

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



BHANU BAWAL,)	
)	
Charging Party,	)	Case No. LA-CE-476-H
)	
v.)	PERB Decision No. 1354-H
)	
REGENTS OF THE UNIVERSITY OF)	September 30, 1999
CALIFORNIA,)	
)	
Respondent.)	
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HENRY HAO, SALLY JO MICHAEL,)	
LOURDES INCHAUSPI, ALLEN FUKUCHI,)	
et al.,)	
)	
Charging Parties,)	Case Nos. LA-CE-478-H,
	)	LA-CE-479-H, LA-CE-480-H
v.	)	and LA-CE-481-H
)	
REGENTS OF THE UNIVERSITY OF)	
CALIFORNIA,)	
)	
Respondent.)	

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by James Rutkowski, Attorney, for Bhanu Bawal, Henry Hao, Sally Jo Michael, Lourdes Inchauspi, Allen Fukuchi, et al.; Atkinson, Andelson, Loya, Ruud & Romo by James C. Romo, Attorney, for Regents of the University of California.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

AMADOR, Member: These consolidated cases come before the Public Employment Relations Board (Board) on exceptions filed by Bhanu Bawal, et al. (Bawal, et al.) and the Regents of the University of California (University) to an administrative law judge's (ALJ) proposed decision (attached). The ALJ found that the University violated section 3571(a) of the Higher Education

Employer-Employee Relations Act (HEERA)¹ when it failed to meet and discuss a layoff and rehire program in good faith with University Professional and Technical Employees.

The Board has reviewed the entire record in this case including the original and amended unfair practice charge, the complaint, the proposed decision and the filings of the parties. The Board affirms the ALJ's decision in accordance with the following discussion.

DISCUSSION

All parties filed exceptions to the proposed decision. The University challenges the ALJ's factual and legal conclusions and the remedy, while Bawal, et al. argues that the remedy is insufficient.

The Board finds the ALJ's findings of fact to be free of prejudicial error and hereby adopts them as the findings of the Board itself.

¹**HEERA** is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3571 provides, in pertinent part, that:

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

The University offers exceptions to the ALJ's finding of a violation concerning the alleged refusal to provide information. This Board finds this conclusion of law to be free of prejudicial error and hereby adopts it as the decision of the Board itself.

The Board finds the ALJ's conclusions of law regarding the retaliation allegations to be free of prejudicial error and hereby adopts them as the decision of the Board itself.

The Board finds the ALJ's conclusions of law regarding the meet and discuss allegations to be free of prejudicial error and hereby adopts them as the decision of the Board itself.

We wish to emphasize that the University has no duty to meet and discuss its decision to reorganize the Department, including the decision to effectuate the reorganization via layoff, with the nonexclusive representative. However, the University does have an obligation to meet and discuss effects of this decision on terms and conditions of employment with the nonexclusive representative. (See proposed dec , pp. 45-46.)

It has been determined that the University failed to meet this obligation. Considering the gravity of this conduct and the impact on numerous employees, we find that the relief ordered by the ALJ is appropriate to effectuate the purposes of HEERA.

ORDER

Upon the findings of fact and conclusions of law, and the entire record in this case, the Board finds that the Regents of

the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a), by interfering with the right of employees to be represented on matters within the scope of representation, by failing to provide reasonable time and opportunity for meeting and discussing a layoff and rehire program.

Pursuant to HEERA section 3563.3, it is hereby ORDERED that the University, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with the rights of employees to be represented on matters within the scope of representation.

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

1. Make "whole" any charging parties adversely affected by the layoff and rehire process by paying them backpay as if the layoff and rehire process had occurred 30 days later than it did. This backpay shall include interest at the rate of 7 percent per annum.

2. Within thirty-five (35) days following the date this Decision is no longer subject to appeal, post at all work locations where notices to employees are customarily placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not

reduced in size, altered, defaced or covered by any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

Member Dyer joined in this Decision.

Chairman Caffrey's concurrence and dissent begins on page 6.

CAFFREY, Chairman, concurring and dissenting: I concur in the finding by the majority and the administrative law judge (ALJ) that Bhanu Bawal, et al. have not demonstrated by a preponderance of the evidence that the Regents of the University of California (University) unlawfully discriminated against them in violation of the Higher Education Employer-Employee Relations Act (HEERA) by laying them off or by failing to rehire them. I also concur in the finding that the University did not unlawfully retaliate against Bhanu Bawal.

I dissent from the finding that the University interfered with the right of employees to be represented on matters within the scope of representation in violation of HEERA section 3571(a) by failing to provide reasonable time and opportunity for meeting and discussing the effects of the University's decision to lay off employees. Therefore, I would dismiss the unfair practice charges and complaints in their entirety.

DISCUSSION

A crucial element in the disposition of this case is the fact that it involves a nonexclusive representative. Employees have the right to be represented by a nonexclusive representative, but the employer's duty to meet and discuss with a nonexclusive representative is far different from its duty to negotiate with an exclusive representative. The duty to meet and discuss does not include the duty to negotiate, and does not require discussions to continue until agreement or impasse has been reached. In some circumstances, providing the opportunity

to present alternatives and supporting rationale satisfies the employer's meet and discuss obligation to a nonexclusive representative. Whether an employer has breached its meet and discuss obligation is determined on a case-by-case basis.

(Regents of the University of California (1984) PERB Decision No. 470-H; Regents of the University of California v. PERB (1985) 168 Cal.App.3d 937 [214 Cal.Rptr. 698]; Regents of the University of California (1990) PERB Decision No. 829-H.) In short, the duty to meet and discuss with a nonexclusive representative represents a substantially lower obligation than the duty to meet and confer with an exclusive representative.

It is also important to note that this case involves the obligation to meet and discuss the effects of a management decision which is outside of the scope of representation, the decision to lay off employees. (Newman-Crows Landing Unified School District (1982) PERB Decision No. 223; State of California (Department of Forestry and Fire Protection) (1993) PERB Decision No. 999-S.) The Board has held that, in an exclusive representation environment, the employer may implement its layoff decision prior to completing effects bargaining. (Compton Community College District (1989) PERB Decision No. 720.) Also, an exclusive representative's bargaining proposals relating to the effects of layoff must not interfere with management's prerogative to determine the timing of layoffs. (San Mateo City School District (1984) PERB Decision No. 383.) It is logical to conclude, therefore, that in a nonexclusive representative

environment the employer is under no obligation to complete the meet and discuss process concerning the effects of layoff prior to implementing the layoffs, or to entertain effects discussions which interfere with the timing of the layoffs.

In this case, the University announced its decision to lay off employees on December 19, 1996. The University sent layoff notices to some employees on January 7, 1997, and to others on January 17, 1997, and January 31, 1997. All employees were given 60 days notice as part of the layoff announcement. During the period between the announcement of the layoff decision and the effective date of the first layoffs, a period of more than 75 days, the University met and discussed with the University Professional and Technical Employees (UPTe), the nonexclusive representative, on at least four occasions - January 2, January 16, January 28 and March 7, 1997.

Based on these facts, the majority and the ALJ conclude that, while the University engaged in the meet and discuss process in good faith, it "failed to provide reasonable time for meeting and discussing" before implementing layoffs. In my view, this result misconstrues the employer's obligation to meet and discuss with a nonexclusive representative, and ignores the employer's right to implement layoffs while discussing their effects. The University fulfilled its HEERA obligation by engaging in multiple, good faith meet and discuss sessions with UPTe over a period of more than two months before the

implementation of layoffs. Consequently, I would dismiss the allegation that it failed to do so.

I must also comment on the unprecedented backpay remedy ordered by the majority in this case. I know of no case in which an employer has been ordered to pay backpay to employees for failure to meet and discuss with a nonexclusive representative. There are no cases in which such a remedy has been ordered when the conduct involved failure to meet and discuss with a nonexclusive representative the effects of a management decision to lay off employees, a subject outside the scope of representation.

Regents of the University of California (Davis, Los Angeles, Santa Barbara and San Diego) (1990) PERB Decision No. 842-H, a case cited by the ALJ here, is particularly instructive on the subject of the appropriate remedy in a nonexclusive representative environment. In that case, the Board found that the employer unlawfully altered the timing of a merit salary program without providing the nonexclusive representative with adequate notice or the opportunity to meet and discuss over the change. Even though the case involved a change in employee wages, obviously a subject within the scope of representation, the Board found that ordering backpay in a nonexclusive representative environment was speculative and inappropriate, stating:

The fact that the University's "meet and discuss" obligation to the nonexclusive representative includes neither a requirement that the parties reach agreement nor continue

to meet until impasse, renders the outcome of any such meeting even more speculative. While the ordinary remedy in unilateral change cases is restoration of the status quo ante, including back pay and interest, this Board has denied back pay where the entitlement thereto is speculative.

Certainly, this rationale has even greater application to the instant nonexclusive representative case in which the employer's obligation was to meet and discuss the effects of a decision which was outside the scope of representation, and which lawfully could be implemented prior to the completion of discussions. Under these circumstances, the majority's backpay order is not only speculative and unprecedented, it is a clearly inappropriate use of the Board's remedial authority.



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

After a hearing in Unfair Practice Case Nos. LA-CE-476-H, LA-CE-478-H, LA-CE-479-H, LA-CE-480-H and LA-CE-481-H, Bhanu Bawal et al. v. Regents of The University of California, in which all parties had the right to participate, it has been found that the Regents of the University of California violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a), when it interfered with the right of employees to be represented on matters within the scope of representation and by failing to provide reasonable time and opportunity for meeting and discussing a layoff and rehire program.

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

A. CEASE AND DESIST FROM:

1. Interfering with the rights of employees to be represented on matters within the scope of representation.

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

1. Make "whole" any charging parties adversely affected by the layoff and rehire process by paying them backpay as if the layoff and rehire process had occurred 30 days later than it did. This backpay shall include interest at the rate of 7 percent per annum.

Dated: _____ Regents of the University of California

By: _____
Authorized Agent

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



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

BHANU BAWAL,)	
	)	Unfair Practice
Charging Party,)	Case No. LA-CE-476-H
)	
v.)	
)	
REGENTS OF THE UNIVERSITY OF CALIFORNIA,)	
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Respondent.)	
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HENRY HAO, SALLY JO MICHAEL, LOURDES INCHAUSPI, ALAN FUKUCHI, et al.,)	Unfair Practice
	)	Case Nos. LA-CE-478-H
	)	LA-CE-479-H
	)	LA-CE-480-H
Charging Parties,	)	LA-CE-481-H
)	
v.)	
	)	PROPOSED DECISION
REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)	(8/14/98)
)	
Respondent.)	

Appearances: University Professional and Technical Employees by Cliff Fried, Vice President, and Van Bourg, Weinberg, Roger & Rosenfeld by James Rutkowski, Attorney, for Bhanu Bawal, Henry Hao, Sally Jo Michael, Lourdes Inchauspi, Alan Fukuchi, et al.; Atkinson, Andelson, Loya, Ruud & Romo by James C. Romo, Tina L. Kannarr and Aaron V. O'Donnell, Attorneys, for Regents of the University of California.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In these consolidated cases, higher education employees allege their employer failed to meet and discuss in good faith and also retaliated against them for protected activity.

