STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION,	)	
Charging Party,	)	Case No. SF-CE-80-H
v.	)	PERB Decision No. 353-H
REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)	October 27, 1983
Respondent.	)	

Appearances: Eugene S. Darling for California State Employees Association.

Before Tovar, Jaeger and Morgenstern, Members.

DECISION

TOVAR, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California State Employees' Association (CSEA) to the attached proposed decision of a PERB administrative law judge (ALJ). CSEA's exceptions are to that part of the proposed decision which dismisses its allegations that the Regents of the University of California (University) violated subsections 3571(a) and (b) of the Higher Education Employer-Employee Relations Act (HEERA or Act)[1] by reclassifying all employees

[1]The HEERA is codified at Government Code section 3560 et seq. All statutory references herein are to the Government

in the "gardener A" classification to the "gardener B" classification, thereby eliminating the existing differential in wages between gardeners "A" and "B." For the reasons which follow, we affirm the ALJ's decision to dismiss those allegations.

No exceptions have been filed to the remainder of the proposed decision, in which the ALJ determined that the University violated subsections 3543.5(a) and (b) of the HEERA by reclassifying certain cafeteria workers. On that basis the ALJ's findings of fact, conclusions of law and order with respect thereto are adopted as those of the Board.

FACTS

In 1972, the University established a two-level pay classification system for gardeners. According to that plan, those classified as "A" gardeners would use no power tools in their work, and would receive a lower rate of pay than "B" gardeners, whose duties would emphasize the use of power

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Code unless otherwise indicated. Section 3571 provides in relevant part as follows:

> It shall be unlawful for the higher education employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

tools. The A gardeners were known as "beat" gardeners because each was assigned full time to a particular area of the campus which he or she was to maintain. B gardeners were not assigned to a particular geographic territory, but specialized in the operation of power equipment and received assignments wherever power tool work was needed on the campus. In practice, however, the distinction in the job duties between A and B gardeners became blurred. A gardeners found it inefficient to wait for a B gardener when they found a need for power tool work. Most took great pride in their work and thus proceeded to use power tools themselves to get the job done, even though the duties set forth in their job description did not include operation of power tools.

In 1976, CSEA job representative Joe Castagnasso, himself an A gardener, drafted a letter which was signed by 25 A gardeners and sent to the department of facilities management requesting that the A gardeners be reclassified as B gardeners in light of the widespread use of power tools. The University took no action in response to the letter.

In February 1978, Castagnasso again wrote to the department complaining of the fact that the beat gardeners were classified and paid as A gardeners but were regularly operating power tools. The letter noted that in 1972 "there were six to eight men" doing the work of B gardeners, but that at present there were only three B gardeners employed at the campus. The letter ended by stating as follows:

> We feel this is a serious blow to the class concept of "A" and "B" gardeners and is in direct violation of the rules and regulations written by the University.
>
> What we have to sell is our labor and services and we expect to be paid accordingly. We ask that these current practices be corrected immediately.

In testimony at the PERB hearing, Castagnasso acknowledged that the letters of 1976 and 1978 were attempts to have the A gardeners reclassified to B. These attempts were made by Castagnasso in response to complaints and pressure brought to bear on him by his fellow A gardeners.

Later in 1978, an A gardener filed a grievance over the fact that he was using power tools to get the job done but was not being paid at the higher B rate. The outcome of this was that A gardeners were instructed not to use power tools. In conjunction with this instruction, the B gardeners were reorganized in an effort to make them more available for the A gardener's needs. This effort was unsuccessful, however. Rather than wait idly for a B gardener to be dispatched whenever the need to use a power tool arose, many A gardeners reverted to the practice of using those tools themselves.

In 1979, Rick Sanchez took over as personnel manager for the department. Upon learning of the gardener issue, he met with the gardener supervisors and other department officials. Eventually, he proposed that all A gardeners be reclassified to the B level. Sanchez met with the A gardeners and explained

the reclassification process. Employees were told that certain of them would be contacted and their jobs audited in order to develop representative job cards.

CSEA representative Castagnasso had by this time been promoted to B gardener. Upon learning informally of the proposal to reclassify the A gardeners, he phoned Sanchez to confirm the information that the department was developing a plan to upgrade the A gardeners. Sanchez told him that he was, in fact, considering that action. Castagnasso then asked to meet with Sanchez, and Sanchez agreed.

On meeting with Sanchez, Castagnasso objected that the upgrade of the A gardeners would eliminate the pay differential enjoyed by the B gardeners. Castagnasso related to Sanchez the concerns of his fellow B gardeners about this and suggested that a new position of C level gardener should be created, to which the existing B gardeners could be assigned. Sanchez listened to this proposal and told Castagnasso he would keep the concerns of the B gardeners in mind.

About a month later, following the conclusion of the reclassification survey in March 1980, the reclassification of the A gardeners to the B level was implemented. In response to this, Castagnasso requested a meeting with Phil Encinio, the Berkeley campus director of labor relations. Encinio first said he could not meet with Castagnasso, but with the prompting of a letter from the CSEA president, a meeting was set up.

Castagnasso and Encinio discussed the question of the pay differential extensively. Encinio agreed to turn over to his subordinates a proposal to study the feasibility of reclassifying the original B gardeners to an as yet nonexistent C level so as to restore a pay differential for the power tool specialists. Castagnasso then met with one of Encinio's subordinates and it was arranged that the personnel office would conduct a reclassification study of the original B positions. As part of this procedure, Sanchez supervised an audit of the original B jobs. He also met with Castagnasso and discussed the latter's desire to restore a differential by creating a class of C gardeners.

