

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



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| SOCIETY OF PROFESSIONAL SCIENTISTS AND ENGINEERS, |) | |
| |) | |
| Charging Party, |) | Case No. SF-CE-461-H |
| |) | |
| v. |) | PERB Decision No. 1316-H |
| |) | |
| REGENTS OF THE UNIVERSITY OF CALIFORNIA, |) | February 24, 1999 |
| |) | |
| Respondent. |) | |
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Appearances: Andrew Thomas Sinclair, Attorney, for Society of Professional Scientists and Engineers; Edward M. Opton, Jr., University Counsel, for Regents of the University of California.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

AMADOR, Member: This case is before the Public Employment Relations Board (Board) on appeal by the Society of Professional Scientists and Engineers (SPSE) to an administrative law judge's (ALJ) proposed decision (attached). The ALJ found that the Regents of the University of California (University) did not violate section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA)¹ by unilaterally implementing a wholesale

¹HEERA is codified at Government Code section 3560 et seq. Section 3571 provides, in pertinent part:

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

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights

change in personnel policies which covered certain employees at the Lawrence Livermore National Laboratory.

The Board has reviewed the entire record, including the ALJ's proposed decision, SPSE's exceptions and the University's response. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge and complaint in Case No. SF-CE-461-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Dyer joined in this Decision.

guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

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| SOCIETY OF PROFESSIONAL |) | |
| SCIENTISTS AND ENGINEERS, |) | |
| |) | |
| Charging Party, |) | Unfair Practice |
| |) | Case No. SF-CE-461-H |
| v. |) | |
| |) | PROPOSED DECISION |
| REGENTS OF THE UNIVERSITY OF |) | (9/8/98) |
| CALIFORNIA, |) | |
| |) | |
| Respondent. |) | |

Appearances: Andrew Thomas Sinclair, Attorney, for Society of Professional Scientists and Engineers; Edward M. Opton, University Counsel, for Regents of the University of California.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

The Society of Professional Scientists and Engineers (Union or SPSE) commenced this action on October 11, 1996, by filing an unfair practice charge against the Regents of the University of California (University). On February 3, 1997, the Office of General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the University unilaterally implemented a wholesale change in personnel policies which covered certain employees at the Lawrence Livermore National Laboratory (Laboratory). These employees are represented here by SPSE, an organization which does not have exclusive representative status. Specifically, the complaint alleges:

Before July 1, 1996, Respondent's policy concerning written employment practices for employees non-exclusively represented by Charging Party was that such employees were covered by policies contained in the Staff

Personnel Policies as well as the Lawrence Livermore National Laboratory "local manual," which contained local policy modifications approved by Respondent.

On or about July 1, 1996, Respondent changed this policy by eliminating the policies contained in the Staff Personnel Policies.

This conduct, the complaint alleged, violated the Higher Education Employer-Employee Relations Act (HEERA) section 3571 (a).¹

The University answered the complaint on February 19, 1997, generally denying it committed a violation of HEERA and asserting a number of affirmative defenses. Denials and defenses will be addressed below, as necessary.

An informal conference was conducted by a PERB agent on June 20, 1997, but the dispute was not resolved.

On February 19, 1998, the Union moved to amend the complaint to include an allegation that the Laboratory eliminated a class of employees known as "Term Appointees" and created in its place a new class of employees known as "Flexible Status Employees;"

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

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

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

among other things, employees in the latter class have no access to the grievance procedure and may be terminated at will. This action, the motion alleged, was one result of the earlier decision which made the University-wide Staff Personnel Policy inapplicable to the Laboratory. Specifically, the Union alleged, due to the elimination of the Staff Personnel Policy, proposed changes such as this at the Laboratory no longer had to be considered in light of University-wide personnel policies.

On February 25, 1998, the eve of the formal hearing, the Union filed a second motion to amend the complaint. The motion alleged the University, on July 1, 1996, unilaterally abolished its practice of conforming local Laboratory personnel policies to University-wide policies such as the Staff Personnel Policy.