Bhanu Bawal (Bawal) filed an unfair practice charge against the Regents of the University of California (University) on January 30, 1997. The Office of the General Counsel of the

Public Employment Relations Board (PERB) issued a complaint on April 18, 1997, alleging the University retaliated against Bawal by issuing her a disciplinary reduction in salary. The University filed an answer on May 27, 1997, denying any retaliation. On May 28 and July 10, 1997, PERB held informal settlement conferences with the parties, but the matter was not resolved.

On February 10, 1997, the other charging parties filed unfair practice charges against the University. PERB issued a complaint based on these charges on March 14, 1997. The complaint alleged the University failed to meet and discuss in good faith in connection with a departmental restructuring by (among other things) failing to provide adequate notice, failing to provide a reasonable amount of time for discussion, and failing to provide relevant and necessary information. The complaint also alleged the University retaliated against charging parties both collectively, by laying all of them off, and individually, by failing to rehire some of them. The University filed an answer on April 7, 1997, and an amended answer on May 8, 1997, denying any retaliation and any failure to meet and discuss in good faith.

PERB held an informal settlement conference on March 19, 1997, but the matter was not resolved. PERB held a formal hearing on May 21-23, August 4-6, September 2-4 and 9-10, and October 6-7, 14-15 and 20, 1997; the first three days of hearing were conducted by Administrative Law Judge W. Jean Thomas,

shortly before her untimely death from a heart attack. On September 9, 1997, Bawal's individual case was consolidated by stipulation with the other cases. With the filing of post-hearing briefs on March 2, 1998, the consolidated cases were submitted for decision.

FINDINGS OF FACT

Introduction

The University is a higher education employer under the Higher Education Employer-Employee Relations Act (HEERA).¹ Charging parties are higher education employees under HEERA.

Charging parties were employed in the Department of Pathology and Laboratory Medicine (Department) of the University's UCLA Medical Enterprise. They were part of the University's health care professionals bargaining unit, known as the HX unit. Until September 1997, the HX unit had no certified organization exclusively representing the employees, but charging parties were members of the University Professional and Technical Employees (UPTe) and had designated UPTe as their representative.

The Department is organized into various administrative units. Before 1997, the employees in each of these units were organized in the following hierarchy, from top to bottom: managers, senior supervisors, supervisors, senior specialists, specialists, clinical laboratory technologists (CLTs), and

¹HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

hospital laboratory technicians (HLTs). Only senior specialists, specialists and CLTs were in the HX bargaining unit.

Charging party Henry Hao (Hao) was a specialist who had worked for the Department for twenty years. In July 1996 he received a performance appraisal indicating his performance "Exceeds Expectations." His supervisor noted he was "an exceptionally dedicated, flexible, and reliable employee."

On December 19, 1996, the week before Christmas, the University issued Hao and all other clinical laboratory employees a memo on the subject "Department of Pathology and Laboratory Medicine Restructuring." The memo stated in part:

As you are all aware, the Department of Pathology and Laboratory Medicine has been undergoing a major restructuring to streamline operations in an effort to improve financial viability while maintaining clinical excellence and quality service. In the preliminary phase of this reorganization, we defined new administrative units and engaged in a selection process for unit Managers.....

We are now ready to proceed with the next phase of our transformation to the new model of service delivery. I have been working for the last three months with the unit Managers to design a supervisory framework for each unit, with an emphasis on our organization's core competencies as well as the technical and service requirements for each of the units. We have developed this supervisory framework; new job descriptions and unit-specific requirements and selection criteria are currently being finalized.

This letter is to further clarify the direction we intend to take over the next few months as we complete the next phases in the implementation of our new organizational structure.

As with the management selection process, and in light of the dismantling of the former department organization, existing Senior Supervisor, Supervisor, Senior Specialists and Specialist positions would be eliminated and each of the individuals in the affected titles would receive a layoff letter. This is expected to occur in the first week of January, with an estimated effective date of 60 days. At the same time, newly defined positions in the categories of Senior Supervisor and Senior Specialist would be opened for recruitment.

Each of the employees who receive layoff letters will be eligible to exercise preferential rehire rights for the vacant positions (subject to the provisions for preferential rehire), before any outside recruiting occurs. . . . First consideration is for those candidates who are eligible and express preference for the vacant positions, subject to the candidates meeting the minimum qualifications for those positions. Following this selection, any remaining vacancies would be posted for open recruitment. I am hopeful that we can complete the selection process and fill the available positions by the end of January.

Following this phase of the process, we intend to use the same approach for the Clinical Laboratory Technologist (CLT) positions, beginning in early February. Thus, each of the individuals in the affected title would receive a layoff letter. Candidates with preferential rehire rights, would, of course, be considered prior to posting and open recruitment. Other clinical support positions will be considered, and additional information provided to you regarding these positions, at a later time.

Although the restructuring effort was public knowledge, the December 19 memo was the first time Hao and the other employees were notified they would all be laid off and would need to apply for any continued employment.

Nineteen days later, on January 7, 1997, the University issued Hao a layoff letter, stating in part:

I regret to inform you that effective March 9, 1997, you will be indefinitely laid off from your position as a Clinical Laboratory Technologist Specialist in the Department of Pathology and Laboratory Medicine. The layoff is due to reorganization of the Department necessitated by expense reduction requirements and the many and rapid changes occurring in the healthcare market.

On the same day, the University issued similar letters to all other specialists, senior specialists, supervisors and senior supervisors. Twenty-four days later, on January 31, 1997, the University issued similar letters to all CLTs.

On January 17, 1997, the University posted the senior specialist and senior supervisor positions for which employees facing layoff could apply. Hao apparently did not apply for these positions, which were higher than his specialist position. On February 7, 1997, the University posted the CLT positions. Hao did apply for CLT positions in three different administrative units, but he was not selected for any of them. In one case he was told "he met the minimum qualifications for a few of the open positions" but "other more qualified preference applicants" were selected. In another case he was similarly told a candidate with "more applicable qualifications and skills" had been selected. In the third case he was simply told he was not selected.

Having failed to obtain a CLT position, Hao applied for and obtained an HLT position. His pay dropped over 30 percent, from \$28.31 hourly to \$18.33 hourly; the personnel system document

described it as "due to Demotion." Other employees, including other longtime employees, also suffered adverse consequences. As of April 3, 1997, some 43 of the 220 Department employees in the HX unit were reduced to HLTs, were reduced from career positions to casual (limited-term) positions, were laid off entirely, or chose retirement over layoff (in some cases, in order to preserve medical benefits).

Origins of Restructuring

The restructuring that resulted in adverse consequences for Hao and other employees apparently began with a report the Department commissioned in 1995. The report noted, "Both the department leadership and the hospital administration agree on the need to consolidate laboratory operations and reduce personnel expenses." The report criticized the organization of the laboratories as resulting in "duplication of some functions" and as including "an excessive number of senior supervisors and managers."

The author of the report drafted a possible new organizational chart for the Department. He also drafted a proposed timeline for implementing a restructuring of the Department, with an effective date of July 1, 1996. The timeline apparently anticipated some layoffs of specialists, supervisors, senior supervisors and "administrators" but not of CLTs.

On January 16, 1996, Judith Stanton (Stanton) became the new chief administrative officer (CAO) of the Department and undertook to carry out the restructuring. In February 1996, she

drafted her own restructuring proposal and a timeline for its implementation, still with an effective date of July 1, 1996. Neither the proposal nor the timeline mentioned layoffs.

When she became CAO, Stanton also became aware of cost reduction targets that had been established for the UCLA Medical Enterprise. As part of \$25.3 million in total reductions, the Department was asked to reduce its costs by at least \$4 million. The cost reductions were apparently dictated not by a financial crisis but rather by a perceived need to remain competitive in the healthcare market.

On March 12, 1996, a restructuring committee was appointed, and by May 9, 1996, the committee had produced a new organization chart for the Department. In general, the Department was to go from a structure with administrative units based on scientific disciplines, such as chemistry and hematology, to one with units based on service level, instrumentation and methodology, such as High Volume Testing and Special Testing. Thus, for example, high volume chemistry and high volume hematology would become part of a High Volume Testing unit, along with the anesthesiology laboratory, which had been a separate unit. Meanwhile, special chemistry and special hematology would become part of a Special Testing unit, along with cytogenetics and amniocentesis, which had been in a separate unit. Histocompatibility, which had been part of the Hematology unit, would become part of a Transfusion Medicine unit, along with the previously separate Blood Bank unit. Other aspects of chemistry and hematology would become

part of a Brentwood unit, along with most of the old Microbiology unit. The new organization chart was made public throughout the Department around May 9, 1996.

Origins of UPTE's Involvement

Although not then certified as their exclusive representative, UPTE had been representing some of the HX employees in the Department since 1994. UPTE had represented employees in meeting and discussing various issues and had assisted employees in filing unfair practice charges, which UPTE later helped to settle. CLT Lourdes Inchauspi (Inchauspi) was widely recognized in the Department as an UPTE steward.

UCLA Medical Enterprise labor relations manager Maure Gardner (Gardner) had a practice of giving UPTE as well as employees notice of decisions affecting the employees. Notice to UPTE was normally simultaneous with or just after notice to the employees. Typically Gardner gave 30 days notice prior to implementing a change.

In April 1996, UPTE began planning a campaign to become the exclusive representative for the HX unit. It kicked off the campaign in late June or early July with a mailing to all HX employees with the theme, "We can save jobs & save the quality of health care." UPTE Vice President Cliff Fried (Fried) routinely gave Gardner copies of this and other campaign literature. The mailing was also distributed and posted in the Department. Supervisors and managers were aware of the campaign; in October 1996 one manager drafted and posted a "Supervisory Update"

explaining the election process. An UPTE letter dated October 18, 1996, which was both mailed and posted, listed the names of five CLTs, including Inchauspi, as "your friends in UPTE." An UPTE letter dated November 4, 1996, which was also both mailed and posted, listed the same five names, along with those of three other CLTs in the Department.

In October or November of 1996, Fried told Gardner UPTE was probably going to file cards calling for an election in January or February, 1997. UPTE ultimately filed the cards on February 10, 1997, leading to an election in August 1997. When the ballots were counted in September 1997 (during the hearing in this matter), UPTE won the right to be the exclusive representative for the HX unit.

Back in May 1996, UPTE became aware that a new organization chart for the Department had been posted. In a letter to Gardner dated May 10, 1996, Fried requested that the University meet and discuss the reorganization plans. Fried requested various information about the changes, including their impact on seniority.

Meeting and Discussing in 1996

Fried testified there had been vague discussions about a possible reorganization as early as 1995. He further testified the subject came up at a meeting in February 1996, at which Gardner said that if there were layoffs they would be by seniority and would "follow the book," that is, the University's Personnel Policies for Staff Members (PPSM).