The information generated by the job audit was reviewed by University personnel officials. As a result of this process, the position of the B gardener doing the tree trimming was adjusted to receive a higher wage in recognition of the special skills required by that position. Otherwise, the determination of the University personnel staff following the conclusion of the job audit in August 1981 was that there were no grounds for making any other changes in the gardening classifications. On August 31, 1981, CSEA filed the instant charge against the University.

DISCUSSION

CSEA's charge alleges that the reclassification of A gardeners to the B classification and the resulting elimination

of the pay differential previously enjoyed by the B gardeners violated the HEERA in two ways. First, CSEA asserts that the reclassification unlawfully interfered with its ongoing organizing drive. The historical origin of the pay differential, alleges CSEA, is in past union-University agreements; thus, the University's unilateral elimination of the differential creates an appearance that unions are ineffectual in exacting lasting employee benefits from the University, and thereby damages CSEA's ability to recruit support among the employees. Second, CSEA alleges that the University acted to reclassify the A gardeners without first meeting its obligation to afford CSEA, as a nonexclusive representative, notice and an opportunity to meet and discuss the proposed action, as mandated by Regents of the University of California, Lawrence Livermore National Laboratory (4/30/82) PERB Decision No. 212.

The ALJ found that these allegations were barred by the HEERA's six-month statute of limitations. That limitations period is set forth at subsection 3563.2(a) and provides as follows:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

The ALJ noted that the promotion of the A gardeners was implemented in March 1980, while the instant charge was filed in August 1981, more than 17 months after the complained-of conduct. Finding no reason why the statute should be tolled, he concluded that the charge was untimely.

CSEA presents two theories as alternate bases for its exceptions to the ALJ's determination that its charge was untimely. First, it maintains that following the blanket promotion of the A gardeners it was not certain that the pay differential was in fact a thing of the past. CSEA representative Castagnasso was continuing to pursue an upward reclassification of the power equipment specialists, and until the University ultimately denied the reclassification request in August 1981, asserts CSEA, the elimination of the differential was not final.

We find this argument to be without merit. The University reclassified the former A gardeners, which had the effect of eliminating the wage differential, in March 1980. If the elimination of the differential was violative of the Act, then it was so as of that date. Thus, the charge could have been filed 17 months earlier. In arguing that the elimination of the differential was not final, and thus not violative, so long as the University remained open to CSEA's efforts to restore it, CSEA is in essence contending that a unilateral change is not a per se violation. This argument is more commonly

asserted by employers who are defending charges that they have refused to bargain in good faith. Regardless of the source of the argument, it is well-settled that a unilateral change violates the Act notwithstanding the employer's subjective good faith. See San Mateo County Community College District (6/8/79) PERB Decision No. 94; Moreno Valley Unified School District (4/30/82) PERB Decision No. 206, affirmed sub nom. Moreno Valley Unified School District v. PERB (1983) 142 Cal.App.3d 191; NLRB v. Katz (1962) 369 U.S. 739 [50 LRRM 2177]. Neither can the elimination of the differential be characterized as a continuing violation. This Board has previously determined that a unilateral change was not a continuing violation where no subsequent reimplementation or refusal to negotiate the affected policy was shown. San Dieguito Union High School District (2/25/82) PERB Decision No. 194.

CSEA's alternative argument is that its pursuit of the reclassification procedure equitably tolled the HEERA's statute of limitations. CSEA relies on the Board's decision in State of California, Department of Water Resources (12/29/81) PERB Order No. Ad-122-S, in which we adopted the doctrine of equitable tolling as developed and applied by the California courts, and on two subsequent decisions of this Board in which issues of equitable tolling arose: San Dieguito Union High School District, supra, and Los Angeles Unified School District (9/20/82) PERB Decision No. 237.

In Department of Water Resources, supra, we reviewed the California Supreme Court's treatment of the equitable tolling doctrine in Elkins v. Derby (1974) 12 Cal.3d 410. There the Court observed that the purpose of a statute of limitations is "to insure timely notice to an adverse party so that he can assemble a defense when the facts are still fresh." (Elkins, supra, 12 Cal.3d at 412.) The Court thus held that a statute of limitations may be equitably tolled where a plaintiff has several legal remedies and reasonably and in good faith pursues one. Such tolling is appropriate, explained the Court, so long as the plaintiff's pursuit of his claim via the first avenue has put the defendant on notice of that claim and thereby obviated the danger of surprise and prejudice which might otherwise result from the extended passage of time. The notice must be of a quality which is effective to protect "[d]efendants' interest in being promptly apprised of claims against them in order that they may gather and preserve evidence." (Elkins, supra, 12 Cal.3d at 417.) Based on this review, we held that the statute of limitations found in the State Employer-Employee Relations Act[2] would be tolled while an employee pursued a remedy reasonably and in good faith via a proceeding before the State Personnel Board and thereafter filed a charge raising the same issues with PERB.

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[2]The State Employer-Employee Relations Act is codified at Government Code section 3512 et seq. The statute of limitations is set forth at subsection 3514.5(a) and is in substance the same as the parallel provision of the HEERA.

In San Dieguito, supra, the complainant filed a grievance in the fall of 1977 alleging that the employer had made a unilateral change in negotiable terms and conditions of employment. That attempt at a remedy ended unsuccessfully in June 1978 when the employer rejected the advisory arbitrator's decision. In September 1978, the complainant refiled the identical grievance. This was rejected by the employer the following month. In January 1979, the complainant filed suit in superior court seeking enforcement of the contract provision allegedly violated by the employer. This suit was dismissed two months later on the grounds that administrative remedies had not yet been exhausted. In May 1979, the complainant filed its charge with PERB.