During the first day of hearing, the undersigned denied the Union's first motion to amend the complaint as merely an effect of the allegedly unlawful conduct that is reflected in the original complaint. Over the University's objection, the second motion to amend the complaint was granted as encompassing a practice and theory closely related to the original complaint.

In addition, the University moved to dismiss the complaint at the outset of the first day of hearing. In essence, the University argued that its internal procedure or standards (for example, the University-wide Staff Personnel Policy) against which proposed changes in Laboratory policies are evaluated is a managerial prerogative. As such, it is not a term or condition

of employment that falls within the scope of representation. The motion was taken under submission and the hearing commenced.

During two days of formal hearing in Oakland on February 26-27, 1998, the Union completed its case-in-chief and the University began to present its case. The hearing was scheduled to resume on April 27, 1998. However, in the midst of a dispute over a subpoena duces tecum (SDT) filed by the Union, the University on that date renewed it's original motion to dismiss, with the added argument that the Union, during its case-in-chief, had established no change in working conditions.² Having heard the Union's case-in-chief, the undersigned concluded that, as a threshold matter, it would be prudent to address issues raised by the University's motion to dismiss prior to addressing outstanding issues related to the SDT.

On June 8, 1998, the Union submitted its written opposition to the University's motion. With receipt of the University's response on July 2, 1998, the matter was submitted for decision.

²Shortly before the hearing, the Union had filed a lengthy SDT essentially seeking documents it claimed would show that, as of June 30, 1996, the Staff Personnel Policy applied to the Laboratory and/or a practice existed under which the Laboratory conformed its local policies to the Staff Personnel Policy. The University moved to quash the SDT and the undersigned took the motion under submission while the Union agreed to proceed with testimony. It was understood that the Union would be permitted to revive its SDT at any subsequent time during the hearing if it deemed the documents relevant. During the University's case-in-chief, the Union renewed its request for documents pursuant to the initial SDT.

JURISDICTION

The University is a higher education employer within the meaning of section 3562(h). SPSE is an employee organization within the meaning of section 3562(g). SPSE is not an exclusive representative within the meaning of section 3562 (j).

FINDINGS OF FACT

University Policies

Three sets of University personnel policies are relevant here. First, the Staff Personnel Policy (SPP) is a comprehensive personnel manual covering a wide range of employment conditions.³ The SPP became effective sometime prior to the enactment of HEERA and is University-wide in application. In relevant part, section 101.1 of the SPP provides:

Staff Personnel Policies delineate the employment relationship between staff employees and the University of California. These policies do not apply to employees in the University Management Program, other employees covered by title codes 0001 through 3999, or to employees who are covered by a Memorandum of Understanding with an exclusive bargaining agent.

³Specifically, a recent version of the SPP covered discrimination in employment, affirmative action, recruitment, selection, partial-year positions, per diem positions, moving expenses, probationary period, performance evaluations, employee development, corrective action, grievances, administrative review, position classification, pay, hours, overtime, protective clothing and equipment, holidays, vacation, sick leave, work-incurred injury or illness, military leave, administrative leave with pay, personnel records, attendance records, resignation, termination and reduction in time from casual positions, release of employees who have not attained regular status, dismissal of employees, rehabilitation, medical separation, death payments, retirement, and phased retirement career positions.

a. The President of the University may approve modifications of Staff Personnel Policies for staff employees of the Lawrence Berkeley Laboratory, the Lawrence Livermore National Laboratory, and the Los Alamos National Scientific Laboratory.

b. Unless approved modifications provide otherwise, Laboratory Directors have the same responsibilities and authorities as those delegated in Staff Personnel Policies to Chancellors.

Effective July 1, 1996, the SPP became inapplicable to most University employees. Another set of personnel policies, discussed below, replaced the SPP on that date. The parties here dispute whether the SPP applied to Laboratory employees prior to July 1, 1996. The Union claims the SPP covered Laboratory employees prior to that date, while the University contends the opposite.