Policy 60 of the PPSM addressed the subject of layoff and reduction in time for professional and support staff career positions. It stated in part:

E. INDEFINITE LAYOFF AND INDEFINITE REDUCTION IN TIME

Indefinite layoff and indefinite reduction in time are effected by department and by class, in inverse order of seniority, except that an employee can be retained irrespective of seniority if that employee possesses special skills, knowledge, or abilities that are not possessed by other employees in the same class, and which are necessary to maintain the operations of the department.

Seniority shall be calculated by full-time-equivalent months (or hours) of University service in any job classification or title. Employment prior to a break in service shall not be counted. When employees have the same number of full-time-equivalent months (or hours), the employee with the most recent date of appointment shall be laid off first.

An employee will receive at least 30 calendar days' advance written notice prior to indefinite layoff or reduction in time, or shall receive pay in lieu of notice.

F. REEMPLOYMENT FROM INDEFINITE LAYOFF

1. Right to Recall. . . .
2. Preference for Reemployment. A regular status employee who has been separated or given written notice of indefinite layoff or reduction in time shall have preference for any active and vacant career position for two months prior to the layoff date when the position is at the same campus, the same salary level or lower, and at the same or lesser percentage of time, provided the employee is qualified for the position. When written notice of indefinite layoff or reduction in time is given more than two months prior to the layoff date, the Chancellor may authorize that preference for

reemployment begin with the date of layoff notice.

A regular status employee with preference for reemployment or transfer may be rejected only if the employee lacks qualifications required of the position. Reasons for non-selection shall be provided as required in local procedures.

There is no evidence Policy 60 had previously been interpreted as authorizing the University to lay off all the employees in a department and make them all reapply for employment, without regard for their seniority.

In May and July of 1996, UPTE participated in meet and discuss sessions focusing on issues in the Toxicology section of the Department's Chemistry unit. Gardner did not attend these sessions, but Fried testified there was some discussion in May about reorganization of the management level of the Department.

The first meet and discuss session actually focusing on reorganization was held on August 19, 1996, with Fried and Inchauspi representing employees and Gardner and Stanton representing the University. The University shared some budget information, and Stanton reported on the selection of managers for the restructured units. The existing managers, who were not covered by the PPSM, had been invited to apply for the newly-defined management positions. There would be two fewer positions, which ultimately meant two managers would receive notices of intent to terminate their appointments.

With regard to layoffs in the HX unit, Fried testified Gardner again said any layoffs would be by seniority and "by the

book" (the PPSM). Inchauspi similarly remembered such a statement by Gardner, although she was unsure of when in 1996 Gardner made it. Gardner acknowledged she said "we'd have to review seniority" in connection with possible layoffs, and her notes confirm she mentioned "review of seniority" in that context.

Stanton explained that although the Department was not running a deficit it still had \$2 million to go in reaching its cost-reduction target. When asked if specialist positions would be eliminated, Stanton said the University had not made plans to eliminate any level of the career ladder.

On September 9, 1996, the chosen managers assumed their newly-defined positions, and they were asked to make recommendations for the staffing of the newly-defined units. On October 7, 1996, manager Lynne Garcia (Garcia) sent Stanton a memo based on "discussions at the meeting on Friday." Attached to the memo was a document headed "Personnel Issues Related to Changes in Job Descriptions, Reduction in Unit Personnel and Possible Reclassifications (Department Reorganization)." The document stated in full:

1. Some unit changes within the laboratory will be more comprehensive than others:
 - A. Example (extensive changes): Numbers of employees, job classifications, job descriptions will change
 - B. Example (minor changes): Minor revisions in job descriptions, job classifications; no change in personnel numbers

2. Confirmation of personnel in new slots will need to begin with Senior Supervisors, Supervisors and Senior Specialists
 - A. It would seem appropriate that if people are left without a slot, they should be allowed to apply for CLT positions (at approximately the same time or very shortly after decisions are made regarding supervisor and specialist positions).
 - B. However, the issue is: would all CLTs have to reapply (looking for the best people for the jobs).
 - C. These jobs (supervisors) need to be filled first, so the individuals can help select all other job classifications.

3. PROS to having all job classifications reapply for positions:
 - A. Would allow everyone an equal chance at finding a position, particularly if they apply for one of the Senior Supervisor, Supervisor, or Senior Specialist jobs and are not selected.
 - B. Would confirm the "new way of operating" and emphasize performance expectations within this changing environment.
 - C. Might solidify the "new teams" and emphasize teamwork and flexibility
 - D. Would force review and revision of all job descriptions (including performance expectations, cooperation, etc.)
 - E. Would require one job classification set of interviews to immediately follow the completed one before - no real chance for a break in time.
 - F. Would be perceived as fair (if handled well)
 - G. Will emphasize from here on - won't be business as usual. Everyone will be responsible for their performance - hopefully would also help eliminate inequities within performance evaluation system.
 - H. Would not have to use layoffs (with possibly of "bumping" other employees) - morale would be much worse in this situation and good employees (may not have seniority) would lose their jobs.

4. CONS to have all job classifications reapply for positions:
 - A. Interview time would be extensive
 - B. Would require review and revision of some job descriptions (might have to occur anyway)
 - C. Might delay completion of unit personnel selection
 - D. Would be perceived as unfair (if handled poorly)
 - E. Would add to the stress
 - F. Might or might not accomplish things mentioned as PROS (above)
 - G. Would require development of a comprehensive plan, definition of timeliness, and preparation of reapplication and hiring guidelines

If we really want to ensure the best possible staff, there seems to be no other option but to have all job classifications reapply for their positions. This provides an excellent opportunity to redraft or revise job descriptions, as well as provide an opportunity for everyone to apply for any open position. Rewriting of job descriptions may have to be done anyway before we undertake the next cycle of performance evaluations, to address inequities, etc.

Garcia testified discussions of these "pros and cons" continued among Stanton and the managers, "certainly in conjunction with Human Resources," which was Gardner's office. Neither UPTe nor the HX employees were apprised of these discussions.

The October 7 cover memo also stated Garcia would draft a separate memo to Gardner that week "regarding the group's discussions per the Senior Specialist and Specialist series." That memo to Gardner is not in evidence, but it appears the managers were recommending or assuming the specialist positions would be eliminated. Neither UPTe nor the HX employees were apprised of this recommendation or assumption.

On October 17, 1996, Gardner (without Stanton) met again with Fried and Inchauspi. Some managers had apparently told some employees that all CLTs would have to reapply for their jobs. When asked if that was true, Gardner's answer was "we haven't really made those decisions yet."

On November 15, 1996, the three met again, with CLT Sally Jo Michael (Michael) also present. Michael asked if layoffs would involve bumping; Gardner said they would not. UPTE requested another meeting with Stanton in January, after the holidays.

Meanwhile, the managers had made recommendations regarding the supervisory structure of the newly-defined units. On December 9, 1996, a proposal for a new supervisory structure was posted in the Department. Overall, the proposal called for an increase in the number of senior supervisors from 7 to 11, a decrease in the number of supervisors from 8.5 to 1, an increase in the number of senior specialists from 12 to 15, and a decrease in the number of specialists from 13 to 0. The posted proposal came to Fried's attention, who informed Gardner that UPTE wanted to discuss its impact.

In mid-December 1996, there was a series of meetings involving Department and University management. Among those involved were Stanton, Gardner, some of the unit managers, Associate Director for Ambulatory Care Frances Ridlehoover (Ridlehoover) and Associate Director for Human Resources Mark Speare (Speare). Ridlehoover ultimately made the decision, with Stanton's agreement, to issue layoff notices to all the

employees. Ridlehoover did not testify, but Stanton explained that the old administrative units, which were also layoff units, "did not divide nicely or did not transfer in toto to the new units," with the result that layoff by inverse order of seniority within the old units "couldn't establish a reasonable starting point . . . that would allow us to get to the new units." She acknowledged, however, that some individual jobs changed only minimally.

Gardner also testified about the discussions that ultimately led to the layoff decision. Like Stanton, she testified that if the Department eliminated the least senior people in the old layoff units it "didn't necessarily have people who were qualified in the new structure to perform the tasks." Having employees apply only for newly-created "hybrid" positions might not work either, because employees who might qualify might not apply. Gardner also testified about discussions of using "special skills exemption letters" (as authorized by PPSM Policy 60), but she "imagined having to write 143 of those letters and we said, well, that's not going to work." Gardner testified there was awareness that failure to use seniority might cause some senior employees to lose their jobs, but there was also awareness that most employees in the Department were longtime employees.

The layoff decision was made on December 17, 1996. The next day, Gardner drafted what became the December 19 memo to the employees. Gardner testified management decided to issue the

memo before the holidays because "people tend to spend money [and] make plans" around that time, and because postponing the notice would "prolong the agony."

The morning of December 19, 1996, before the memo was finalized, Fried met briefly with Gardner. Fried was leaving on vacation that day or the next, and he so informed Gardner. Fried asked what was happening; he remembers Gardner saying there would be some decisions soon, but Gardner remembers telling Fried there would be a "letter" sometime that day. Gardner did not reveal to Fried the contents of the memo; she testified she "didn't think it was appropriate or necessary" to do so until the memo was issued to the employees. Gardner ultimately faxed the memo to Fried's office four days later, on December 23, 1996.

During their brief December 19 meeting, Fried and Gardner talked about meeting again on or after January 10, 1997, after Fried returned from vacation. They also talked at least tentatively about Gardner meeting with Inchauspi on December 27, 1996, the only day during the two-week holiday period Gardner would be available. Because of a failure of communication, that meeting did not occur but was rescheduled for January 2, 1997.

Meeting and Discussing in 1997

On January 2, 1997, Gardner met with Inchauspi, Michael and (in Fried's absence) UPTE organizer Howard Ryan (Ryan), who asked for a delay in the layoff and rehire process while meeting and discussing took place, and for more information. (UPTE's requests for information will be addressed separately in these

findings of fact.) Gardner took the position there would be plenty of time for meeting and discussing before the layoffs actually took effect in March. Ryan suggested any layoffs be based on inverse order of seniority, and Gardner explained problems she saw with that approach given the restructuring of the Department.

On January 16, 1997, Gardner and Stanton met with Fried, Inchauspi and CLT Bhanu Bawal (Bawal). This was nine days after the first layoff letters (to specialists, senior specialists, supervisors, and senior supervisors) were issued and just one day before the newly-defined senior specialist and senior supervisor positions were posted. UPTE again asked for a delay and for more information. There was talk about some alternative approaches, but according to Fried UPTE could not make a proposal without more information. Fried and Inchauspi remember Gardner saying many of the jobs had changed 20 percent, which was the University's standard for reclassification. Gardner remembers saying she "didn't think the CLT job descriptions could meet the 20 percent test" but the senior specialist and senior supervisor job descriptions did. (Gardner thought she said this at the January 2 meeting, but it is her notes for the January 16 meeting that first mention the 20 percent standard.)

Meanwhile, the managers continued to work on the supervisory structure of the newly-defined units. On January 17, 1997, they produced a new proposal calling for 14 senior supervisors, no supervisors, 14 senior specialists, and no specialists.