We held that the statute of limitations should not be tolled. While the initial grievance proceeding would justify tolling of the statute until its resolution in June 1978, the complainant's actions over the succeeding 11 months did not constitute reasonable and good faith pursuit of an alternate remedy. "Before this Board is willing to relieve a charging party from the effects of the statute of limitations," we held, "there should be some indication in the record that the alternate chosen represented a practical effort to resolve this dispute expeditiously."

In Los Angeles Unified School District, supra, we again rejected a complainant's claim that the statute of limitations

should be equitably tolled. We affirmed an administrative law judge's ruling that letters to public officials did not constitute the kind of administrative remedies contemplated by Elkins, and that the proceedings instituted by the complainant before the Equal Employment Opportunity Commission did not constitute a reasonable alternative remedy for the matters raised by the charge before PERB.

Our review of the three decisions of this Board on which CSEA relies fails to persuade us that the ALJ erred in ruling that the statute of limitations should not be tolled. That ruling was based on the ALJ's judgment that CSEA's efforts to secure reclassification of the original B gardeners was not the sort of alternative action which would put the University on notice that it should be prepared for litigation in connection with its decision to promote the A gardeners.

We agree. As we have explained, an essential requirement of the doctrine of equitable tolling is that the complainant's initial action in pursuit of a remedy must have alerted the respondent of the claim against it so that the delay in the filing of the subsequent action does not prejudice it in the ability to assemble a defense. Here, charging party's only actions in the six months preceding the filing of the instant charge were to express to the University its wish that the original B gardeners be reclassified to a new classification and to secure the University's agreement to conduct a

reclassification investigation. We cannot find that these actions assured protection of "defendants' interest in being promptly apprised of claims against them in order that they may gather and preserve evidence." (Elkins, supra.)

In addition, we find CSEA's previous actions deficient as notice for another reason. The charge brought before PERB by CSEA raises substantially different issues than those which arose in connection with the reclassification investigation undertaken by the University. In Department of Water Resources we said that equitable tolling would be applied "where unfair practice charges have been filed more than six months after the alleged violation of SEERA and the issues raised by the charge have been pursued [by alternative remedy]." [Emphasis added.]

In the instant case, the issues raised by CSEA's charge before PERB are significantly different from the issues involved in the reclassification investigation pursued by the University at Castagnasso's behest. The communications between CSEA and the University during the 17 months prior to the filing of the instant charge addressed only the question of the proper job classification for power equipment specialists. The charge before PERB, however, would at this late date have the Board undertake two different inquiries entirely: whether the University failed to meet and discuss the reclassification of the A gardeners; and whether that reclassification unlawfully infringed on CSEA's right to organize employees. Clearly, these issues would turn on evidence and witnesses entirely

unrelated to the reclassification investigation. Thus, even positing that CSEA's pursuit of reclassification on behalf of the original B gardeners alerted the University that CSEA harbored a claim against it, that information was insufficient to enable it to assemble and preserve the evidence necessary for its defense to the instant charge.

We conclude on the facts before us that there are no grounds for tolling the HEERA's statute of limitations with respect to CSEA's charge that the University unlawfully reclassified its gardeners. Consequently, that portion of the charge is DISMISSED. The Board's Order with respect to the remainder of the charge follows.

ORDER

Upon the foregoing Decision and the entire record in this case, it is hereby ORDERED that the Regents of University of California, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

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

(b) Denying to the California State Employees' Association rights guaranteed by the Higher Education Employer-Employee Relations Act including the right to represent its members.

(c) Interfering with employees because of the exercise of rights guaranteed by the Higher Education Employer-Employee Relations Act.

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

(a) Upon request, immediately meet and discuss with the California State Employees Association regarding the impact of the reclassification of food service workers on the senior food service worker classification.

(b) Within five (5) workdays after service of this Decision, prepare and post copies of the Notice attached as an appendix hereto, for at least thirty (30) consecutive workdays at its headquarters offices and in conspicuous places at the location where notices to employees are customarily posted. It must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

(c) Within twenty (20) workdays from service of the final Decision herein, give written notification to the San Francisco regional director of the Public Employment Relations Board of the actions taken to comply with this Order. Continue to report in writing to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the charging party herein.

Members Jaeger and Morgenstern joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-80-H, California State Employees' Association v. Regents of the University of California, in which all the parties had the right to participate, it has been found that the University violated Government Code subsections 3571(a) and (b) by implementing a reclassification of food service workers without giving prior notice to CSEA and by refusing to meet and discuss the effects of that decision. In all other respects the Complaint issued against the University, regarding a reclassification of gardeners, has been DISMISSED.

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

1. CEASE AND DESIST FROM:

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

(b) Denying to the California State Employees' Association rights guaranteed by the Higher Education Employer-Employee Relations Act, including the right to represent its members.

(c) Interfering with employees because of the exercise of rights guaranteed by the Higher Education Employer-Employee Relations Act.

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

Upon request, immediately meet and discuss with the California State Employees' Association regarding the impact of the reclassification of food service workers to the senior food service worker classification.

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 BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Unfair Practice Case No. SF-CE-80-H PROPOSED DECISION (9/30/82)

Appearances: Eugene S. Darling, job steward, for California State Employees' Association; Marcia J. Canning, assistant counsel, for Regents of the University of California.

Before: James W. Tamm, Administrative Law Judge.

PROCEDURAL HISTORY

On August 31, 1981 the California State Employees' Association (hereafter CSEA or charging party) filed this charge against the Regents of the University of California (hereafter University or respondent). The charge originally alleged the University violated Government Code section 3571(a) and (b) of the Higher Education Employer-Employee Relations Act (HEERA)[1] by taking unilateral action reclassifying certain

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

Sections 3571 states, in pertinent part:

gardeners, which had the effect of eliminating a differential paid to other gardeners.