The second set of personnel policies is in the form of a local manual applicable to Laboratory employees. It is known as the Personnel Policies and Practices Manual (Local Policy). Prior to 1979, a loose collection of personnel policies and administrative procedures existed as a supervisor's handbook. In 1979, the personnel policies were separated from the administrative procedures and placed in the Local Policy. The supervisor's handbook has not been in effect since 1979. Tailored to the Laboratory, the Local Policy manual covers a wide

range of employment conditions for employees who work there.⁴

The 1998 version of the Local Policy manual states that

the purpose of this Manual is to provide Lawrence Livermore National Laboratory (LLNL) personnel policies and procedures pertaining to the employment relationship between an employee (other than those participating in the University of California Executive Program) and the Laboratory.

Personnel policies can be amended only by the Director with the concurrence of the President of the University of California (UC) and, as appropriate, the Department of Energy (DOE). Exceptions to the policies require the approval of the Director and, as appropriate, the President of the University and/or DOE.

The Local Policy manual remains in effect at the Laboratory.

The third relevant set of personnel policies was implemented by the University on July 1, 1996, as part of a sweeping Human Resources Management Initiative (Initiative). These policies are known as the Personnel Policies for Staff Members (PPSM).⁵ The Initiative was designed to redirect the

⁴The most recent version of the Local Policy covers nondiscrimination, affirmative action, recruitment, selection, hiring, promotion and transfers, employee conduct (including personal conduct, acceptance of gifts and favors, outside employment, conflict of interest, privileged information, etc.), employee performance, corrective action, fitness for duty, employee records, benefits (including holidays, vacation, sick leave, use of leave for work-incurred injury or illness, military leave, leave without pay, retirement, group insurance plans, etc.), grievances and administrative review, employee development, separation (including resignation, layoff, dismissal, medical separation, retirement, etc.), work schedules, pay, time reporting, rehabilitative services (including vocational rehabilitation, and reasonable accommodation, etc.).

⁵The PPSM covers appointments, affirmative action, leaves, classification of positions, complaint resolution, conflict of interest, corrective action, death payments, holidays, awards,

management of human resources; the PPSM contains the actual policies developed by the Initiative. In relevant part, the PPSM provides:

These policies delineate the employment relationship between staff members and the University of California. These policies describe certain rights, benefits and expectations which encourage professionalism, service, and contribution. Management retains all other rights and prerogatives in order to manage the University so that it may attain its missions.

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Employees at the Department of Energy (DOE) Laboratories are covered by approved variations of these and prior policies, including provisions required by the contracts between the University and DOE, or, in the case of Senior Managers, the policies in Appendix II and other staff policies as specified in the Introduction thereof. Employees at the Laboratories should consult local policy documents for information about policies that apply to them.

As noted above, the PPSM superseded the SPP for most University employees on July 1, 1996.

The PPSM includes some benefits that go beyond those found in the SPP or the Local Policy manual. For example, an expanded grievance procedure was the most frequently mentioned of these rights during the hearing. New benefits in the PPSM were not extended to Laboratory employees represented here by the Union.

leaves, medical separation, discrimination, overtime, per diem positions, performance appraisal, probationary period, protective clothing, reasonable accommodation, recruitment, reduced fee enrollment, release of casual and probationary employees, salary, shifts, personnel records, termination, and work-incurred illness and injury.

Overall authority to make changes in personnel policies has not been delegated from the Office of the President to the Laboratory level. Laboratory officials have no authority to make changes in local personnel policies. Final authority to make changes in the Local Policy rests in the Office of the President. A change in Local Policy occurs only after a request is made and the Office of the President approves it, according to Lubbe Levin (Levin), University assistant vice president for human resources.

During this process, Levin testified, "key factors" are considered as tools in determining whether to change the Local Policy. Prior to July 1, 1996, one such factor was to evaluate a change as it related to other University-wide policies, including the SPP. She described the SPP as a "yardstick" against which proposed changes in the Local Policy were considered. Now that the PPSM has been implemented, Levin said, the yardstick has not changed in substance.

