, the Board reverses the ALJ's decision and dismisses the charge and complaint.

#### PROCEDURAL HISTORY

UPTE filed unfair practice charge Case No. SA-CE-69-H on January 11, 1995 and amended that charge on May 4, 1995. On June 5, 1995, a Board agent issued a complaint on that charge. The complaint alleged that the University violated HEERA section 3571(a) and (c) when it unilaterally modified the HAZMAT duties of firefighters represented by UPTE. The University filed its answer on June 26, 1995 and amended that answer on December 1, 1995.

The ALJ held six days of formal hearing between October 30 and December 6, 1995. On September 17, 1996, the ALJ rendered a proposed decision holding that the University's actions violated

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(c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

HEERA section 3571(a) and (c). The University filed exceptions to that proposed decision on November 6, 1996.

FACTUAL SUMMARY

The University is a higher education employer within the meaning of HEERA. PERB certified UPTE as the exclusive representative of a bargaining unit including University firefighters on December 1, 1994.

In the late 1980's, the federal Occupational Safety and Health Administration promulgated regulations covering hazardous waste operations, including emergency responses to HAZMAT releases. These regulations became effective on March 6, 1990. The regulations require each covered facility to prepare an emergency response plan prior to the commencement of emergency operations. As part of an emergency response plan, a facility may designate a group of employees to act as a HAZMAT response team. This team may act only in accordance with its level of training.

Two levels of HAZMAT response training are important to this case: (1) FRO; and (2) hazardous materials Technician. An FRO is trained to act in a completely defensive fashion, attempting to contain a HAZMAT release and protecting nearby persons and property. (29 CFR section 1910.120(q)(6)(ii).) A Technician is trained to respond in an aggressive fashion, attempting to plug, patch or otherwise stop the release of the hazardous substance.

(29 CFR section 1910.120(q) (6) (iii).)<sup>2</sup> Because of the aggressive

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<sup>2</sup>29 Code of Federal Regulations (CFR) section 1910.120 provides, in relevant part:

(q)(6) Training. Training shall be based on the duties and function to be performed by each responder of an emergency response organization. The skill and knowledge levels required for all new responders, those hired after the effective date of this standard, shall be conveyed to them through training before they are permitted to take part in actual emergency operations on an incident. Employees who participate, or are expected to participate, in emergency response, shall be given training in accordance with the following paragraphs:

(ii) First responder operations level. First responders at the operations level are individuals who respond to releases or potential releases of hazardous substances as part of the initial response to the site for the purpose of protecting nearby persons, property, or the environment from the effects of the release. They are trained to respond in a defensive fashion without actually trying to stop the release. Their function is to contain the release from a safe distance, keep it from spreading, and prevent exposures. First responders at the operational level shall have received at least eight hours of training or have had sufficient experience to objectively demonstrate competency in the following areas in addition to those listed for the awareness level and the employer shall so certify:

(A) Knowledge of the basic hazard and risk assessment techniques. (B) Know how to select and use proper personal protective equipment provided to the first responder operational level. (C) An understanding of basic hazardous materials terms. (D) Know how to perform basic control, containment and/or confinement operations within the capabilities of the resources and personal protective equipment available with their unit. (E) Know how to implement basic decontamination procedures. (F) An understanding of the relevant standard

nature of the work, a Technician-level response entails greater risk of bodily harm than does a response at the FRO level.

In the early 1990's, University firefighters at UCD and LBL were trained to respond to HAZMAT emergencies at the FRO level. During this period, both the UCD and LBL fire departments determined that it was necessary to train their firefighters at

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operating procedures and termination procedures.

(iii) Hazardous materials technician. Hazardous materials technicians are individuals who respond to releases or potential releases for the purpose of stopping the release. They assume a more aggressive role than a first responder at the operations level in that they will approach the point of release in order to plug, patch or otherwise stop the release of a hazardous substance. Hazardous materials technicians shall have received at least 24 hours of training equal to the first responder operations level and in addition have competency in the following areas and the employer shall so certify: (A) Know how to implement the employer's emergency response plan. (B) Know the classification, identification and verification of known and unknown materials by using field survey instruments and equipment. (C) Be able to function within an assigned role in the Incident Command System. (D) Know how to select and use proper specialized chemical personal protective equipment provided to the hazardous materials technician. (E) Understand hazard and risk assessment techniques. (F) Be able to perform advance control, containment, and/or confinement operations within the capabilities of the resources and personal protective equipment available with the unit. (G) Understand and implement decontamination procedures. (H) Understand termination procedures. (I) Understand basic chemical and toxicological terminology and behavior.

the Technician level. Because the chronologies at the two campuses differ, we review them separately.