An informal settlement conference held October 21, 1981 failed to resolve the issues, and a complaint was issued November 3, 1981. A formal hearing was originally scheduled for December 1981, however, at the request of the University, with the concurrence of the charging party, the hearing was postponed.

On February 22, 1982 CSEA amended its charge to include alleged unilateral action taken by the University in reclassifying food service workers. This, according to CSEA, had the effect of eliminating a differential paid to senior food service workers.

A pre-hearing conference was held May 14, 1982, and the formal hearing held May 24, 25 and 26, 1982. The transcript

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> It shall be unlawful for the higher education employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> . . . . . .

was prepared, briefs filed, and the case was submitted for decision September 20, 1982.

FINDINGS OF FACT

Prior to 1972, certain University employees were hired at the Berkeley campus in what was then known as "union-related" classifications. Included among these were the building and construction trades and the culinary classifications. The wages and job classifications accorded by the University to these employees in union-related classifications were the same as those appearing in area contracts that the laborers, gardeners or culinary unions had with private sector employers. Since 1972 the University has been converting employees in union-related classifications to the University wage and classification system.

Gardeners.

Prior to 1972, there were three rates of pay for employees doing gardener work. These were rates 1, 2 and 3, with rate 3 being the highest paid. Those gardeners paid at rate 1 used no power tools. Gardeners paid at rate 2 used power tools such as rotary mowers, edgers and hedge shears. The gardeners paid at rate 3 used power tools such as power mowers, and they also did tree-trimming which required the use of ladders and climbing.

As of July 1, 1972, the union-related classifications for the gardeners were converted to the University classification system which combined the old classifications into gardener A

and B classifications. The former rate 1 work, using no power tools, was converted to gardener A. The former rate 2 and 3 work, which involved the use of power tools, was combined into the level B work for gardeners.

The A gardeners, those who were at the lower rate of pay and did not use power tools, were usually referred to as "beat gardeners" because they worked within a certain territory. Beat gardeners generally had total responsibility for work done on the beat except for jobs requiring the use of power tools.

The B gardeners operated power tools a substantial portion of the time. They moved around the campus and were not confined to or responsible for a beat. In theory, they were responsible for any work which required the use of power tools.

Under the strict A and B system, many beat gardeners (A's) who were not supposed to be using power tools, found it impossible to do their jobs adequately. Most took great pride in their work and proceeded to use power tools in order to get the job done.

During the same period, a number of A gardeners complained to CSEA job representative Joe Castagnasso that they were doing B level work to get the job done, but they were not getting paid at the B rate. Castagnasso, who was then an A gardener, stalled them and encouraged them to do what was necessary to get the job done. The complaints continued, however, and in July 1976 Castagnasso sent a letter and a petition to the

Department of Facilities Management (hereafter DOFM). The letter and petition was, according to Castagnasso, an attempt to have the A gardeners reclassified to the B level.

No action was taken in 1976, however, and in February 1978 Castagnasso wrote to DOFM in another attempt to have the A gardners reclassified to the B level. The substance of that letter is as follows:

> Prior to 1972 there were six to eight men who were qualified and doing the work required of the present . . . Gardeners ("B") now we have three "B" Gardeners. Class "A" Gardeners are being asked to do the work of "B" Gardeners, without the higher rate of pay.
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> According to Staff Personnel Manual, dated July, 1973, "A" Gardeners are <u>not</u> required to climb trees, work on . . . ladders, operate chain saws, tractor mowers, roto-tillers, and other power equipment.
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> We have observed "A" Gardeners and Ceta workers doing all of the above mentioned work.
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> There are several things wrong with this practice:
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> 1. Safety - an unskilled man could be seriously injured.
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> 2. Damage to equipment.
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> 3. Morale (the men feel degraded).
>
> 4. <u>Working out of class</u>.
>
> We feel this is a serious blow to the class concept of "A" and "B" Gardeners and is in direct violation of the rules and regulations <u>written</u> by the <u>University</u>.

> What we have to sell is our labor and services and we expect to be paid accordingly. We ask that these current practices be corrected immediately.

Castagnasso testified he never intended to equalize everybody's wages. There is, however, no evidence that his intentions other than in the letters, were ever communicated to management until he proposed a new C level classification two years later, during a reclassification in 1980.

Later in 1978, one of the A gardeners filed a grievance over the fact that he was using power tools to get the job done, but was not being paid at the higher B rate. As a result of the grievance, the A gardeners were instructed not to use power tools. Additionally, the B gardeners were reorganized into squads. Whenever the A gardeners needed the use of power tools on their beats, the squad of B gardeners would come in to do those jobs. However, according to testimony by Fred Warnke, manager of grounds and services, DOFM, this system of squads of B gardeners performing tasks within the beats was not workable. The A gardeners could not really perform their jobs adequately and were hampered by the necessity of waiting for the availability of B gardeners. The B gardeners were overburdened with the job of using power tools on the whole campus. As it turned out, some of the A gardeners simply continued to use power tools without authorization in order to get the job done.

In 1979, Rick Sanchez took over as personnel manager for DOFM, and learned of the gardener issue while conducting a general job review of the department. Sanchez met with Warnke and the supervisors of the gardeners unit concerning their lack of flexibility in assignment of work. Sanchez eventually recommended that the A gardeners be reclassified to the B level. According to Sanchez, he also talked to individual employees in the A gardener classification during his study and had a meeting with employees to explain the reclassification process. Employees were told at a meeting that certain individuals would be contacted and their jobs audited in order to develop representative job cards.