Susan Angstadt (Angstadt), staff relations representative at the Laboratory, testified that there is no provision in the SPP for which there is not a corresponding provision in the Local Policy manual.⁶ However, Angstadt testified further, there have been a few instances where policies in the SPP have not been

⁶The University points out in its brief that there are subjects in the SPP that also are covered in the Local Policy, but the two policies are incongruent on the same subject. For example, both provide for notice in the event of layoff, but the specific requirements in the policies are not identical. Also, the Local Policy covers some subjects that are not covered in the SPP. For example, the Local Policy provides for severance pay, while the SPP does not.

followed at the Laboratory. As examples, she cited family medical leave, use of sick/vacation leave for exempt employees, and staff awards. Levin similarly testified that between 1979 and 1996 there were changes in the SPP that were not automatically incorporated into the Local Policy manual; she also said there were changes in the SPP that were incorporated into the Local Policy during that period.

Application of the three policies described above lies at the center of this dispute. As discussed below, the Union contends that the SPP has applied to Laboratory employees since it was promulgated prior to the enactment of HEERA, and the Local Policy was conformed to changes in the SPP from 1979 until July 1, 1996. According to the Union, the University's unilateral substitution of the PPSM for the SPP in 1996, the refusal to apply the PPSM to Laboratory employees, and the elimination of an established practice under which the Local Policy was conformed to changes in University-wide policy violated employee rights under HEERA. It is not disputed that the University gave no notice to employees when the PPSM was implemented on July 1, 1996.

The University takes the position that it has no obligation to provide notice and afford employees the opportunity to meet and discuss the internal procedure or standards (such as the SPP or the PPSM) it uses to promulgate personnel policies at the Laboratory. Moreover, the University contends the SPP has not applied to Laboratory employees since about 1979, and therefore a

substitution of the PPSM for the SPP would not constitute the kind of change that triggers the meet and discuss obligation.

Application of University Policies

Richard White (White) worked at the Laboratory as a physicist from 1956 until his retirement in 1996. He continues to work there as a "participating guest." White helped found SPSE in 1973 and has been active in the Union since that time, frequently serving as an officer and grievance committee member. As a Union officer he has met with Laboratory and University representatives regarding policy changes, and he has represented employees in grievance matters.

Bruce Kelly (Kelly) has worked at the Laboratory as a computer scientist since 1975. He too has held Union office on numerous occasions and frequently has met with Laboratory and University representatives regarding application of University policies at the local level.

White and Kelly testified that the SPP applied to Laboratory employees from before the enactment of HEERA until July 1, 1996. They said the SPP continued to apply to the Laboratory after 1979, even though the Local Policy was implemented at that time. According to White, no notice that the Local Policy would supplant the SPP was given in 1979. He said "it was presented to us at that time as essentially a clarification and codification of the policies that were in effect." He said neither the University nor the Laboratory had ever taken a position in

dealings with the Union that the Local Policy is a so-called "stand alone" policy.

In the past, the University sought input from Laboratory employees about changes in the SPP because any change would become part of the Local Policy, according to White. Hence, it came as a surprise when the University took the position in the instant unfair practice case that the SPP had not applied at the Laboratory since 1979.

The Union points to a number of specific incidents where employees were consulted about proposed changes in the SPP, or the University sought an exception to the SPP. The Union contends these incidents confirm that the SPP applied to the Laboratory after 1979.

One example, according to White, involves a recent recommendation by the Laboratory to the Office of the President to modify a layoff policy. The then current policy was to lay off employees in reverse order of seniority except that a department head could retain employees who possess special skills, knowledge, or abilities that are not possessed by other employees in the same classification with greater seniority, and are necessary to perform ongoing functions. The Laboratory requested a modification of the policy to permit the layoff of a certain class of employees (scientists and engineers) based on skills, knowledge, and abilities that are necessary to perform future work of the unit. Employees were given notice and the Union provided input. On January 25, 1996, University President

Richard Atkinson approved the recommendation with the understanding that Laboratory employees were given an opportunity to comment.