#### UCD

On February 2, 1992, the UCD fire department (UCDFD) made a final determination that its firefighters needed to respond to HAZMAT releases at the Technician level. UCDFD provided Technician-level training to all of its firefighters between October of 1992 and January of 1993.

In November of 1993, UCDFD Chief Michael Chandler (Chandler) prepared a draft HAZMAT emergency response plan which required UCDFD firefighters to respond at the Technician level. The UCDFD anticipated that the plan would be implemented between October 1, 1994 and December 1, 1994. Chandler shared this draft emergency response plan with the three line fire chiefs who were directed to communicate its contents to the firefighters on their respective shifts. On August 1, 1994, the UCDFD distributed a new draft HAZMAT response plan to all involved staff. The new draft also required UCDFD firefighters to respond at the Technician level.

In October of 1994, all career firefighters at UCDFD attended a refresher Technician training course taught by UCD personnel. After the course's completion, UCDFD management determined that additional training was necessary before the firefighters could respond at the Technician level. Accordingly, UCDFD personnel then participated in a series of field training exercises.

On December 30, twenty-nine days after the Board certified UPTE as exclusive representative, UCDFD promulgated a HAZMAT response plan based on the August 1, 1994 draft HAZMAT response plan. UCDFD management indicated that UCDFD firefighters would thereafter respond to HAZMAT incidents at the Technician level. At that time, UCDFD also made Technician-level HAZMAT equipment available to its firefighters.

LBL

In February 1993, the LBL fire department (LBLFD) established a committee to develop a HAZMAT emergency response plan. The committee consisted of members from each shift of LBLFD. Committee members were expected to share information with all firefighters on their respective shifts. At the committee's second meeting, in March of 1993, LBL's fire chief informed the committee that he planned to have all LBL firefighters respond at the Technician level.

In June of 1993, all LBL firefighters received refresher training at the FRO level. Shortly after September 1, 1993, LBL's HAZMAT emergency response plan became operational. This plan required FRO certification for firefighters, but did anticipate some offensive response to HAZMAT releases.

Between November of 1993 and June of 1994, all LBL firefighters received Technician-level training at University expense. During that period, those firefighters who had completed their training participated in Technician-level

training exercises with the Berkeley and Oakland fire departments.

In June, September, and October of 1994, LBLFD produced draft HAZMAT emergency response plans. LBLFD distributed these plans to its fire captains, who were expected to get feedback from the firefighters in their commands. In October of 1994, LBLFD distributed an interim HAZMAT emergency response plan to all personnel. That interim HAZMAT emergency response plan required LBL firefighters to respond at the Technician level.

In December, 1994, the LBLFD began its annual revision of job descriptions. These revised job descriptions, dated December 24, 1994, required, for the first time, that all LBL firefighters be certified at the Technician level.

#### ALJ'S DECISION

The ALJ noted that a unilateral change in a term or condition of employment for exclusively represented employees is a per se refusal to meet and confer in good faith. (Pajaro Valley Unified School District (1978) PERB Decision No. 51 at p. 5 (Pajaro Valley); San Mateo County Community College District (1979) PERB Decision No. 94 at p. 12 (San Mateo); Regents of the University of California (1996) PERB Decision No. 1169-H at p. 3 (Regents)). The ALJ held that the University violated HEERA section 3571(a) and (c) when it unilaterally implemented new HAZMAT duties for firefighters at UCD and LBL without providing UPTE notice or an opportunity to bargain over the change.

### UNIVERSITY'S APPEAL

On appeal, the University reiterates the defenses it raised at the hearing. First, the University contends that UPTE's charge was untimely. Second, the University argues that the assignment of Technician-level duties was part of the dynamic status quo. Finally, the University claims that LBL and UCD firefighters, acting at the FRO level, either performed Technician-level duties or duties so intimately related to Technician-level duties that the imposition of Technician-level duties was not actually a change in working conditions.

### DISCUSSION

As the ALJ noted, once PERB has certified an exclusive representative for a bargaining unit, an employer's unilateral change in a term or condition of employment within the scope of representation is a per se refusal to meet and confer in good faith. (Pajaro at p. 5; San Mateo at p. 12; Regents at p. 3.) To establish an unlawful unilateral change, the charging party must demonstrate that: (1) the employer breached or altered the parties' written agreement or established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not an isolated breach of contract but amounts to a change in policy; and (4) the change in policy concerns a matter within the scope of representation. (Regents at pp. 3-4.)