On January 28, 1997, Gardner and Stanton met with Fried, Inchauspi, Michael, and three other employees. This was just three days before the layoff letters to CLTs were issued and ten days before the newly-defined CLT positions were posted. UPTE again asked for a delay and for more information. UPTE raised a number of questions about retirement, which were ultimately addressed by a letter to Fried on February 11, 1997, which was later supplemented on March 3, 1997. There was also talk on January 28 about the rehire selection process and criteria, about the impact on part-time employees, about whether jobs were really changing (with reference again to the 20 percent standard), about the risk of retaliation against employees who filed grievances, and about the Department's financial situation. With regard to the risk of retaliation in the rehire process, Gardner promised to discuss the matter with the managers, and did so.

Meanwhile, the layoff and rehire process moved forward. The managers finalized a generic job description for all CLTs, with addenda for particular CLT jobs in particular units. Because the job descriptions indicated a somewhat higher level of potential responsibility for CLTs, the University ultimately approved an expanded CLT salary range, raising the top of that range to what had been the top of the specialist range. The managers selected senior supervisors and senior specialists for their units and began interviewing CLT candidates.

On March 7, 1997, before the process was completed, Gardner and Stanton met once again with Fried, Inchauspi and Bawal. By

this time the charging parties had filed their unfair practice charges and were seeking injunctive relief from PERB (ultimately without success). UPTE asked once again for a delay and for more information. Fried asked for an extension of time for employees to file grievances, in order to avoid the risk of retaliation; Gardner denied the request, but she said supervisors and managers would not be told who filed grievances. There was also talk about training; Fried and Bawal remember Gardner saying rehired CLTs would be expected to do their jobs with a minimum of further training.

Gardner testified she and Stanton consulted with Associate Directors Ridlehoover and Speare about the meet and discuss sessions, and the four of them decided not to delay the layoff and rehire process, as UPTE asked. Fried testified Gardner and Stanton "kept repeating . . . that they would listen to us and hear what we had to say," but "they heard what we had to say and nothing changed."

Requests for Information

UPTE made numerous and repeated oral and written requests for information. These findings of fact shall focus on the ten requests alleged in the PERB complaint.

1. Current (old) job descriptions for senior supervisors, supervisors and senior specialists. Fried first requested these in a letter to Gardner dated December 11, 1996. Gardner provided these to Fried over two months later, during the week of February 18, 1997.

2. Current (old) job descriptions for CLTs. Fried first requested these in a letter to Gardner dated January 13, 1997. Gardner provided these over five weeks later, during the week of February 18, 1997.

3. Number of employees who would lose their jobs, including the number of full-time equivalent (FTE) jobs lost. Fried first requested the number of employees who "could possibly" lose their jobs in his letter of December 11, 1996, and he requested the "projected" loss of FTE jobs in his letter of January 13, 1997. Gardner provided the information in a letter to Fried dated March 12, 1997, when the numbers were finalized. Gardner acknowledged some of the information was available over a month earlier, on February 7, 1997, when the CLT positions were posted. In a letter to Fried dated February 13, 1997, she said "approximately 110 CLT vacancies were posted." Later, in the March 12 letter, she indicated 131.6 career CLT positions would be filled.

The University points out that on December 9, 1996, the proposal for a new supervisory structure had been posted. That proposal had included, among other things, a specific reduction in the number of specialists, but it had not indicated whether jobs would be lost or merely reclassified. The proposal had not addressed the number of CLT jobs at all.

4. Names and job titles of all employees. Fried requested this information in a letter to Gardner dated January 22, 1997. Gardner provided the information in a letter to Fried dated

February 7, 1997. She had previously provided the information on a diskette on January 9, 1997.

5. Number of supervisory staff. Fried requested this information in his letter of January 22, 1997, and Gardner effectively provided it in her letter of February 7, 1997, which listed the supervisory staff along with the rest of the staff. The supervisory structure proposal posted on December 9, 1996, had also included the number of supervisory staff.

6. Administrative directives regarding restructuring. In his letter of January 13, 1997, Fried requested "[a]ny and all directive[s] regarding the restructuring from the Director of the Medical Center." Gardner testified she knew of no such directives; she did not respond to the request.

7. Proposed application procedures. In his letter of December 11, 1996, Fried requested a "[c]opy of the application procedure" for supervisory and specialist positions. In his letter of January 13, 1997, he requested the same information for CLT positions as well. At the meet and discuss sessions in January 1997, Gardner verbally outlined the selection process, and she outlined that process again in her letter of February 13, 1997. Gardner apparently never provided a "copy of the application procedure", and there was no evidence whether such a document existed.

The University points out the layoff letters themselves announced informational meetings on the preferential rehire process, at which employees would be asked "to specify the types

of UCLA positions you are interested in pursuing and to present a current description of your job skills and qualifications."

8. Proposed (new) job descriptions for senior supervisors and senior specialists. Fried requested these "proposed" job descriptions in his letter of December 11, 1996. The job descriptions were posted on January 17, 1997, and Gardner provided what she thought were complete job descriptions to Fried at the same time. Gardner learned on January 28, 1997, the job descriptions given Fried were incomplete, and she promptly made the missing parts available to Fried, who picked them up on January 30, 1997.

The University points out these job descriptions were not entirely finalized until just before they were posted. The evidence also showed, however, that these job descriptions were in various stages of drafting and approval in October, November and December of 1996.

9. Seniority lists for all employees. Fried requested "the seniority of each employee in each division" in his letter of January 22, 1997. Under Policy 60 of the PPSM, seniority is calculated "by full-time-equivalent months (or hours) of University service," excluding employment prior to a break in service. In her letter of February 7, 1997, Gardner provided just the hire dates for all employees. On March 7, 1997, Fried told Gardner he wanted actual seniority points, which she provided in a letter dated March 28, 1997.

The University maintained lists of hire dates but not of seniority points, which required review by a personnel specialist. Gardner testified she interpreted Fried's request as one for hire dates; CLT Michael testified UPTe had asked for "hire dates" at the meet and discuss session on January 16, 1997. An employee relations manager testified hire dates are quicker to get and generally give the same results.

10. Proposed (new) job descriptions for CLTs. Fried requested this information in his letter of January 24, 1997. These job descriptions were posted on February 7, 1997. Gardner made them available for Fried to pick up on February 14 or 18, 1997. These job descriptions were drafted in late January and early February of 1997.

Rehiring

There was relatively little evidence about the rehiring process for senior supervisors and senior specialists, but presumably the University followed the procedures outlined in the memo of December 19, 1996, and the layoff letters of January 7, 1997. Employees were asked to attend meetings at which they were to present a description of their qualifications and to specify the positions they were interested in pursuing. There were then to be two rounds of hiring. The first round was to be for employees exercising preference for jobs at the same salary level or lower and the same or lesser percentage of time. In the second round, any remaining vacancies were to be posted for open

recruitment. The hope was to fill all these vacancies by the end of January.

According to Gardner's letter of February 13, 1997, "[e]ach section assembled an interview panel" that included the section manager, and each manager "utilized a generic questionnaire and then added questions specific to the specialty area." Gardner further stated that "written notification will be provided to those candidates not selected for positions along with the reason(s) for nonselection." When the process was concluded, some 35 employees (mostly specialists) had not been rehired.

There was more evidence about the rehiring process for CLTs. Again, employees were asked to attend meetings, present a description of their qualifications, and specify their interests. Binders of resumes were circulated among the managers, who determined whether employees met the minimum qualifications they had established.

Once again there were two rounds of interviews, a preference round and an open round. Specialists and other higher level employees not yet rehired could qualify for the preference round, along with the current CLTs. At some point, candidates were considered not only for career CLT positions but also for casual CLT positions and for HLT positions.

Once again interview panels were assembled, now including both managers and senior supervisors. Each panel used its own set of interview questions to evaluate not only relevant technical skills but also such things as interpersonal skills.

After the interviews, panel members looked at personnel records, including recent evaluations and attendance records.

Apparently none of the interview panels gave any positive consideration to length of service. The job descriptions they used generally called for "recent" or "current" experience in particular areas, so longtime employees with a range of experience that might not be "recent" or "current" enjoyed no advantage. Also, the job descriptions sometimes called for "recent" or "current" experience in more than one area, even though those areas had been in separate units. Longtime employees who had remained in one unit thus might not meet the qualifications.

As of April 3, 1997, some 26 employees (mostly CLTs) had not been rehired, some having chosen to retire. Of the 43 employees adversely affected (by layoff, demotion, or otherwise), 51 percent were UPTE members, even though only 29 percent of the 220 HX employees in the Department were UPTE members.

The complaint (as amended during the hearing) alleges seven UPTE members in particular suffered retaliation during the rehire process, and their situations will be addressed individually in these findings of fact. Not all UPTE activists were adversely affected, however. Three of the five CLTs listed on the UPTE letter of October 18, 1996, and five of the eight listed on the UPTE letter of November 4, 1996, were rehired as CLTs, including Inchauspi, the UPTE steward.

Henry Hao

As previously stated, Hao was a specialist with 20 years of service and a recent evaluation that his performance "Exceeds Expectations." He applied unsuccessfully for CLT positions in three units: Brentwood, High Volume Testing and Special Testing. He ultimately accepted an HLT position.

Hao actually joined UPTE in January 1997, but he had been active in the UPTE campaign since July 1996. He believed High Volume Testing manager Debra Cobb (Cobb) and Special Testing manager Maggie McGinley (McGinley) were aware of his UPTE activities because they saw him in the hallway talking to Inchauspi, Michael and Bawal. On February 3, 1997, the Daily Bruin (the campus newspaper) published a picture of Hao standing next to Inchauspi, along with an article about the layoffs and UPTE's opposition to them. The article did not identify Hao as an UPTE supporter but did quote him as asking "when something like this happens, what's the point of loyalty?"

Brentwood manager Garcia testified Hao did not do as well in the interview process as other candidates, who had more recent relevant experience. She also testified that she did not see the Daily Bruin article, that she learned Hao was involved with UPTE only after the interview, and that Hao's involvement did not affect the decision not to offer him a position. The Brentwood unit did hire one of the CLTs listed on the UPTE letters of October 18 and November 4, 1996.

High Volume Testing manager Cobb testified Hao's interview was "disappointing." Hao's technical scores were barely acceptable in hematology and not acceptable in chemistry. Also, Cobb thought Hao's communication skills were not good, in that he could be difficult to understand at times. (The transcript of Hao's hearing testimony lends some support to Cobb's concern.)

Cobb testified she was not aware of Hao's involvement with UPTE. She acknowledged she saw the Daily Bruin article, but testified it did not affect her consideration of Hao. She did ultimately hire Hao as an HLT, partly because she thought he had "good interpersonal skills and a willingness to learn." The High Volume Testing unit also hired one of the CLTs listed on the UPTE letter of November 4, 1996.