Another example, in 1982, concerned a change in sick/vacation leave for work-incurred injury or illness. The change was announced by Jack Russ (Russ), then manager of human resources at the Laboratory, in an administrative memo. In that instance, the policy revision allowed employees to return to work part-time and continue to be eligible for extended sick leave. Although Russ' memo refers in general terms to a change in University policy, as opposed to the SPP, White testified that he is certain the change referred to the SPP.⁷

The University, however, contends the SPP did not apply to the Laboratory during the relevant time period. Thus, it disputes that these and other changes in University policy concerned modifications of the SPP.

It is unnecessary to resolve this dispute or make findings on the evidence relied upon by the Union at the hearing and its subsequent written offer of proof in support of its argument that, prior to July 1, 1996, the SPP applied to the Laboratory and the Local Policy was conformed to reflect changes in the SPP. As more fully discussed later in this proposed decision, for purposes of ruling on the University's motion to dismiss, it will

⁷Other examples include a 1983 proposal for a new sexual harassment policy and a change in the scope of the grievance procedure in the SPP to include layoff, termination, and disciplinary procedures.

be assumed without deciding that the SPP applied to Laboratory employees between 1979 and July 1, 1996, and the Local Policy was conformed to reflect changes in the SPP during that period.⁸

As noted, the PPSM replaced the SPP on July 1, 1996, for a large number of University employees, but the PPSM was not made applicable to Laboratory employees. The PPSM contained new benefits for covered University employees that were not extended to these Laboratory employees. For example, White testified, the scope of binding arbitration in the PPSM was expanded to include new issues. He said the Union considered this to be a "very important right for the employees."

The effect of eliminating application of the SPP at the Laboratory, according to White, was that the Office of the President, which acted as a "watchdog" with respect to local personnel policy changes, would not have a "yardstick" such as the SPP to measure such changes against. Laboratory employees, he said further, "tend to be subject to pressure from the Department of Energy in particular which blows with the political winds and so that has been a concern for employees, that the University has played a constructive positive role in maintaining the quality of the personnel policies."

⁸As a practical matter, it appears that the Local Policy was the primary personnel policy used at the Laboratory prior to July 1, 1996. Asked if he "refer[ed] to" the SPP in his dealings with the Laboratory, White replied "yes, though we tended to use the parallel parts in what was called the [Local Policy]." Also, most grievances at the Laboratory were filed under the Local Policy.

In his testimony, White summed up the impact of the complained of University action as follows:

The change is that we were previously measured against University Staff Personnel Policies which applied to the staff of the University and we were part of the staff of the University, okay. Now the University has adopted a new set of policies and we are no longer measured against those new policies as evidenced by the fact that the University changed the grievance policies in such a way that we view as benefitting other employees and the corresponding changes are not picked up by the Laboratory, although in the past when changes in the exact same policy were made of the same nature, the Laboratory did adopt those same policies.

Since July 1, 1996, the Laboratory has contemplated a series of changes in its Local Policy. According to White, one change would eliminate a classification of employees known as term or restricted appointees and replace it with a classification known as flexible term employees. White said that, unlike restricted/term appointees, flexible term employees are terminable at will on 30 days notice with no access to appeal rights through either the grievance or administrative review procedure.

Notice of this proposed change was given to employees through a Laboratory publication and its website. Some employees responded with comments and the Union in its newsletter published several employee opinions critical of the change.

It is the Union's contention that this change deviates from the SPP and the PPSM. It would not have been implemented if either of those two policies applied at the Laboratory because,

according to the theory advanced by the Union, the University would not have granted such an exception.

ISSUE

Whether the University breached its obligation to provide notice and, upon request, meet and discuss changes in terms and conditions of employment with Laboratory employees?