During this survey, approximately four to five weeks prior to the implementation of the reclassification, Castagnasso, who by this time had been promoted to the B level, phoned Sanchez. Castagnasso said he had heard that the A gardeners might be blanketed into the B classification and he was calling to confirm that. Sanchez told Castagnasso that the possibility did exist. Castagnasso then asked to meet Sanchez and Sanchez agreed.

Sanchez met with Castagnasso and several other gardeners and discussed the possibility of the upgrade. Castagnasso indicated that a reclassification would effectively eliminate the pay differential the B gardeners were paid. Castagnasso indicated a third position (a C level gardener) could be

created. Sanchez listened to Castagnasso's proposal and told him he would keep the incumbent B gardeners in mind.

The reclassification of the A gardeners to the B level was implemented in March 1980. There is no evidence on record, however, that at the time of the reclassification survey any representative from CSEA other than Castagnasso or any other employee organization requested further meetings to discuss the reclassification of the A gardeners to the B level.

After the actual reclassification took place, Castagnasso requested a meeting with Phil Encinio, Berkeley campus director of labor relations. Encinio first indicated he could not meet with Castagnasso.[2] However, once the CSEA president wrote to Encinio requesting a meeting, one was set up. Castagnasso indicated this meeting eventually took place several months after the reclassification.

Castagnasso testified they discussed the pros and cons of the differential, and that,

> I gave him all my information. . . . We discussed it almost two hours. I don't

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[2]Castagnasso's explanation of Encinio's reasons were rather vague:

> Well, the first letter, he said he could not meet with us due to some fact about HEERA, and etc. and so forth . . . and he couldn't play favorites or didn't quite make a lot of sense to me, but . . . . I'm not that up on HEERA.

> recall all of his [Encinio's] conversation but I gave him everything I had on it.

When Castagnasso was asked if Encinio expressed any willingness to consider Castagnasso's proposal, he testified:

> A. He advised me that he would turn it over to . . . . One or two of his subordinates, and they would handle it.
>
> Q. Did they?
>
> A. Yes. . . .

The proposal that Encinio agreed to turn over to his subordinates involved a job audit regarding the feasibility of creating a new differential for the original B gardeners.

Castagnasso met with Dennis Marino, who is a senior personnel analyst in the Berkeley personnel office. They discussed the issue and the potential of creating a new differential. Marino agreed to have the original B jobs audited to see if a new job classification should be created. Marino followed up that meeting by having Sanchez collect job cards from the original B gardeners. While collecting job cards, Sanchez met once again with Castagnasso. He went over Castagnasso's job duties and once again discussed the proposal to create a C level job for the original B gardeners.

The information was then turned over to, and reviewed by, a team of personnel services advisors and the University classification committee. During this reclassification review, the position of the B gardener doing the tree trimming was adjusted. DOFM and the personnel office determined that the

position of tree trimmer, which was already in existence in the University's classification scheme, should be accorded a higher wage in recognition of the special skills required by that position. It was as a result of the reclassification review that this position was given a range adjustment and was offered to one of the original B gardeners.

In August 1981 it was the determination of both the department and the personnel office that the remaining B gardeners originally in that classification were appropriately classified as B gardeners, and that there were no grounds for recommending to systemwide administration the creation of a third classification in that series. Thus, other than the adjustment of the wage rate for the tree trimmer position, the job audit done by the personnel office did not result in the creation of another classification level.

Several gardeners testified on behalf of the charging party regarding their own attitude towards unions as well as giving hearsay testimony regarding the attitudes of other employees. In general, the testimony was that some employees were now cynical about unions and may not want to pay dues to unions because unions were ineffective in maintaining pay differentials.

Some of the same gardeners also testified that the reclassification of A gardeners to the B level was "a good idea," and that it was done,

> Because [the University] couldn't get the other guys to run mowers and stuff.

Furthermore, they testified that after the reclassification they could use power tools and get the job done right.

Food Service Workers.

The housing, child care and food services department provides staffing to seven food service operations located at different points at the Berkeley campus. These food service operations provide service to six resident halls which house as many as 900 students per hall, as well as to the rest of the campus. The department staffs these operations seven days a week, two shifts per day.

Prior to 1977, there were employees in the food services department whose job title was kitchen helper, and those whose job title was porter. Although individuals holding these job titles were University employees, the job titles themselves were union-related classifications. The campus paid the prevailing rate set by the area contracts which Local 28 of the Cooks and Culinary Workers Union had with other employers. At that time the kitchen helpers were paid more than porters.

In the fall of 1977, the University decided to convert the employees in these union-related classifications to the University's title and pay plan. The kitchen helper classification was converted to the University's uniform classification of senior food service worker, and the employees in the porter classification were converted to food service

worker. The senior food service worker classification started at a higher wage rate than the food service worker classification.

Food service workers work under close supervision and perform a variety of unskilled duties related to food preparation, serving and general maintenance in a kitchen or dining area. Senior food service workers work under less supervision than the food service workers, and usually require previous experience and training in food preparation, serving, and general maintenance in a kitchen or dining area.

A third level currently exists titled principal food service worker. Incumbents in this position serve as work leaders for groups of food service workers. The assistant cook classification is another promotional opportunity which is senior to the principal food service worker.

By 1981 the department was having a difficult time keeping qualified career employees in the food service worker classification.[4] Ed Hendricks, the director of housing and child care and food services, also testified that the department had a classification of senior custodian which was very similar in responsibility to the food service worker. The

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[4]Career employees, who work longer hours and tend to develop more expertise in the job, were distinguished from student employees and casual employees working a limited number of hours.

senior custodian was, however, receiving higher pay than the food service worker doing similar maintenance work, which caused employee dissatisfaction.