Had the University precipitously required UCD and LBL firefighters to perform Technician-level duties in January of 1995, we would concur with the ALJ's determination that the University's conduct constituted a unilateral change in violation of HEERA section 3571(a) and (c). The circumstances of this case, however, lead us to a different conclusion.

Although HEERA precludes the University from unilaterally changing a term or condition of employment within the scope of representation when employees are exclusively represented, the University has no such obligation in the absence of an exclusive representative. (Regents of the University of California v. Public Employment Relations Bd. (1985) 168 Cal.App.3d 937, 945 [214 Cal.Rptr. 698] (noting that employee has right to be represented but that nonexclusive representative has no right to represent).) This case, of course, takes place during the transition from no representation to exclusive representation.

During the transition period, the Board requires the University to maintain the dynamic status quo. (Regents of the University of California (1997) PERB Decision No. 1188-H at p. 22, citing Clovis Unified School District (1984) PERB Decision No. 389; Regents at p. 4.) Accordingly, during the transition period, the University may, indeed must, implement decisions made outside of the election period.

As noted above, the UCDFD and LBLFD instituted plans to upgrade their HAZMAT response capabilities from the FRO to the Technician level, in August of 1992 and March of 1993, respectively. Over the next two years, the UCDFD and LBLFD implemented training programs, purchased equipment, and circulated a number of draft HAZMAT response plans to line firefighters.

On March 10, 1994, after the University had invested more than a year preparing UCD and LBL firefighters to provide a Technician-level HAZMAT response, UPTE filed a petition to become the exclusive representative of a bargaining unit including those firefighters. The Board certified UPTE as the exclusive representative of that bargaining unit on December 1, 1994, less than a month before the University completed implementation of Technician-level HAZMAT response plans for UCDFD and LBLFD.

The Board finds that the University devised and implemented the changes at issue in this case over a number of years. Although the final, formal adoption of the new HAZMAT response plans did not occur until after UPTE's certification, the University communicated its intention to make these changes to the affected employees and completed partial implementation of these changes long before UPTE's certification. These actions fulfilled the University's duty to communicate proposed changes to UCD and LBL firefighters, who were not exclusively represented

at that time. (Regents of the University of California v. Public Employment Relations Bd. (1985) 168 Cal.App.3d 937, 945 [214 Cal.Rptr. 698].) UPTE's certification did not alter the University's right to complete implementation of these changes.

ORDER

The unfair practice charge and complaint in Case No. SA-CE-69-H are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Johnson joined in this Decision.

Chairman Caffrey's concurrence begins on page 13.

CAFFREY, Chairman, concurring: The Regents of the University of California (University) did not violate the Higher Education Employer-Employee Relations Act (HEERA) by unilaterally changing the hazardous material (HAZMAT) duties of firefighters at the University of California at Davis (UCD) and the Lawrence Berkeley Laboratory (LBL) without providing the University Professional and Technical Employees, CWA Local 9119, AFL-CIO (UPTe) with notice or the opportunity to bargain over the change.

#### DISCUSSION

Under HEERA, the higher education employer must meet and confer with the employee organization selected as the exclusive representative of a bargaining unit.<sup>1</sup> The nonexclusive employee organization, however, has no independent right to represent its members, and the higher education employer has no duty to meet and confer with a nonexclusive representative. (Regents of the University of California v. Public Employment Relations Bd. (1985) 168 Cal.App.3d 937 [214 Cal.Rptr. 698].) It is important to take note of these fundamental principles in considering the rights and obligations of parties during the period in which the transition from no representation to exclusive representation is occurring.

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<sup>1</sup>HEERA section 3570 states:

Higher education employers, or such representatives as they may designate, shall engage in meeting and conferring with the employee organization selected as exclusive representative of an appropriate unit on all matters within the scope of representation.

It is in this period that the conduct giving rise to the instant case occurred. Interestingly, the Board has recently considered two other cases involving the University and UPTE which also involved conduct occurring during this transition period.

In Regents of the University of California (1996) PERB Decision No. 1169-H (UC-UPTE I), the Board recognized the dynamic status quo concept found in federal labor law. (Pajaro Valley Unified School District (1978) PERB Decision No. 51, citing NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) The Board concluded that the University did not violate HEERA during this transition period when it acted in accordance with its past practice and adjusted health benefit contribution rates while the parties negotiated over their first collective bargaining agreement.

In The Regents of the University of California (1997) PERB Decision No. 1188-H (UC-UPTE II), the Board noted that:

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

In this case the University failed to grant to employees transitioning to exclusive representation a pay increase which had an effective date prior to, but an implementation date after, certification of UPTE as exclusive representative. The Board concluded that the University violated HEERA by failing to grant

the increase to the employees in question, because its timing was clearly justified by factors other than the certification of UPTE as the exclusive representative.

