STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES LOCAL 1650,	)	
Charging Party,	)	Case No. SF-CE-143-H
v.	)	PERB Decision No. 516-H
REGENTS OF THE UNIVERSITY OF CALIFORNIA (SAN FRANCISCO MEDICAL CENTER),	)	August 7, 1985
Respondent.	)	

Appearances; Ellen Shaffer for American Federation of State, County and Municipal Employees Local 1650; Thomas E. Matteoli for Regents of the University of California (San Francisco Medical Center).

Before Jaeger, Morgenstern and Porter, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the American Federation of State, County and Municipal Employees Local 1650 (AFSCME) to the proposed decision, attached hereto, of a PERB administrative law judge (ALJ) which dismisses the charges against the Regents of the University of California (San Francisco Medical Center) (University).

In the underlying charge, AFSCME alleged that the University failed to grant casual status to an employee because of his union activity. Based on the discussion which follows, we affirm the ALJ's conclusion that AFSCME failed to prove its charge by a preponderance of the evidence.

FACTUAL SUMMARY

The statement of facts set forth in the ALJ's proposed decision is free from prejudicial error, and we adopt it as the findings of the Board itself.

To summarize the facts, the case involves the employment status of Cory Silver, hired by the University in May 1979 as a staffing coordinator. As an employee, Silver was quick to offer innovative and helpful solutions to staffing difficulties and became an active member of AFSCME. Silver's union activity was well known at the Medical Center, and his superiors were aware of his union activity.

In the summer of 1982, Silver was offered a supervisory position at a nurses' registry outside the University. According to Silver's version of the facts, he decided to accept the outside position but hoped to continue his ties with the University. Silver believed he could accomplish that by switching from "career status" to "casual status" and working part time for the University while he worked full time elsewhere.

Silver resigned his career "staffer" position and was not rehired by the University in a casual status. The crux of AFSCME's case is Silver's claim that his resignation was contingent upon being rehired and that, because of his protected activity, management falsely led him to believe that such a conversion would occur and that the denial of his conversion was contrary to past practice.

DISCUSSION

AFSCME claims that the University refused to permit Silver to change his employment status only because he engaged in protected activity. The record fully supports the fact that Silver was a spokesperson for his fellow employees, and was active in AFSCME Local 1650. Similarly, it is not disputed that management was aware of his protected activity. The issues contested on appeal concern the reasons why supervisors Gail Oakley and Sylvia Hinkle would not permit Silver to convert from full-time status to casual status.

In assessing both decisions, the Board must determine what caused management to act the way it did and may look to various indices of improper motive outlined by the Board in Novato Unified School District (1982) PERB Decision No. 210. Considering all such factors, the ALJ found, and we agree, that Oakley did not prevent Silver from converting his staffing position from career to casual status because of the fact that Silver engaged in protected activities.

The ALJ found from the weight of the evidence that Silver was denied casual status by Oakley because she had no such openings under her control and efforts were being made to hold positions open because of impending layoffs. Although AFSCME takes issue with the University's claim of impending layoffs, it does not dispute the contention that there were no casual positions as staff coordinator available in August 1982. Therefore, while Oakley and other administrators may have erroneously relied on

an administrative policy which was never adopted, given the fact that Oakley could not have hired Silver as a casual employee, we cannot conclude that, but for his protected activity, Silver would have been able to convert to a casual staffer position. In sum, Silver sought supervisory experience and, therefore, left his position at the University. Although he engaged in union activity, the motivational link to the University's failure to offer him a casual position is absent. We, therefore, affirm the ALJ's conclusion that Silver's protected activity played no decisive role in Oakley's decision.

The ALJ also reviewed Silver's application for a float pool position and Hinkle's decision in the spring of 1983 not to hire Silver. The primary reason given by Hinkle was that, because of Silver's full-time job elsewhere, he was not sufficiently available for work, even in a float pool position. Hinkle also had some difficulty with Silver's attitude toward his application, i.e., that he was hopeful of transferring into other positions and saw the float pool position merely as a way of getting his foot in the door. The ALJ concluded that Hinkle's decision appears justified and not based on unlawful motivation. Again, we agree.

The critical point in AFSCME's case rests on its assertion that Hinkle told Silver he could become a floater if he first resigned his staffer position. Hinkle, however, denies giving such an assurance. In the ALJ's opinion, Hinkle's testimony was "straightforward," "believable," and she was "one of the most

credible witnesses at the hearing." Based on his first-hand observation of both Hinkle and Silver on the witness stand, the ALJ credited Hinkle's testimony over Silver's when there was a discrepancy. Thus, since the ALJ credits Hinkle's testimony that she gave Silver no assurance of employment, we defer to the ALJ's credibility determination. Santa Clara Unified School District (1980) PERB Decision No. 104a.