Special Testing manager McGinley testified Hao was not offered a job because other candidates had more experience and better knowledge. She also testified she was unaware of Hao's UPTE activities. She acknowledged she saw the Daily Bruin article at some point but testified it did not affect her consideration of Hao. She did hire Inchauspi as a CLT, knowing Inchauspi was an UPTE steward.

Sally Jo Michael

As previously stated, Michael participated in meet and discuss sessions in 1996 and 1997. She was also active in the UPTE campaign and wore an UPTE button at work.

Michael was a CLT with 13 years of service. Her most recent evaluation indicated "Good Performance" overall, but it also

indicated she "Does not meet standards" in the area of "planning/time utilization" and was "borderline" in "judgement/decision making." On March 8, 1996, she was issued a counseling memo with regard to "Job Knowledge - Independent Judgment." She filed a grievance, which was settled with a promise that the memo would be withdrawn on July 1, 1997, and would not be used in her next evaluation if her job knowledge and independent judgment were otherwise satisfactory.

At the time of the layoffs, Michael was working 60 percent of full-time. She applied unsuccessfully for CLT and/or HLT positions in four units: Brentwood, High Volume Testing, Special Testing, and Outreach Testing.

Brentwood manager Garcia testified Michael was not interviewed because she lacked the requisite recent experience. Garcia acknowledged she became aware at some point of Michael's involvement in UPTE, but she testified it was not a reason Michael was not interviewed.

High Volume Testing manager Cobb testified Michael was not offered a job because she lacked recent experience and because of the evaluation and counseling memo. Cobb also testified she was unaware of Michael's involvement with UPTE.

Special Testing manager McGinley testified Michael was not interviewed in the preference round for a 100 percent CLT position because she was working only 60 percent of full-time. Michael was interviewed for a 60 percent casual CLT position, however. McGinley testified Michael was not offered the position

because there was a better qualified candidate. McGinley had reviewed Michael's personnel file and had seen the counseling memo; she then talked to Michael's supervisors and learned Michael's performance had improved. McGinley acknowledged she was aware of Michael's involvement in the meet and discuss sessions, but she testified it was not a factor in the decision not to offer Michael a position.

Outreach Testing manager Deborah Hangebrauk (Hangebrauk) testified Michael was not interviewed for a CLT position because she lacked particular experience. Hangebrauk determined Michael's experience from her resume and from a telephone conversation with her. At first Hangebrauk was not going to interview Michael even for an HLT position, but Michael persuaded her she had the experience for that position. Hangebrauk testified that among the 14 or 15 candidates interviewed for 2 HLT positions, there were others with more recent experience than Michael. She also testified she had concerns about Michael's evaluation and was unaware of Michael's involvement with UPTE.

Ron Allin

Ron Allin (Allin) was a specialist with 21 years of service. Allin was an UPTE member, was active in the UPTE campaign, and had worn an UPTE button. He believed his supervisors were aware of his UPTE membership by being "on the other side of the fence in grievance procedures, among other things." Allin applied unsuccessfully for career CLT positions in three units: Brentwood, High Volume Testing, and Outreach Testing. His resume

was reviewed in Special Testing, but he did not meet the minimum qualifications. He was offered an HLT position but eventually decided to take a casual CLT position instead.

Brentwood manager Garcia testified Allin did reasonably well in the interview but not as well as those who were offered career CLT positions. On March 14, 1997, Garcia sent Allin a memo stating he "met the minimum qualifications" but "more qualified preference applicants" were selected. Allin testified Garcia had previously told him he was not minimally qualified. Allin also testified that when he asked "them" specifically why he was not selected "they wouldn't answer the question."

Garcia testified she did not think she knew of Allin's involvement with UPTE until later. Also on the interview panel was May Ota (Ota), Allin's supervisor. From Allin's testimony, it appears Ota may have been aware of Allin's involvement with UPTE. Ota did not testify, and it is not clear what her role in the selection process may have been.

Garcia did, however, offer Allin an HLT position, which he initially accepted but then rejected. When a casual CLT position became available, Garcia offered it to Allin, and he accepted it.

High Volume Testing manager Cobb testified Allin was not offered a CLT position because he lacked recent experience in the relevant areas. She also testified Allin was not offered an HLT position because of his limited experience and because Allin had been offered an HLT position in the Brentwood unit. She also testified she was unaware of Allin's involvement with UPTE.

Outreach Testing manager Hangebrauk testified she reviewed Allin's resume and determined he did not meet the minimum qualifications in terms of relevant experience. She also testified she was unaware of Allin's involvement with UPTE.

Arnold Aquino

Arnold Aquino (Aquino) was a CLT with 23 years of service. His most recent evaluation indicated "Good performance" and credited him with being a "team leader" as well as a "team player." One of the "goals and expectations" for Aquino in the next year was that he be "conscientious with verification of microscopic work and calling of panic values."

Aquino was active in the UPTE campaign. He attended an UPTE meeting in January 1997; he believes his supervisor Ada Lopez (Lopez) knew he was at the meeting because "she was looking for us and somebody told her." (Aquino's belief appears to be based on hearsay, since he apparently was not present to hear someone tell Lopez where he was.)

At the time of the layoffs, Aquino was working 80 percent of full-time. He applied for CLT and HLT positions in three units: High Volume Testing, Special Testing and Outreach Testing.

High Volume Testing manager Cobb testified Aquino was not offered a CLT position for three reasons: (1) there were only one or two 80 percent positions, (2) Aquino did not do particularly well on the technical questions in the interview, and (3) there was "a history of customer service issues" with Aquino. Cobb had heard of two incidents in the last six months

when Aquino had failed to help her staff. Senior supervisor Dennis Sunseri (Sunseri), who was also on the interview panel, was aware of another similar incident within the last eight to twelve months. According to Aquino, Cobb explained to him he was not selected because he was not a "team player," and Aquino understood this referred to yet another incident back in 1992 or 1993. Aquino had not been counseled or written up for any of these incidents, however.

A "candidate review document" prepared by Cobb appeared to indicate Aquino would be hired for a casual position, but he was not; this anomaly was not explained. Cobb testified she was unaware of Aquino's involvement with UPTE. Aquino's supervisor Lopez, who was also on the interview panel, did not testify.

Special Testing manager McGinley testified Aquino was not interviewed in the preference round because he worked less than 100 percent of full-time, and he was not interviewed in the open round because he lacked the necessary experience, based on his resume and on what he told her. She also testified she was unaware of his involvement with UPTE.

Outreach Testing manager Hangebrauk testified Aquino canceled two scheduled interviews for positions in the Med Plaza section and tried to set up a third only after those positions were filled. Aquino was interviewed for positions in the Santa Monica Hospital section, however, as one of about 50 candidates for 22 positions. Hangebrauk ultimately informed Aquino she had "decided to select more qualified applicants for these positions

possessing not only Hematology and Chemistry experience, but established Blood Banking experience as well." Aquino acknowledged he had no formal training in blood banking. Hangebrauk also testified that she was concerned about the reference to "verification of microscopic work and calling of panic values" in Aquino's evaluation, and that when she checked she was informed there were some undocumented problems with Aquino's work performance and accuracy. She also testified she was unaware of Aquino's involvement with UPTE.

Barbara Freed

Barbara Freed (Freed) was a CLT with 20 years of service. She was active in the UPTE campaign, and her name was listed on the UPTE letters of October 18 and November 4, 1996. She wore an UPTE button at work, and she believed her supervisor knew she was active in UPTE. The Daily Bruin article of February 3, 1997, mentioned her; it did not identify her as an UPTE supporter but did quote her as describing the layoffs as "very cold."

Freed's last evaluation indicated "Good Performance" overall, but it also indicated she was not familiar with all procedures and was not an effective teacher. It also indicated she should improve her productivity, punctuality, interpersonal skills, accountability and safety practices. She applied unsuccessfully for CLT positions in three units: High Volume Testing, Special Testing, and Outreach Testing. She ultimately chose to retire in order to maintain her medical benefits.

High Volume Testing manager Cobb testified Freed was not selected because of Freed's last evaluation and because Cobb knew Freed had been verbally counseled in recent months for inappropriate interaction with her coworkers. Freed was informed of these reasons when she asked why she had not been selected. Cobb testified she was unaware of Freed's involvement with UPTE, although she knew Freed had been quoted in the Daily Bruin.

Special Testing manager McGinley testified Freed was the lowest ranking candidate "just based on the interview questions and her technical ability." McGinley sent Freed a memo stating a candidate "with more applicable qualifications" was selected. McGinley testified she was unaware of Freed's involvement with UPTE and had not really read the Daily Bruin article.

Outreach Testing manager Hangebrauk testified her review of Freed's resume indicated Freed lacked recent chemistry experience. Hangebrauk sent Freed an e-mail message stating she would not interview Freed for that reason. Hangebrauk testified she was unaware of Freed's involvement with UPTE.

Patricia Palmer

Patricia Palmer (Palmer) was a CLT with 21 years of experience. She was active in the UPTE campaign and wore an UPTE button at work. She believed her own and other supervisors were aware of her involvement with UPTE.

Palmer's last evaluation indicated "Good Performance" overall. It praised her interpersonal skills, and it stated her attendance and punctuality were "within departmental

expectations", noting her total sick hours for the year were 96.0 and her total tardy hours were 1.3.

Palmer applied unsuccessfully for a career CLT position in High Volume Testing. She also applied for a position in Outreach Testing, but she had to cancel the scheduled interview. Her resume was reviewed in Special Testing, but she did not meet the minimum qualifications. She ultimately accepted a casual CLT position.

One of the interview questions for High Volume Testing asked, "Who are your customers?" The question was based on "customer service training" all employees had been given. The correct answer was supposed to be "Everyone." Palmer had received the training and knew what the correct answer was supposed to be. High Volume Testing manager Cobb had been one of the trainers, although she had not trained Palmer.

For some reason, in the interview Palmer chose to say that only patients and physicians were her customers, that she "could care less" about management, and that she would not do things management asked if she felt they were immoral or unethical. Cobb found this answer bizarre. She and the two other panelists each gave Palmer a score of 0 out of a possible 5 for the answer. As a result, Palmer's total score for "customer service skill" was only 12 out of a possible 30. No one with such a score under 15 was selected.

After the interview, Cobb checked Palmer's attendance records for the previous ten months and found four or more

unscheduled absences within a three-month period. Cobb believed this was inconsistent with Department work rules, which required review of absenteeism in excess of one occurrence per month for three consecutive months. Palmer's supervisor Lopez, who was on the interview panel, told the other panelists she was unaware of any mitigating circumstances with regard to Palmer's attendance. Lopez had not told Palmer there was any attendance problem, however.

When Palmer was informed she was not selected, she asked senior supervisor Sunseri, the third panelist, for the basis. He told her candidates were judged on three things: their interview, their last evaluation, and their attendance. Palmer recalled Sunseri told her she "failed all three." Sunseri recalled he had only said her attendance was not acceptable and her answer to the customer question was "upsetting." Palmer then spoke to Cobb; she remembers Cobb telling her "none of them [her interview, her evaluation or her attendance] were very good." Palmer sent Cobb an e-mail message, asking in part "to discuss my evaluation of last year that you said was not very good." Cobb replied with a message stating she "did not recall telling you that your evaluation was not good" but "did indicate that your interview did not go well." Sunseri testified he regarded Palmer's evaluation as "good," and Cobb's notes indicate she regarded Palmer's evaluation as "All OK."