Given those problems, along with the desire to offer more cross training, the department on its own initiative requested the Berkeley personnel office to conduct a reclassification review of food service workers. Job cards gathered from individual employees were submitted on a representational basis, and a review conducted. The reclassification was approved, and on September 15, 1981 food service workers were notified by letter that they had been reclassified to senior food service workers retroactively as of September 1, 1981.

On October 23, 1981 the department received a petition from CSEA requesting a meeting to discuss reclassification and wages. Hendricks testified he forwarded the request to the Berkeley personnel office. CSEA, however, received no response from the Berkeley personnel office.

On December 3, 1981 CSEA wrote directly to Encinio, requesting a meeting to discuss the issue of classifications and wages. That request triggered a series of letters between CSEA and the Berkeley personnel office regarding a meeting. The personnel office kept seeking a more specific written agenda from CSEA so that it could

> . . . prepare for the meeting and have the correct management persons in attendance.

They further notified CSEA that,

> Unless extraordinary circumstances exist and prior approval is obtained, only two representatives or employees will be allowed in the session.5

By the conclusion of the formal hearing in this matter on May 26, a meeting had still not been held between the Berkeley personnel office and the charging party regarding the issues of classifications and wages of food service employees.

ISSUES

1. Did the University violate sections 3571(a) and (b) by unilaterally reclassifying A gardeners thereby eliminating pay differentials paid to B gardeners?

2. Did the University violate sections 3571(a) and (b) by unilaterally reclassifying food service workers thereby eliminating pay differentials paid to senior food service workers?

DISCUSSION

Arguments of the Parties.

CSEA claims that the actions taken by the University in these two situations violate HEERA in two ways:

1. They were unilateral changes. There was no prior notice to CSEA nor was there prior consultation with CSEA.

5The issue of whether the University's limitations of the number of CSEA representatives is an unfair practice was specifically removed from consideration in this case by the charging party, and is therefore not addressed in this decision.

2. Even had they not been unilateral, the changes nevertheless violate HEERA in that they have had a discouraging effect on employees' exercise of their right to organize and have interfered with CSEA's right to organize because they caused many employees to view the union cynically as impotent and unreliable.

The University argues with respect to the reclassification of gardeners the following:

1. There is no evidence that the reclassification of the A gardeners or the failure to create a new classification for the original B gardeners was unlawfully motivated.

2. The charging party did not establish there is a duty to meet and discuss over a review of employees' duties to determine if they are properly classified.

3. If in fact there was a duty to meet and discuss regarding the effects of the action (elimination of the differential), the University met that duty.

4. The elimination of the differential was an effect of the original reclassification in March 1980 and is therefore outside the statute of limitations.

With regard to the food service workers, the University argues:

1. The charging party failed to produce any evidence of unlawful motive or retaliation.

2. The charging party did not establish there is a duty to meet and discuss over a review of employees' duties to determine if they are properly classified.

3. There has been no refusal to meet regarding senior food service worker classification and wages, and that the parties are in fact setting up a meeting so that discussions can take place.

Gardeners-Unilateral Changes.

As to the unilateral changes affecting gardeners, the issue arises of whether the unfair practice complaint should be dismissed because of the six-month statute of limitations provided in HEERA.

Section 3563.2(a) provides that:

> Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

Charging party takes the position that once the University refused to create a new pay differential it immediately filed this unfair practice charge. Here, CSEA misses the point. If any violation occurred, it happened not because the University refused to create a new classification or create a new pay differential, but rather because it made unilateral changes when it eliminated the original pay differential. Thus, the statute of limitations should start running at the time the

charging party first learned of the actual elimination of the pay differential. CSEA clearly had notice of the change in March 1980, almost 17 months prior to the filing of this charge.

CSEA argues that after learning of the reclassification, it filed for a new job audit. This, according to CSEA, is in effect an internal appeal process which should toll the statute of limitations.

In San Dieguito Union High School District (2/25/82) PERB Decision No. 194, the Board held a statute of limitations could be tolled under either of two circumstances. The first is the statutory provisions which provide for tolling during efforts of the parties to resolve their differences through binding arbitration. This is not the case at hand.

The second possibility is the doctrine of equitable tolling established by the California courts[6] and adopted by PERB in State of California, Department of Water Resources; State of California, Department of Developmental Services (12/29/81) PERB Order No. Ad-122-S. Essential to this doctrine is the premise that the respondent is somehow given notice of potential claims to prevent surprise. In Henriette Allums v. Los Angeles Unified School District (9/20/82) PERB Decision No. 237, the Board found the doctrine of equitable tolling

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[6]Elkins v. Derby (1974) 12 Cal.3d 410 [115 Cal.Rptr. 641]; Myers v. County of Orange (1970) 6 Cal.App. 3d 626 [86 Cal.Rptr. 198].

inapplicable where the actions taken by the charging party were not sufficient to provide timely notice to the employer of its need to preserve relevant evidence. In this case, although the University was in fact aware CSEA sought a reclassification of the former B gardeners to a new C level, it had never received notice of any potential litigation on this issue. CSEA should therefore not be allowed to revive a 17-month old claim of unilateral change.

It is therefore found that the statute of limitations started running in March 1980 and was not tolled by any action by the parties. The complaint regarding gardeners is therefore untimely by almost one full year.

Even assuming, arguendo, the statute the limitations was either tolled or started running when the University refused to create a new classification, the University has met any duty it had to meet and discuss the issue with CSEA.