CONCLUSIONS OF LAW

In its brief, the Union observes that the allegations at issue here, properly considered, are as follows:

The charge, as amended, boils down to the allegation that (1) respondent stopped applying University-wide personnel policies to Laboratory employees on July 1, 1996, thus depriving them of significantly expanded rights, which became effective that same day; and thereby removing protection for the "academic environment" which University-wide policies had provided and allowing the Laboratory to pursue policies which significantly diminish employee protection (e.g., the Flexible Employee policy) without having to justify their requests as modifications to University-wide policies, and (2) that respondent abrogated a long-standing and established practice of conforming Laboratory personnel policies to University-wide personnel policies on June 30, 1996.

The theory underlying these allegations is one of unilateral change. The Union argues that the University has altered terms and conditions of employment without affording employees notice and an opportunity to have their chosen representative meet and discuss the changes.

Applying rules of statutory construction, the Union first contends that the plain language of the SPP indicates that policy

covers Laboratory employees. The language in the PPSM, the Union contends further, indicates that Laboratory policies are subject to the newly implemented University-wide policy, although the Local Policy may constitute an approved variation. By adopting the PPSM in 1996 as a University-wide personnel policy, while declining to extend its coverage to the Laboratory, the University unilaterally has implemented a wholesale "approved variation."

In addition, the Union argues that the evidence does not support a claim that the Local Policy supplanted the SPP in 1979. In fact, the Union takes the position that it has presented substantial evidence that the SPP was never supplanted by the Local Policy.

With respect to effects of the alleged unilateral change, the Union argues that the elimination of University-wide policy against which local policies are judged constitutes a departure from long-existing practice. The Union asserts that the elimination of the University-wide policies and the corresponding elimination of the expectation that Laboratory policies will conform to the SPP or the PPSM is the core unilateral change at issue here.

In response, the University first points out that the theory of the complaint is one of unilateral change, but argues that the Union has failed to identify a single change in a term or condition of employment for Laboratory employees. According to

the University, this also is strong evidence that the SPP did not apply at the Laboratory as of July 1, 1996.

The University further argues that use of a University-wide policy as a "yardstick" in adopting or rejecting proposed changes in the Local Policy is not a term or condition of employment that falls within the meet and discuss obligation. Rather, the University contends, the standards or policies used to evaluate proposed changes at the Laboratory fall within an employer's prerogative and changes therein need not be noticed and made the subject of discussions with the Union or employees.

The University next argues that application of the PPSM to the Laboratory would itself constitute an unfair practice. Because some terms and conditions of employment in the PPSM are different than those in force at the Laboratory, wholesale implementation of the PPSM at the Laboratory would have subjected the University to an unfair practice charge.

Lastly, the University takes issue with the evidence presented by the Union in its attempt to show the SPP applied at the Laboratory as of June 30, 1996. After a point-by-point analysis, the University concludes that evidence the SPP was in effect at the Laboratory as of June 30, 1996, is lacking.

As a nonexclusive representative, the Union's right to represent employees under HEERA is limited. The University is required to notify individual employees of proposed changes in employment conditions and, if an employee chooses to have his or her union meet with the employer to discuss the changes, such

meetings must be held upon request. (Regents of the University of California v. Public Employment Relations Board (1985) 168 Cal.App.3d 937, 945 [214 Cal.Rptr. 698] (Regents v. PERB).) The right of a nonexclusive representative to represent employees, to the extent it exists, is derivative; it is the right of an agent or representative of the employee. (Ibid.)

In this case, although the Union (as opposed to aggrieved employees) is named as charging party, there is no real difference between the employees and the Union. The Union is made up exclusively of scientists and engineers at the Laboratory. Kelly, for example, currently is a Laboratory employee who is represented here by the Union; he testified that he was not given notice of the unilateral change that lies at the center of this dispute. Thus, the present case is properly before the Board for adjudication.

In a true bargaining context, an employer's unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate and violative of the duty to bargain under HEERA. (Regents of the University of California (1985) PERB Decision No. 520-H; Pajaro Valley Unified School District (1978) PERB Decision No. 51.)