Cobb ultimately offered Palmer a casual CLT position, having understood Palmer preferred that over a career HLT position.

Cobb testified she was unaware of Palmer's involvement with UPTE. Sunseri did not testify whether he was aware; Lopez did not testify at all.

Bhanu Bawal

As previously related, Bawal participated in meet and discuss sessions in 1997. She was also active in the UPTE campaign and wore an UPTE button at work. She believed her own and other supervisors were aware of her involvement with UPTE. She was a CLT with nine years of service.

Bawal's situation in this case is somewhat different from the other individual employees in that it is alleged she suffered retaliation before as well as during the rehire process. Specifically, it is alleged she was issued a disciplinary reduction in salary on December 23, 1996, because of grievances and UPTE activities in 1996.

Bawal received a warning letter from supervisor Eileen Whalen (Whalen) on January 10, 1996. The letter criticized Bawal's "Interpersonal Relationships," mentioning a co-worker who had portrayed Bawal as "bossy" and "lording it over" her. Bawal grieved the warning letter. On April 10, 1996, Bawal received an evaluation signed by Whalen on March 25, 1996, and by senior supervisor Ana Reyes (Reyes) on April 2, 1996. Although the evaluation indicated "Good Performance" overall, it also stated Bawal "Does not meet standards" in "Interpersonal Relationships" and mentioned "Documentation in Employee's file." Bawal also grieved this evaluation.

Meanwhile, on April 1, 1996, UPTE requested a meet and discuss session on issues in the Toxicology section where Bawal worked. A session was held on May 15, 1996, and Bawal, Whalen and Reyes were all present. On July 10, 1996, UPTE requested another such session, and one was held later that month, with Bawal, Whalen and Reyes again present.

A third meet and discuss session was held on December 5, 1996. Bhanu and Reyes were present, but Whalen was not. One issue at the session was the transition between shifts. Bawal mentioned she had once worked late without overtime compensation, when someone on the next shift was late. After the session, Reyes went to Whalen and asked if she was aware of uncompensated overtime in her section; Whalen said she was not.

Reyes and Whalen then called Bawal into a meeting and asked her about the overtime incident. Bawal said it had happened two years earlier. Bawal testified Whalen then said "you cannot go to these meetings and say things like this which will look as if we are not doing our job right." Whalen denied she had been critical of Bawal in this regard, and Reyes denied she and Whalen were concerned that the overtime incident reflected badly on them. At some point, Reyes or Whalen sent an e-mail message to employees acknowledging, "I have found out that one technologist stayed over on a Saturday approx. 2 years ago."

A few days later Reyes sent Bawal an e-mail message about a shipment of paper towels Bawal had offered to put away on December 10, 1996. Reyes, who could only find two packages,

asked Bawal, "Are we looking in the wrong places?" Bawal testified she interpreted this as her being "asked to justify [the] disappearance of paper towels," and this caused her real concern. Bawal replied with an e-mail indicating the locations of the towels.

On December 23, 1996, Bawal received a notice of intent to issue a disciplinary temporary salary reduction, for a total of three days salary over four weeks, due to "your continued unsatisfactory interaction with your co-workers." The notice was issued by Whalen with the approval of Reyes and manager McGinley. The notice cited incidents on December 9 and 11, 1996, as well as the warning letter of January 10, 1996, and the evaluation of April 10, 1996. Bawal had a right to respond to the notice, and she did so, but Whalen decided to proceed with the temporary salary reduction, which Bawal then grieved.

Bawal's grievances concerning the warning letter and the evaluation ultimately went before an independent party reviewer. On March 27, 1997, the reviewer determined the warning letter "lacked a sufficient factual base" and the performance evaluation similarly "lacks substantiation." On April 21, 1997, the vice provost accepted the reviewer's determinations and ordered removal of the warning letter and partial deletion of the evaluation. The vice provost also concluded that "[a]bsent the prior discipline" the temporary salary reduction "should more appropriately remain as a verbal counseling" and that Bawal should therefore be reimbursed.

Before the vice provost's decision, Bawal went through the layoff and rehire process. She applied unsuccessfully for CLT and/or HLT positions in four units: Brentwood, High Volume Testing, Special Testing and Outreach Testing.

Brentwood manager Garcia testified Bawal was not granted an interview because it appeared from her resume she lacked recent experience on the instrumentation used in Brentwood. Bawal was sent an e-mail message drawing her attention to the requirement of recent experience. Garcia testified she was unaware at that time of Bawal's involvement with UPTE.

High Volume Testing manager Cobb testified Bawal was not selected as a CLT because her license was limited to chemistry. Bawal was licensed as a Clinical Chemist Scientist, while the High Volume Testing job description specified a Clinical Laboratory Scientist license, which is more flexible. Cobb acknowledged one CLT with a limited license was selected "because he had special expertise in donor testing and was our key person on performing all the blood donor testing in the Unit," which was "basically a full time job for one individual."

Cobb testified Bawal was not selected as an HLT because of the evaluation and other documentation regarding her interpersonal skills. Cobb also testified she was unaware of Bawal's involvement with UPTE.

Special Testing manager McGinley testified Bawal was not interviewed because of the evaluation, warning letter and disciplinary action in Bawal's file. McGinley was aware of these

items because she was Bawal's manager and had approved the disciplinary action. McGinley therefore felt Bawal did not meet the job description requirements for communication skills, interpersonal skills, commitment to customer service requirements (including "in-house and coworkers"), and ability to work as a team member.

McGinley was aware Bawal's grievances were pending. She checked with Human Resources and was told not to interview Bawal. Gardner testified documents that are subject to grievances are typically regarded as "live" and may be considered in employment decisions. McGinley told Bawal why she was not interviewed.

McGinley acknowledged she was aware of Bawal's involvement in the meet and discuss sessions but denied it was a factor in her decision not to interview Bawal. McGinley later became aware Bawal had only a chemistry license, while the job description specified a Clinical Laboratory Scientist license or a Clinical Toxicologist license.

Outreach Testing manager Hangebrauk testified she interviewed Bawal for an HLT position. After the interview, which went well, Hangebrauk reviewed Bawal's personnel file. The evaluation and other documentation led her to believe Bawal had problems with interpersonal relationships, and this led her not to select Bawal. She informed Bawal only that "more qualified applicants" had been selected. She testified she was unaware of Bawal's involvement with UPTE.

On April 21, 1997, when the vice provost overturned the adverse actions against Bawal, he further stated as follows:

During the imminent restructuring of the Department of Pathology and Clinical Laboratory Medicine, I have been informed that Ms. Bawal was denied an interview for any vacant CLT positions and was subsequently laid off on March 31, 1997, based on the adverse actions in her file. Once removed, Ms. Bawal should be given the opportunity to interview and, if qualified, should be selected with preference for a vacant career position in Clinical Labs. This is to hereby request that the Human Resources Department assist the hiring managers in the preference selection process.

Based on the above, I expect these actions to be concluded within thirty days.

On April 30, 1997, the University issued a list of current job opportunities that included two Brentwood CLT positions, one career and one casual. Bawal expressed interest in the career position, but she got a message back that she did not meet the minimum qualifications. She wrote a letter to the vice provost, and she then got a call telling her the job did not exist. Allin ended up getting the casual position in Brentwood, but Bawal did not get a position.

ISSUES

1. Did the University fail to meet and discuss in good faith?
2. Did the University retaliate against charging parties collectively, by laying all of them off?
3. Did the University retaliate against charging parties individually during the rehire process?

4. Did the University retaliate against charging party Bawal in particular?

CONCLUSIONS OF LAW

Meet and Discuss Obligation

HEERA section 3565 gives higher education employees the right "to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." HEERA section 3567 gives "[a]ny employee or group of employees" the right "either individually or through a representative of their own choosing" to "present grievances to the employer and have such grievances adjusted." An employer's interference with these or other employee rights violates HEERA section 3571(a).

In Regents of University of California v. Public Employment Relations Bd. (1985) 168 Cal.App.3d 937, 945 [214 Cal.Rptr. 698], the court held HEERA section 3565 meant employees had a right to be represented by a nonexclusive representative, in the absence of a certified exclusive representative. The court further held an employer therefore "notifies individual employees of proposed changes in employment conditions and, if the employee chooses to have his or her union meet with the employer to discuss the changes, such meetings are held upon request." (Ibid.) Such meetings may be called meet and discuss sessions.

An employer's duty to meet and discuss with a nonexclusive representative is different from its duty to meet and confer with an exclusive representative under HEERA section 3570. Unlike

meeting and conferring, meeting and discussing need not continue until agreement or impasse. (Regents of the University of California (1990) PERB Decision No. 829-H.) Under some circumstances, it may be enough for the nonexclusive representative to have an opportunity to present its alternatives and the rationale therefore to someone with authority to respond. (Ibid.)

Whether an employer has satisfied its meet and discuss obligation is determined on a case-by-case basis. (Ibid.) Three touchstones have been recognized, however: (1) notice before the employer's decision is final or implemented, (2) reasonable time and opportunity for meeting and discussing, between the notice and the final decision or implementation, and (3) good faith conduct in listening to and considering proposals. (Regents of the University of California) (1990) PERB Decision No. 842-H.)

PERB has not specifically discussed the role of information in the meet and discuss process. PERB has long recognized that in meeting and conferring an exclusive representative has a right to request and receive relevant information. (Trustees of the California State University (1987) PERB Decision No. 613-H.) An employer's failure or refusal to provide such information is enough in itself to violate the duty to meet and confer. (Ibid.)

In the context of grievance processing, PERB has recognized a nonexclusive representative also has a right to relevant information. In Santa Monica Community College District (1979) PERB Decision No. 103 (Santa Monica), PERB stated as follows:

A nonexclusive representative's right to present grievances would be meaningless if the employer were under no duty to provide information it possesses and which is relevant to the evaluation and/or processing of the grievance. Accordingly, a necessary corollary to the duty of the employer to engage in such grievance resolution is the duty to furnish information necessary for the nonexclusive representative to provide effective representation. . . .

Although this case arose under the Educational Employment Relations Act (EERA)² and in the grievance context, its rationale also applies to the meet and discuss process under HEERA.

In Santa Monica, PERB was interpreting the specific statutory right of a nonexclusive representative to represent employees under EERA section 3543.1. HEERA does not give that specific statutory right to a nonexclusive representative, but, as noted above, it does give employees the right to be represented by a nonexclusive representative, both in the grievance process and in the meet and discuss process. Whatever the context, the right of representation must be meaningful, and the representation must have an opportunity to be effective. In Santa Monica, PERB held a meaningful right to effective representation necessarily imposes on an employer a duty to provide relevant information. A meaningful right of representation in the meet and discuss process therefore similarly imposes a duty to provide information relevant to that process. It seems appropriate to regard this duty as related to the second touchstone of good faith meeting and discussing:

²EERA is codified at section 3540 and following.

reasonable time and opportunity for meeting and discussing, between notice and final decision or implementation.