In sum, while we are convinced that Hinkle could have hired Silver as a floater and had, in fact, accommodated other employees in the past by giving them such a position, Silver was not entitled to such a position either on the basis of University policy or because of Hinkle's representations. The Board, therefore, affirms the ALJ's decision.

Finally, we dismiss AFSCME's contention that the University failed to provide it with an opportunity to meet and discuss the administrative policy regarding casual status conversions. Inasmuch as the record fails to establish that the University officially adopted the policy or claimed that it reflected the University's position, the Board affirms the ALJ's dismissal of this allegation.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, the unfair practice charge in Case No. SF-CE-143-H is hereby DISMISSED.

Members Jaeger and Porter joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES LOCAL 1650,	)	
Charging Party,	)	Unfair Practice Case No. SF-CE-143-H
v.	)	
REGENTS OF THE UNIVERSITY OF CALIFORNIA (SAN FRANCISCO MEDICAL CENTER),	)	PROPOSED DECISION (4/27/84)
Respondent.	)	

Appearances; Ellen Shaffer for Charging Party; Tom Matteoli for Respondent.

Before; James W. Tamm, Administrative Law Judge.

PROCEDURAL HISTORY

On December 14, 1982, the American Federation of State, County and Municipal Employees Local 1650 (hereafter AFSCME or Charging Party) filed this charge which, as amended, alleges that the Regents of the University of California, San Francisco Medical Center (hereafter University) violated sections 3565 and 3571(a), (b) and (c) of the Higher Education Employer-Employee Relations Act (hereafter HEERA or Act)[1] by refusing

[1]The HEERA is codified at Government Code section 3560 et seq. All references are to the Government Code unless otherwise specified. Section 3571 states in relevant part that:

> It shall be unlawful for the higher education employer to;

to grant Cory Silver status as a casual employee. An informal settlement conference was held April 20, 1983, however, the matter was not resolved. A formal hearing was held on September 27 and 28, 1983. A transcript was prepared, briefs were filed, and the case was submitted for decision in December 1983.

FINDINGS OF FACT

Cory Silver was first hired by the University in May of 1979. His job throughout his employment at the University was as a "staffing coordinator." The job was also known as a "staffing assistant" or a "staffer." Although the job title changed several times throughout his tenure, his duties remained essentially the same. As a staffing coordinator, he was responsible for coordinating vacancies on the nursing staff due to absence for illness or other reasons, then arranging to fill the vacancies with per diem substitute nurses obtained through local nursing registries.

(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.

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

Silver was the first non-nurse hired into the position and soon became an innovator on the job. Silver developed several format changes and was thought of as a pioneer in the position. For example, Silver suggested the idea of ranking nursing registries in order to obtain nurses at the most economical rates possible. When the issue of discontinuing the use of "blue slips" came up (a method of keeping track of last minute scheduling changes), Silver argued to retain them. The form was discontinued in spite of Silver's arguments, but later it was reinstated when the new system did not work properly.

Silver also spent time on his own developing a new system for scheduling vacancies over a 24-hour period rather than the previously used 8-hour periods.

Through his efforts, Silver became a leader among his co-workers. During this same time Silver became active in AFSCME. From spring 1980 through August 1983, Silver was treasurer of AFSCME Local 1650. For each of those same years, he was also either a delegate or alternate to statewide AFSCME. For two of those years he was also a delegate to the San Francisco Labor Council. Silver has never represented anyone in any grievance nor has he, for example, ever been observed handing out or posting union literature. Nevertheless, the testimony indicates that it was common knowledge that Silver was affiliated with the union.

As his efforts gained him the respect of his co-workers, it also drew the attention of his supervisor. Charging Party introduced a document written by Tom Weaver, Silver's supervisor in April 1980. The document summarized a conversation between Weaver and Carol Kreer, the assistant director of nursing services. At the time, Weaver was new and Kreer was conducting an orientation session with him.[2] Weaver's notes included the following:

> [Kreer] privately informed me about feelings that perhaps [Silver] may be involved in union activity. But nothing that she [Kreer] could act on. Allegation that C. [Silver] came in on day off to look at 9th Flr. staffing. That they were aware that something didn't jive with him being there.
>
> If the allegation was true, with new Nursing Supervisor coming on in May, he will definitely be cut back in his "assumed" duties on the floors. And with the revision of job descriptions and closer control and accountability of all the positions in N.O. this may be enough to re-direct and channel Cory.