To prevail on a complaint of unilateral change, the charging party must establish by a preponderance of the evidence that (1) the employer breached or altered a 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 merely an isolated breach of the contract, but amounts to a change of policy (i.e., having a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant); Pajaro Valley Unified School District, supra, PERB Decision No. 51; Davis Unified School District, et al. (1980) PERB Decision No. 116.) Although this burden of proof is ordinarily required of an exclusive representative in establishing a unilateral change, the same reasoning applies to employees being represented by a nonexclusive representative in an unfair practice case involving the theory that an employer has refused to meet and discuss a change in employment conditions.

The threshold question here is whether the University implemented a change that triggered its obligation to provide employees notice and, upon request, meet and discuss the action under attack. As noted earlier, for purposes of ruling on the University's motion to dismiss, it will be assumed without deciding that the SPP applied to employees at the Laboratory as of June 30, 1996, and the Local Policy reflected changes in the SPP.

To prevail under the theory of the complaint, as amended, the Union must show an actual "effect" or "impact" in a

negotiable matter. (Grant.) The Board has observed that a nonexclusive representative must demonstrate "a change was proposed or occurred which affects employees." (Regents of the University of California (1984) PERB Decision No. 470, adopting proposed decision of administrative law judge (ALJ) at 7 PERC Para. 14217, p. 885 (Moffitt Library).) In this context, a unilateral action which does not change a condition of employment is not unlawful. (Id. at 7 PERC Para. 14217 p. 886.) Even in unilateral change cases where an employer has a duty to negotiate, the charging party must demonstrate an actual impact on employment conditions, for the Board will not presume a change in a negotiable topic. (See Imperial Unified School District (1990) PERB Decision No. 825, pp. 9-10; Modesto City Schools (1983) PERB Decision No. 291, p. 13; Alum Rock Union Elementary School District (1983) PERB Decision No. 322, pp. 22-23.)

A comparison of the Local Policy and the SPP indicates that these are parallel policies which in many respects are similar in substance. It is arguable, however, that the SPP may contain an employment condition that also is not covered by the Local Policy; thus, elimination of the SPP at the Laboratory (assuming it applied there prior to July 1, 1996) arguably would constitute an actual unilateral change in such a condition. But, as the University has pointed out repeatedly during the hearing and in its motion to dismiss, the Union has failed to identify a single term or condition of employment in this category.

The Union has cited several cases in support of its claim that the action under attack here is unlawful. While one cannot quarrel with the general proposition in these cases that a unilateral change in a negotiable condition of employment is unlawful, I find none of these persuasive on the question of whether Laboratory employees suffered an actual change in employment conditions.

For example, The Regents of the University of California (1983) PERB Decision No. 359-H, a case involving a non-exclusive representative, dealt with a unilateral change in the maximum duration of employment for certain non-tenured faculty members from eight to four years. In my view, modification of a policy that eliminates the expectation that contracts would be renewed for up to eight years is a concrete change in a fundamental condition of employment. The Union has pointed to no comparable change in this case. More importantly, however, that decision was vacated by letter of the PERB executive director on October 29, 1986. (10 PERC Para. 17178, p. 788.) Thus, the case is without precedential value.

Regents of the University of California (1990) PERB Decision No. 842-H, also was decided in a context where no exclusive representative existed. That case involved a unilateral change in the timing of annual merit pay increases. An actual change in the timing of merit salary increases involves a concrete term of employment that is subject to notice and the meet and discuss

requirements of HEERA. However, the Union has cited no comparable change in this case.

In Ironton Publications, Inc. (1996) 321 NLRB 1048 [153 LRRM 1245], an employer unilaterally implemented changes in an employee handbook which involved modifications in, among other things, the requirement that an absence due to illness be verified by a doctor's certificate, employee break time, dress code, and probationary period. And in NLRB v. Merrill and Ring (9th Cir. 1984) 731 F.2d 605 [116 LRRM 2221], the Ninth Circuit enforced an NLRB order finding that an employer's unilateral change in its personnel policy relating to jury duty was an unfair labor practice. Unlike the alleged change in the instant case, both of these cases involved actual unilateral changes in terms and conditions of employment. Because the Union has cited no comparable change here, I do not find these cases persuasive.⁹

Actual changes aside, the Union argues in its brief that "it is the elimination of the expectation that Laboratory policies will conform to the SPP policies or the PPSM policies, that is the 'unilateral change' here. The fact that there is no explicit policy left against which proposed Laboratory policies can be measured is an effect of this change." (Underlining in original.) This argument is not convincing.