HEERA section 3562(q)(1) states the scope of representation for employees of the University shall not include:

Consideration of the merits, necessity, or organization of any service, activity, or program established by law or resolution of the regents or the directors, except for the terms and conditions of employment of employees who may be affected thereby.

In the present case, therefore, the University did not have a duty to meet and discuss in themselves the decisions about the organization of the Department and the number of employees needed by the reorganized Department. (Cf. Newman-Crows Landing Unified School District (1982) PERB Decision No. 223.) The University did have a duty, however, to meet and discuss the effects of those decisions on employees, including, most crucially, how employees would be selected for layoff. (Cf. Healdsburg Union High School District (1984) PERB Decision No. 375.)

With regard to the first and third touchstones, the University's conduct looks like good faith meeting and discussing. The University did give employees notice at a time when the University's decision was apparently not yet final or implemented. The memo of December 19, 1996, informed employees as to the "the direction we [of the University] intend to take" and what "would" happen. The memo did not describe a foregone conclusion or an accomplished fact.

With regard to the third touchstone, the University was apparently prepared to listen to and consider UPTE's proposals.

According to Gardner's undisputed testimony, she and Stanton consulted with other top management about the meet and discuss sessions. Fried acknowledged Gardner and Stanton said "that they would listen" and in fact "heard what we had to say." Fried further testified that "nothing changed," but an employer's decision not to change a proposed action does not show bad faith in meeting and discussing.

It is the second touchstone that is crucial in this case: whether there was reasonable time and opportunity for meeting and discussing, between notice and final decision or implementation. The University has taken the position there was plenty of time for meeting and discussing between December 1996, when notice was given, and March 1997, when the layoffs were effective. With regard to meeting and discussing the after-effects of the layoffs (for example, their effect on the workload of the remaining employees), the University's position seems reasonable.

Not all the negotiable effects of the layoffs were after-effects, however. As stated above, one of the most crucial effects was how employees would be selected for layoff. The University's decision was that all employees would be subject to layoff unless they successfully competed for the newly-defined positions. The University acted to implement that decision when it issued layoff letters to all employees and posted the positions for which they had to compete. For specialists and senior specialists, those actions took place on January 7 and 17,

1997. For CLTs, those actions took place on January 31 and February 7, 1997.

Once the University had issued the layoff letters and posted the positions, the University had committed its resources to the layoff and rehire process. From that point on, University managers needed to focus on completing the massive project, and employees needed to focus either on getting rehired or on developing their other alternatives (such as retirement). Under these circumstances, the time and opportunity for meaningful meeting and discussing about how employees would be selected for layoff was past. In fact, no meet and discuss sessions did take place for a month once the newly-defined CLT positions were posted.

The time between the notice of December 19, 1996, and the layoff letters and postings was short. This was especially true with regard to the specialists, for whom layoff letters were issued on January 7, 1997, just 19 days after notice, and for whom positions were posted on January 17, 1997, just 29 days after notice. This amount of time was short even by Gardner's own standards, as she typically gave UPTE and employees 30 days notice prior to implementing a change.

With regard to the CLTs, the time was somewhat longer: 42 days before the layoff letters, and 49 days before the postings. Various factors, however, limited even this longer period of time as an opportunity for meaningful meeting and discussing.

An obvious factor was the holiday period at the end of 1996 and the beginning of 1997. Gardner was available for meeting and discussing only one day (December 27) in the two-week holiday period. Fried was apparently not available until January 10, 1997. Predictably, a number of the affected employees would also be unavailable for at least some of the holiday period. In fact, no meeting and discussing took place until January 2, 1997.

Another factor was the magnitude of what the University was proposing to do. The University was not merely proposing to layoff some junior employees, or to change an ordinary working condition; the University was proposing to put at risk the careers of an entire Department of employees. A proposal of this magnitude requires more time for meaningful discussion. In fact, University management apparently continued to discuss the proposal internally for more than two months after the October 7 "pros and cons" document said there seemed to be "no other option."

A related factor was the element of surprise. The affected employees had reason to suspect the reorganization might result in some layoffs. They also had reason to know their managers had competed for newly-defined positions in the summer of 1996. They had no reason to suspect, however, that a similar procedure might apply to them. The PPSM, which did not cover managers, provided for layoff based on seniority, and it apparently had never been interpreted as authorizing the University to layoff all the employees in a department and make them reapply for employment

without regard for seniority. At the meet and discuss session of August 19, 1996, when the University reported on the selection of managers, Gardner said any layoffs would be "by the book" (the PSSM) and would involve "review of seniority." Gardner apparently never corrected the impression that layoffs would be based on seniority until the December 19 memo indicated otherwise. Thus, as far as UPTE and the employees were concerned, the layoff and rehire procedure in the December 19 memo came out of nowhere. They had no reason to be prepared to discuss such a proposal, and they would need some time to understand it and respond to it.

Another factor was lack of information. As noted above, PERB has held a meaningful right to effective representation includes a right to relevant information. Although in some cases the University was reasonably responsive to UPTE'S requests for information, in other cases it was not. For example, Fried first requested the current (old) job descriptions for senior specialists on December 11, 1996 (even before the December 19 memo). Gardner was sufficiently familiar with these job descriptions that at the meet and discuss session on January 16, 1997, she could represent they were changing 20 percent. Gardner did not actually provide these job descriptions until the week of February 18, 1997, however. This was over two months after the initial request, at least six weeks after the University issued layoff letters to all senior specialists (on January 27, 1997), and over a month after the newly-defined senior specialist

positions were posted (on January 17, 1997). Thus, by the time the information was provided, it had lost its value for meaningful meeting and discussing about how senior specialists would be selected for layoff.

Similarly, Fried requested the current (old) CLT job descriptions on January 13, 1997. Gardner provided these job descriptions the week of February 18, 1997, over five weeks after the request, over two weeks after the University issued layoff letters to all CLTs (on January 31, 1998), and over ten days after the newly-defined CLT positions were posted (on February 7, 1997). Again, the information had lost its value for meaningful meeting and discussing.

In meeting and discussing the effects of layoffs, few items of information could be more relevant and necessary than the number of possible layoffs. Fried began seeking this information on December 11, 1996, when he asked how many employees "could possibly" lose their jobs. On January 13, 1997, Fried followed up by requesting the "projected" loss of FTE jobs. Gardner did not provide the information until March 12, 1997, over three months after the first request and almost 2 months after the second.³ Gardner provided this information only when the numbers were finalized, even though the requests clearly asked for possible or projected numbers. I do not believe the University entered the layoff and rehire process without some knowledge of

³Gardner did provide some information on February 13, 1997, when she said "approximately 110 CLT vacancies were posted."

the possible or projected number of jobs to be lost; the University did not demonstrate why it could not share that knowledge with UPTE.

The University seems to have acted on the view that it was obliged to provide requested information only when the information was final, even if the information had lost its value for meaningful meeting and discussing by the time it was final. Thus, for example, Fried requested "proposed" job descriptions for senior specialists on December 11, 1997, but Gardner did not provide these job descriptions until over five weeks later, on January 17, 1997, when they were finalized and posted.⁴ The evidence showed these descriptions were in various stages of drafting and approval in October, November and December of 1996. Fried had requested "proposed" job descriptions, not final ones, and the University did not demonstrate why it could not have provided UPTE with the job descriptions that were being proposed, before they were final.

I conclude that in the present case the University failed to satisfy its obligation to meet and discuss in good faith. The University failed to provide reasonable time for meeting and discussing before implementing its very significant and surprising layoff and rehire program. The University also failed to provide reasonable opportunity for meeting and discussing, by failing to provide relevant requested information before

⁴Actually, Gardner provided UPTE with incomplete job descriptions, until the mistake was caught and corrected at the end of January.

implementation. The University's conduct interfered with the right of employees to be represented, in violation of HEERA section 3571 (a) .⁵

Retaliatory Layoff

In order to prevail on a retaliatory adverse action charge, a charging party must establish an employee was engaged in protected activity, the activities were known to the employer, and the employer took adverse action because of the activity. (Novato Unified School District (1982) PERB Decision No. 210 (Novato)). Unlawful motivation is essential to a charging party's case. In the absence of direct evidence, an inference of unlawful motivation may be drawn from the record as a whole, as supported by circumstantial evidence. (Carlsbad Unified School District (1979) PERB Decision No. 89.) From Novato and a number of cases following it, any of a host of circumstances may justify an inference of unlawful motivation on the part of the employer. Such circumstances include: the timing of the adverse action in relation to the exercise of the protected activity (North Sacramento School District (1982) PERB Decision No. 264); the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision

⁵The complaint also alleges the University denied UPTE's rights, in violation of HEERA section 3571(b). In Regents of the University of California v. Public Employment Relations Bd., supra, 168 Cal.App.3d 937, 945, the court held a nonexclusive representative's rights to represent are derivative, not independent. Since then, PERB has not found that a failure to meet and discuss violated HEERA section 3571(b). I see no particular reason to do so in the present case.

No. 459-S); departure from established procedures or standards (Santa Clara Unified School District (1979) PERB Decision No. 104); inconsistent or contradictory justification for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); or employer animosity toward union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572 (Cupertino)).

In the present case, the complaint alleges the University retaliated against charging parties collectively, by laying all of them off, along with the rest of the Department. Such an allegation is not unprecedented or inherently implausible. In Cupertino, PERB found a prima facie case of retaliation in allegations that an employer implemented a layoff targeting a particular department because of a high number of union activists in the department. In such a case, the burden is still on a charging party to establish all the elements of retaliation, including an inference of unlawful motivation.

In the present case, charging parties have established some elements of a prima facie case. Charging parties engaged in protected activities, including the UPTE campaign, and University management had at least general knowledge of the activities. The layoffs occurred in the midst of the UPTE campaign and departed from the established PPSM procedures of layoff by seniority.

I nonetheless conclude charging parties have not established an inference, on the record as a whole, that the layoffs were unlawfully motivated. Unlike the allegations in Cupertino, the

evidence here did not show a particularly antagonistic relationship between management and the employees' representative. There had been issues and disputes between the University and UPTE, but it appears both sides had addressed them in a professional manner. There was no evidence the University showed animosity toward union activism in general or toward the UPTE campaign in particular.

Furthermore, the layoffs in the present case, unlike the layoffs alleged in Cupertino, were not well-suited to a retaliatory purpose. In Cupertino it was alleged the effect of the layoff was "to completely lay off, out the door, virtually every Facilities member of the Union/District Personnel Committee [emphasis in the original]" as well as several other union activists. In the present case, no union activists were necessarily "out the door" because of the layoffs, because they all had at least a theoretical opportunity to be rehired into the newly-defined positions. In fact, the great majority of laid-off employees, including the great majority of UPTE members, were rehired without loss of status.