From these cases it is clear that, during the period of transition to exclusive representation, the employer may continue to make certain changes if the action is consistent with an established practice, policy or rule. Further, the employer may, and under some circumstances must, implement or complete implementation of certain changes based on decisions made prior to exclusive representation if the timing of a change is clearly justified by factors other than the impending certification of the exclusive representative.

Briefly recounting the facts of this case, it is undisputed that the University made the decision to make the HAZMAT-related changes<sup>2</sup> at issue long before UPTE's certification as exclusive representative on December 1, 1994. It is also clear that affected employees were aware of the University's decision and the specific changes being made, and that most of the implementation of the changes was accomplished prior to UPTE's certification.

At UCD, on August 25, 1992, the Assistant Vice Chancellor announced that he would fully fund HAZMAT technician training for

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<sup>2</sup>The changes involve upgrading HAZMAT response capability from the first responder level, which is a defensive, containment response, to technician level, which is an aggressive, remediation response.

all UCD firefighters. UCD firefighters were trained at a HAZMAT technician level between October 1992 and January 1993. On November 11, 1993, Assistant Chief Michael Chandler (Chandler) prepared a planning document regarding the implementation of HAZMAT technician response status. The goal was to have the requisite training completed and equipment obtained between July and October 1994. This plan was given to the UCD fire captains, who were to disseminate this information to their respective shifts. Quarterly planning sessions on HAZMAT training and implementation status were held. Again, this information was to be shared with the line personnel. On June 21, 1994, a meeting was held to finalize the training schedule to bring the HAZMAT operation team into service. Chandler states that this information was shared with UCD firefighters and that every firefighter had some input into the plan. Meanwhile, on June 4 and June 10, 1993, and August 29, 1994, UCD firefighters responded to HAZMAT incidents prepared to function at the technician level. Commencing on October 11, 1994, and continuing for the next two months, HAZMAT technician and refresher training was held at UCD.

At LBL, on February 24, 1993, a HAZMAT committee was formed by Fire Chief George Dietrich to develop a HAZMAT response plan and requirements for HAZMAT equipment and personnel training. LBL firefighters were involved in this process from its onset, even to the point of LBL paying off-duty firefighters overtime so that they could attend these monthly meetings. Assistant Chief

Stacy Cox stated that when he arrived at LBL in March of 1994, he personally discussed HAZMAT issues with LBL firefighters.

Firefighters were informed on April 4, 1994, by memo from LBL Fire Chief Billy White that they were to receive HAZMAT technician training in April, May and June of 1994. All LBL firefighters received HAZMAT technician training and were considered trained to that level by August 18, 1994. On July 7, August 27 and September 14, 1994, LBL firefighters responded to HAZMAT incidents prepared to function at the technician level.

On December 1, 1994, UPTE was certified by PERB as the exclusive representative of a bargaining unit which includes the UCD and LBL firefighters. Implementation of the HAZMAT changes continued, including the revision of job descriptions and adoption of an interim HAZMAT plan in December 1994 to reflect the technician level response. Final HAZMAT response plans incorporating the changes were formally adopted at UCD in July 1995, and at LBL in August 1995.

It is clear from these facts that the University devised and was actively involved in implementing over an extended period of time the changes which are at issue in this case. The final, formal adoption of those changes occurred after UPTE was certified as exclusive representative, but that adoption was merely the conclusion of a process which began in 1992 at UCD and in 1993 at LBL. During this process, the University made its intention to make the changes clear to the affected employees, and thereby fulfilled its duty toward nonexclusively represented

employees as defined in Regents of the University of California v. Public Employment Relations Bd., supra. 168 Cal.App.3d 937 [214 Cal.Rptr. 698]. Further, most of the implementation steps occurred prior to UPTE's certification as exclusive representative, and the timing of the change was justified by factors other than the pendency of the certification. Therefore, under the concept of the dynamic status quo described in UC-UPTE I. and the principles discussed in UC-UPTE II. the University was free to complete implementation without bargaining with UPTE. Accordingly, the University did not commit an unlawful, unilateral change by its action, and the unfair practice charge and complaint in this case must be dismissed.

As noted above, the transition to exclusive representation must occur in a manner which promotes stability and avoids disruption while acknowledging the changing relationship between the parties. In this case, it would be destabilizing and disruptive to require the University to negotiate with UPTE over the HAZMAT-related changes it decided to make, and began to implement, long before UPTE's certification as exclusive representative.