⁹The Union also points to a number of PERB ALJ decisions in support of its unilateral change theory. However, proposed decisions by PERB ALJs carry no precedential value and thus are not controlling here. (PERB Regulation 32215. [PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.])

Meet and discuss rights are designed to afford employees who are not represented by an exclusive representative an opportunity to provide input and participate in discussions when facing actual changes in negotiable working conditions. (Moffitt Library.) The parameters of this right are not defined with precision in case law, and the Board has noted that they are to be determined on a case-by-case basis. (Moffitt Library.) In this particular case, there are key factors that argue against the position advanced by the Union.

This case admittedly involves a unique set of circumstances. However, I am aware of no authority that would attach a meet and discuss obligation to a University decision to eliminate a set of University-wide personnel policies that cover certain Laboratory employees and implement a separate set of University-wide policies for employees outside the Laboratory where, as here, no bargaining obligation exists (either at the local or the systemwide level), no actual change in employment conditions is identified, the comprehensive Local Policy which is parallel to the eliminated policy remains in effect at the Laboratory, and the University stands ready to meet and discuss actual changes in the future. Similarly, in the face of these factors, I know of no requirement that would attach a meet and discuss obligation to such a decision because previously there was an "expectation"

that the Local Policy would be conformed to reflect changes in the SPP.¹⁰

And the fact that the University, in implementing the PPSM, granted expanded rights to employees outside the Laboratory does little to alter this view. The question here is whether Laboratory employees experienced an actual change in working conditions. The University's decision to implement a policy that grants expanded rights to employees beyond the Laboratory has little bearing on this question.

In addition, it is significant that the University's action did not constitute a wholesale withdrawal of personnel policies which wiped the slate clean and left Laboratory employees in the dark about which policies would define their employment conditions. What remained after July 1, 1996, was a comprehensive set of personnel policies in what I have referred to as the Local Policy. The Local Policy has covered Laboratory employees since 1979, and the specific policies therein are in many respects parallel to those in the SPP. Moreover, the opportunity to meet and discuss actual changes in conditions of employment in the future is not lost. Any changes in actual working conditions the Laboratory seeks to implement in the future remain subject to the meet and discuss requirements set by Regents v. PERB.

¹⁰The Union's contention that the Local Policy was conformed to reflect changes in the SPP under an established practice is under cut by a comparison of the two policies. While these parallel policies are in many respects similar, they are not identical.

The essence of the Union's position is that, in opposing a change in policy, employees have been deprived of the argument that a local policy deviates from the SPP or the PPSM. For example, if either the SPP or the PPSM applied at the Laboratory and this argument were available, the Union has argued, the flexible term employee classification change would not have occurred. However, there were no guarantees with respect to the outcome of proposed changes in policy prior to July 1, 1996, and the same situation continues. Policy decisions at the Laboratory must still be approved by the Office of the President and employees may still oppose any actual change in local personnel policies on the basis of its relationship to University-wide policy. The conclusion that a particular proposed change will be defeated if the Union is able to argue that it deviates from University-wide policy is of necessity based largely on speculation.

Under these circumstances, I must conclude that there has been no change that triggers the meet and discuss obligation. Future changes in actual employment conditions at the Laboratory remain subject to that obligation.

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record herein, the complaint in Unfair Practice Case No. SF-CE-461-H, Society of Professional Scientists and Engineers v. Regents of the University of California, is hereby dismissed.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing" (See Cal. Code Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305 and 32140.)

FRED D'ORAZIO
Administrative Law Judge