The layoff and rehire process involved an extraordinary amount of effort for University management, as well as an extraordinary amount of trauma for employees. The University could have anticipated that the effort and trauma would result in employees neglecting or abandoning the UPTE campaign. The University could also have anticipated, however, that the effort and trauma would result in employees seeing the UPTE campaign as

an absolutely necessary means of protecting themselves in the future. On the record as a whole, I do not find sufficient basis for inferring that the University sought either result, or that the Department-wide layoffs were otherwise unlawfully motivated.

Retaliatory Failure to Rehire

Charging parties point out that of the 43 employees adversely affected by the layoff and rehire process (as of April 3, 1997), 51 percent were UPTE members, although only 29 percent of the 220 HX employees in the Department were UPTE members. To UPTE these figures are cause for concern. The question is whether they are legally relevant.

If statistically significant, these figures would be legally relevant in a discrimination case based on an adverse impact theory. This is not such a case, however, because adverse impact is not a recognized theory in HEERA discrimination law. On the contrary, as noted above, actual unlawful motivation is essential in a HEERA discrimination case.

If statistically significant, the figures might also be legally relevant if all the rehire decisions had been made by one decisionmaker (either an individual or a group). One might then have a basis to infer the one decisionmaker had an anti-union bias (in the absence of other explanations for the figures). In the present case, however, the evidence showed no single decisionmaker, but rather separate decisionmakers making separate decisions for each unit. There are no figures in evidence

sufficient to support an inference of bias on the part of any of those separate decisionmakers.

There thus seems to be no real alternative to looking at the individual rehiring decisions for evidence of unlawful motivation. The findings of fact cover over 20 separate rehiring decisions affecting 7 separate employees. (See pages 28 to 45 above.) Without restating those findings, let it suffice to say that in no instance does the circumstantial evidence justify an inference of unlawful motivation. Some reasons for the rehiring decisions may seem petty or unfair, and some may not have been well-communicated to the employees, but they do not appear pretextual. The managers who ran the rehire process testified credibly that they had only limited knowledge of individual employees' UPTE involvement and that any such knowledge did not affect the decisions. On the record as a whole, I do not find sufficient basis for inferring otherwise.

Retaliation Against Bawal

As noted above, Bawal's situation in this case is unique, in that it is alleged she suffered retaliation before as well as during the rehire process. It appears her opportunity to be rehired was adversely affected by her earlier disciplinary reduction in salary. If the reduction was tainted by retaliation, as alleged, so was the failure to rehire her.

Bawal did engage in protected activities in 1996: she filed at least two grievances and participated in at least three meet and discuss sessions. These protected activities were known to

her supervisors and manager (Whalen, Reyes and McGinley), and these three were involved in issuing the allegedly retaliatory salary reduction notice of December 23, 1996. Bawal testified that at a meeting earlier in the month Whalen had told her "you cannot go to these [meet and discuss] meetings and say things like this [about uncompensated overtime] which will look as if we [Whalen and Reyes] are not doing our job right." If credited, this testimony would support an inference that Whalen and Reyes were hostile to Bawal's activism in the meet and discuss sessions.

Whalen denied criticizing Bawal's activism, however, and Reyes denied she and Whalen were concerned the overtime incident reflected badly on them. Reyes's testimony is supported by the e-mail message she or Whalen sent to employees acknowledging the overtime incident. A supervisor trying to hush up a problem would seem unlikely to send out such a message.

Bawal seems to have been particularly sensitive to any perceived hint of criticism. That same month, when Reyes sent Bawal a message asking whether she (Reyes) was "looking in the wrong places" for paper towels, Bawal was concerned that she (Bawal) was being "asked to justify [the] disappearance of paper towels." This seems an overreaction and a misinterpretation. With regard to both the paper towels and the overtime incident, Bawal may have subjectively believed she was being criticized when objectively she was not being criticized. I credit Bawal's testimony about the December meeting as evidence of what Bawal

believed when she was questioned about the overtime incident, but I also credit the testimony of Whalen and Reyes that they did not in fact express hostility towards Bawal's activism.

The University's vice provost concluded the salary reduction was inappropriate, and should have remained a verbal counseling, because the earlier warning letter and evaluation lacked sufficient substantiation. In the absence of evidence that the salary reduction was otherwise inappropriate, the question becomes whether the insufficiently substantiated warning letter and evaluation were due to retaliation. If they were tainted by retaliation, then so was the salary reduction, and ultimately so was the failure to rehire.

As to the warning letter, there is no prima facie showing of retaliation, because there is no evidence of prior protected activity by Bawal. The warning letter was issued on January 10, 1996, before any of the protected activity that is in evidence. Whatever reasons led to the insufficiently substantiated warning letter, they could not have included protected activity that was yet to occur.

The evaluation was issued to Bawal on April 10, 1996. By then, Bawal had engaged in some protected activity: she had grieved the warning letter. She had not yet, however, participated in a meet and discuss session, and there is no evidence Whalen or Reyes knew she would do so.⁶

⁶In fact, Whalen signed the evaluation on March 25, 1996, while UPTE did not even request a meet and discuss session on Toxicology section issues until April 1, 1996.

There is no particular evidence that Bawal's grievance about the warning letter played a role in her evaluation. On the contrary, it seems more reasonable to suppose that the reasons which led to the warning letter itself (insufficiently substantiated though it was) also led to the evaluation. Since those reasons predated the protected activity, they presumably may have continued independent of the protected activity. On the record as a whole, I do not find sufficient basis to infer unlawful motivation in Bawal's evaluation, or in her salary reduction, or ultimately in the failure to rehire her.

REMEDY

HEERA section 3563.3 gives PERB:

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

In the present case, the University has been found to have violated HEERA section 3571(a) by interfering with the right of employees to be represented on matters within the scope of representation. It is therefore appropriate to direct the University to cease and desist from such conduct.

Charging parties argue it is also appropriate to direct the University to reinstate with backpay all charging parties adversely affected by the layoff and rehire process. Such a remedy would seem appropriate if the adverse effects had been shown to be the result of retaliation. Such a remedy might also

be appropriate if the adverse effects were the result of a unilateral change where there was a duty to meet and confer with an exclusive representative. In California State Employees' Association v. Public Employment Relations Bd. (1996) 51 Cal.App.4th 923, 946 [59 Cal.Rptr.2d 488], the court stated in part:

Restoration of the status quo is the normal remedy for a unilateral change in working conditions or terms of employment without permitting bargaining members' exclusive representative an opportunity to meet and confer over the decision and its effects. (See, e.g., Oakland Unified School Dist. v. Public Employment Relations Bd. (1981) 120 Cal.App.3d 1007, 1014-1015 [175 Cal.Rptr. 105].) This is usually accomplished by requiring the employer to rescind the unilateral change and to make employees "whole" from losses suffered as a result of the unlawful unilateral change.

In the present case, however, retaliation has not been shown, and there was no duty to meet and confer, because there was not yet an exclusive representative.

In Regents of the University of California, supra, PERB Decision No. 842-H, PERB declined to order backpay "where the entitlement thereto is speculative." PERB noted the outcome of a meet and discuss process is particularly speculative, given there is no requirement the parties reach agreement or continue to meet until impasse. In the present case, it would be speculative to conclude the adverse effects on charging parties would not have occurred at all if the University had satisfied its meet and discuss obligation.

It does not seem speculative, however, to conclude the adverse effects would not have occurred so soon if the University had satisfied its meet and discuss obligation. I have already concluded the University failed to provide reasonable time for meeting and discussing before implementing its layoff and rehire program. With regard to the specialists, the University provided almost no time, issuing the layoff letters only 19 days after notice that all specialists would be laid off, with the two-week holiday period occupying almost all of those 19 days.

Faced with a very significant and surprising development, and with full information slow in coming, UPTE asked that the whole process be delayed by as much as 120 days. A delay of that length seems more than would be reasonably required to complete a meet and discuss process. I conclude, however, that in the circumstances of the present case an additional 30 days was reasonably required.

I note Gardner typically gave 30 days notice prior to implementing a change. Had she given an additional 30 days notice of the layoff and rehire program, there might have been a meaningful opportunity for meeting and discussing before the layoff letters were issued to the specialists, notwithstanding the two-week holiday period.

I also note the University gave employees 60 days individual notice of their layoffs, rather than the minimum 30 days specified in the PPSM. This additional 30 days did increase the time and opportunity for meeting and discussing the after-effects

of the layoffs, but it did not increase the time and opportunity for meeting and discussing how employees would be selected for layoff, before the layoff and rehire process was already underway. An additional 30 days before the layoff letters and position postings could have provided such an opportunity.

I also note University management apparently continued to discuss the layoff and rehire program internally for more than 60 days after the October 7 "pros and cons" document said there seemed to be "no other option." An additional 30 days notice could have given UPTE a real opportunity to join the discussion with options and arguments of its own.

I therefore find it appropriate to order the University to make charging parties "whole" with backpay as if the layoff and rehire process had occurred 30 days later than it did, and the layoffs had therefore been effective 30 days later than they were. Charging parties who were actually laid off, or who retired rather than be laid off, shall receive 30 days backpay. Charging parties who were reduced to lower paying positions shall receive 30 days backpay for the difference in pay. Charging parties who were reduced to casual (limited-term) positions shall receive backpay as if the casual positions began 30 days later and therefore ended 30 days later. Charging parties shall receive this backpay with interest at the rate of 7 percent per annum. (Regents of the University of California (1997) PERB Decision No. 1188-H.)

At the beginning of the hearing in this matter, Administrative Law Judge Thomas ruled that charging parties included 65 UPTE members, all in the HX unit and employed by the Department, who were identified in the unfair practice charges filed on February 10, 1997. I see no reason to disturb that ruling. The evidence showed 22 of these charging parties were adversely affected by the layoff and rehire process; these 22 are the charging parties who shall receive backpay as described above.

It is also appropriate to direct the University to post a notice incorporating the terms of the order in this case. Posting of such a notice, signed by an authorized agent of the University, will provide employees with notice the University has acted in an unlawful manner, is being required to cease and desist from this activity and take affirmative remedial actions, and will comply with the order. It effectuates the purposes of HEERA that employees be informed both of the resolution of this controversy and of the University's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law, and upon the entire record in this matter, it is found the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA or Act), Government Code section 3571(a) by interfering with the right of

employees to be represented on matters within the scope of representation, by failing to provide reasonable time and opportunity for meeting and discussing a layoff and rehire program.

Pursuant to HEERA section 3563.3, it is hereby ORDERED that the University, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

Interfering with the rights of employees to be represented on matters within the scope of representation.

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

1. Make "whole" charging parties adversely affected by the layoff and rehire process by paying them backpay as if the layoff and rehire process had occurred 30 days later than it did. Charging parties shall receive this backpay with interest at the rate of 7 percent per annum.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to unit employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the University, indicating the University will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board, in accord with the regional director's instructions.

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 of 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 of Regs., tit. 8, sec. 32135; Code of Civ. Pro. 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 of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Thomas J. Allen **Administrative Law Judge**