In Laborers' Local 1276, LIUNA, AFL-CIO and Alameda County Building and Construction Trades Council (4/30/82) PERB Decision No. 212, the Board held that HEERA requires the University to provide prior notice and an opportunity to discuss contemplated changes in wages, hours and other terms and conditions of employment to non-exclusive representatives. In Professional Engineers in California Government (3/19/80) PERB Decision No. 118-S, the Board held the duty to meet and discuss with a non-exclusive representative was not the same as

that imposed with regard to an exclusive representative. An employer and an exclusive representative have a mutual duty to meet and confer in good faith promptly upon request by either party and continue for a reasonable period of time in order to exchange information, opinions and proposals, and to endeavor to reach agreement on matters within scope of representation. In contrast, the obligation upon the employer with respect to a non-exclusive representative is to provide "reasonable opportunity to meet and discuss" subjects basic to the employment relationship prior to reaching or taking action upon policy decisions.

It is clear that the affected employees (both A gardeners and B gardeners) had actual notice of the potential reclassification. Furthermore, one of the affected employees was Joe Castagnasso, the CSEA representative, who had on two prior occasions suggested reclassification of A gardeners because they were working out of classification. When Castagnasso learned of the possibility of the upgrade he asked to meet with Rick Sanchez, the personnel officer for the department. Sanchez agreed and did, in fact, meet with Castagnasso and other gardeners. They discussed the potential upgrade, and Sanchez listened to Castagnasso's proposal that a C level classification be created.

There was no evidence of any other request for meetings until after the reclassification was implemented. At that

time, Castagnasso met with Phil Encinio and, according to Castagnasso,

> I gave him all my information. . . . We discussed it almost two hours. I don't recall all of his [Encinio's] conversation but I gave him everything I had on it.

From that meeting, the University agreed to do a job audit on the former B gardeners. The job audit was completed and the University offered to increase the level of the B gardener who did tree trimming.

Gardeners-Interference.

CSEA also argues that even if the University's actions did not constitute unilateral changes, they nevertheless interfered with rights to organize. Although the unilateral action has been found to be outside the statute of limitations, the refusal to create a new pay differential or new classification is within the statute of limitations and could be a violation if it is found to interfere with rights to organize.

In Carlsbad Unified School District (1/30/79) PERB Decision No. 89, and Novato Unified School District (4/30/82) PERB Decision No. 210, the Board noted that subsection 3543.5(a) [the section of the EERA corresponding with section 3571(a)][7] essentially combined provisions of subsections 8(a)(1) and 8(a)(3) of the NLRA.[8] The Board pointed out that:

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[7]The Educational Employment Relations Act is codified at Government Code section 3540 et seq.

[8]The National Labor Relations Act is codified at 29 U.S.C. 151-68. Section 8(a) states:

> Generally with respect to "intent" the NLRB and federal courts have drawn a distinction between sections 8(a)(1) and 8(a)(3). While unlawful intent appears not to be a necessary element of an interference charge under 8(a)(1) (cites omitted), it has generally been held to be a necessary ingredient in finding a violation of section 8(a)(3) (cites omitted). Novato, supra, at footnote 6.

If the charging party has meant to show the refusal to create a new pay differential or create a new gardener classification was done with unlawful motivation, it has failed completely. In Carlsbad, supra, the Board said:

> Unlawful motivation, purpose or intent is essentially a state of mind, a subjective condition known only to the charged party. Direct and affirmative proof is not always available or possible. However, following generally accepted legal principles the presence of such unlawful motivation, purpose or intent may be established by inference from the entire record. (Cites Omitted.)

The evidence from which unlawful motive could be inferred is limited to the following: (1) the pay differential was looked upon by some employees as a benefit acquired for them by

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> It shall be an unfair labor practice for an employer - (1) to interfere with, restrain or coerce employees in the exercise of rights guaranteed in Section 7. . . .(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization. . . .

unions, and (2) the action took place during a time in which unions were seeking to become exclusive representatives. It cannot reasonably be concluded from these two facts that the University took this action with the unlawful intent to interfere with rights to organize. This is particularly true since this was a move which had received at least partial support from CSEA in prior years.

If, on the other hand, charging party sought to treat the charge strictly as an interference case showing no unlawful motive, then CSEA,

> . . . need only make a prima facie showing that respondent's conduct tends to or does result in harm to employee rights guaranteed under . . . [the Act]. The respondent then has the burden of producing an operational necessity justification. The Board will then balance the competing interests of the parties and resolve the charge accordingly. Novato, supra, at footnote 7.

Although some employees may view unions cynically as impotent and unreliable because CSEA was unable to secure a new pay differential or a new classification for all of the original B gardeners, that by itself does not establish harm to employee rights. Employee rights are not harmed simply because the University chose not to adopt CSEA's proposal. Furthermore, even if this were to establish a prima facie case of harm to employee rights, the University has clearly demonstrated an operational justification. These valid operational needs were established by both University and

charging party witnesses, and outweigh any alleged harm to employee rights.

For the reasons set forth above, that portion of the complaint dealing with the gardener reclassification should be dismissed.

Food Service Workers.

The process of the elimination of the senior food worker pay differential is significantly different than the gardeners. Here, there was no prior notice given to CSEA or any of the affected employees. Although individual job cards were gathered from employees, there was no evidence the employees were aware of the purpose or the implications of such action. CSEA was not given any opportunity to state its position regarding the elimination of the pay differential, or to suggest possible alternatives. The first any employees or CSEA learned of the change was two weeks after the change had already taken place.

Furthermore, once the change did occur and CSEA made a request to meet, the request was apparently ignored. The director of food services testified he forwarded the request to the Berkeley personnel office. However, CSEA received no response whatsoever. After waiting almost six weeks for a response, CSEA wrote directly to the Berkeley personnel office seeking a meeting. This request still did not result in a meeting due to the University's insistence upon a more specific

written agenda and a limit on the number of CSEA representatives allowed into any meeting.[9] The University has simply failed to demonstrate any sincere willingness to meet on this issue.

The University states in its brief that the parties are, in fact, still trying to set up a meeting over this issue. This, however, strains credibility beyond reasonable limits. If the University had a good faith willingness to meet, it certainly would not take 10 months to schedule a simple meet and discuss session. Furthermore, even if it were true, the duty to meet arises prior to taking action, not a year later.

The University also argues that there is no duty to meet and discuss because there was no unilateral change. According to the University, all it did was scrutinize the work performed and, based upon that, adjusted titles and wages within the existing classification structure. This argument is not persuasive. There was no evidence that food service workers performed senior food service worker duties on a routine basis. The reclassification did not merely change their title to reflect their actual duties. The purpose of the reclassification was to cut down on turnover, ease recruiting

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[9]Although the limitation on the number of CSEA representatives the University would allow into any meet and discuss session was removed from consideration as a separate violation, it is evidence of a lack of a sincere interest to meet on this issue.

problems, and provide opportunity for cross-training. Thus, when all career employees in the food service worker class were reclassified to senior food service workers, a change most definitely occurred. This change affected wages, an item fundamentally within the scope of representation.

Based upon the information set forth above, it is clear the University failed to give CSEA any prior notice of the reclassification, nor did it give CSEA an opportunity to discuss the elimination of the pay differential which was an effect of the reclassification.

CONCLUSION

By implementing a reclassification of food service workers without giving the required notice to CSEA, and by refusing to meet and discuss the effects of that decision, the University has denied to CSEA its right to represent its members in their employment relationships with the University in violation of section 3571(b). Because the failure to meet and discuss this issue necessarily interferes with the employees in their exercise of protected rights to representation, the University has also violated section 3571(a).

Because the University did provide notice to CSEA and did meet and discuss the issue of the reclassification and pay differential for gardeners, and because the unfair practice charge was filed beyond the statute of limitations provided in the Act, that portion of the complaint dealing with the

elimination of the pay differential to gardeners is hereby DISMISSED.

Because CSEA failed to prove that the refusal to establish a gardener C classification was done with unlawful motive or that any rights were interfered with, that portion of the complaint dealing with the refusal to create a new classification is hereby DISMISSED.

REMEDY

Section 3563.3 of the Act provides that:

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

The remedy for violations such as those found in this case should be designed to restore, so far as possible, the status quo ante. Santa Clara Unified School District (9/26/79) PERB Decision No. 104. Restoration of the status quo ante in the present case would require demotion of former food service workers and would not, therefore, be appropriate. It would only serve to further undermine the charging party. The charging party, instead, seeks the restoration of the pay differential to original senior food service workers through a salary increase or the establishment of a new classification for original senior food service workers. In light of the fact that the senior food service worker classification is one of a

series of several promotional levels, ordering a pay increase to the original senior food service workers would merely compound the problem and would create exactly the same issue for employees in the next higher job classification. Furthermore, the original senior food service workers are performing the same duties as they did in the past, and there is no evidence on the record justifying a salary increase or establishment of a new classification as an ordered remedy.

The University will therefore be ordered to meet with CSEA and discuss the impact of the implementation of the reclassification of food service workers.

The University shall also be ordered to cease and desist from arriving at a determination of policy or course of action concerning matters within scope of representation without first giving notice to employee organizations and, upon request, discussing the matters pending the selection of an exclusive representative.

It also is appropriate that the University be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the University indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice effectuates the purpose of the Act by providing employees with notice that the controversy has been resolved, that the University has acted in an unlawful manner and that the

University is being required to cease and desist from this activity. See, e.g., Placerville Union School District (9/18/78) PERB Decision No. 69; Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3563.3, it is hereby ordered that the University of California, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

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

(b) Denying to the California State Employees Association rights guaranteed by the Higher Education Employeer-Employee Relations Act including the right to represent its members.

(c) Interfering with employees because of the exercise of rights guaranteed by the Higher Education Employer-Employee Relations Act.

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

(a) Upon request, immediately meet and discuss with the California State Employees Association regarding the impact of the reclassification of food service workers on the senior food service worker classification.

(b) Within five (5) workdays after this decision becomes final, prepare and post copies of the NOTICE TO EMPLOYEES attached as an appendix hereto, for at least thirty (30) workdays at its headquarters offices and in conspicuous places at the location where notices to certificated employees are customarily posted. It must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

(c) Within twenty (20) workdays from service of the final decision herein, give written notification to the San Francisco Regional Director of the Public Employment Relations Board, of the actions taken to comply with this Order. Continue to report in writing to the Regional Director thereafter as directed. All reports to the Regional Director shall be concurrently served on the charging party herein.

3. IT IS FURTHER ORDERED that all other charges filed against the University regarding reclassification of gardeners be DISMISSED, and that the Notice attached as an appendix shall reflect this dismissal.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on October 20, 1982, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Board itself at the headquarters office of the Public Employment Relations Board in Sacramento before the close of business (5:00 p.m.) on October 20, 1982, in order to be timely filed. When exceptions are sent by telegraph or certified United States mail postmarked not later than the last day set for filing, said document shall also be considered filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305 as amended.

Dated: September 30, 1982

James W. Tamm
Administrative Law Judge