When Kreer was cross-examined by the Charging Party and the administrative law judge, she appeared evasive and had no recall of discussing Silver's union activities with Weaver. Kreer did indicate there was some general concern that staffing coordinators on duty during weekends were having to take on responsibilities that were out of their job descriptions. This

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[2]Weaver is no longer working at the University and did not testify at the hearing.

however did not satisfactorily explain away the document, which is found to be evidence of Kreer's anti-union feelings.

The following month, May 1980, another incident occurred between Silver and Kreer. Silver saw a memo addressed to "hospital directors" which indicated a shift differential for nurses had been approved, thereby increasing nurses' base pay and calling for a retroactive payment. As Silver met with hospital staff, gathering information on staffing vacancies that day, he told other employees about the memo.

On May 26, Kreer issued a memo to all staff informing them of the changes. The next day, on May 27, Kreer issued a conference form (similar to a written reprimand) to Silver for disseminating information that was addressed to "hospital directors" without authorization. There was no evidence that any grievance was filed regarding the conference form.

As further evidence of the University's anti-union animus, two witnesses of the Charging Party testified that supervisors threw away union literature. Susan Beifuss, a University employee, testified that on two occasions she observed Weaver throwing out union literature that had been left in the nursing office. Beifuss was vague in her testimony about why Weaver threw out the material, testifying that:

> [Weaver] said we're just going to dump this because it's not in the interest of management or something like that. It's contrary to our policy, or I don't know his exact words, but it was something like that.

Beifuss did not indicate when this incident occurred, however, it is known that Weaver was being oriented into the job in April 1980 and, according to Silver, left in March 1981. Therefore, it would have had to occur between April 1980 and March 1981.

Charles Homan, a current staffing coordinator, testified that sometime between 1980 and 1981 he saw Karen Day, the associate director of nursing, throw away a stack of material which he thought was union flyers. Homan said the material had been left on the receptionist's desk in the nursing office.

In the fall of 1981 Silver got a new supervisor, Gail Oakley. About the same time, nursing services decided to include the night shift as part of the responsibility of staffing coordinators. This created problems for the five staffing coordinators who up until that time had not had to cover night shifts. Also up until that time Silver usually made up the work schedule. This was not one of his official duties. He was simply good at it and no one else wanted to do it, therefore Silver usually did it. When the night shift was added, Silver and Oakley had several confrontations on how to schedule the staffing coordinators' work assignments. Silver represented the interests of the staffing coordinators and argued with Oakley for a six to eight-week period. Silver eventually refused to continue doing the scheduling because he felt it could not be done in an equitable manner. This

resulted in Oakley having to make out the work schedule. At one point Silver informed Oakley that the schedule as she envisioned it would have the result of forcing employees to call in sick. According to Silver, Oakley's reaction was strong and bitter, with Oakley storming out of two meetings with staffing coordinators, implying that Silver was purposely getting people upset about the schedule.

Oakley freely admitted that she had an unhappy staff while the scheduling problems were being resolved, and that some of the discussions could be described as heated, however, she denied ever storming out of any meetings. She also claimed there was avid participation of all staffing coordinators and did not recall that Silver played a role distinctive from that of his co-workers.

The truth seems to lie somewhere between the testimony of Silver and Oakley. Charging Party's witness, Homan, supported Silver's testimony that Silver played a strong role in representing other staffing coordinators, and that Oakley seemed frustrated with the scheduling discussions. But Homan also testified that everyone was frustrated that the schedule was not resolved, and that he felt his opinions and criticisms of policies or practices in the department were welcomed.

Another staffing coordinator testifying for the Charging Party was Johnnie Carolyn Jones. She testified that Silver was the only one that really understood the schedule and was the

only one who could make it work. But according to Jones, she and other staffing coordinators complained many times themselves. Jones also supported Homan's testimony that Oakley was open to suggestions.

> Q. (by Shaffer) Did [Oakley] readily accept suggestions that [Silver] would make about staffing?
>
> A. Yes, I would say so.
>
> Q. Was that true in all cases?
>
> A. Yes, I would say, yes.

Michelle Morton, a former staffing coordinator, testified that Silver provided leadership among the staffing coordinators and was consistently an advocate for them. But Morton also testified that she could not put her finger on any particular animosity because of his assumed role.

During his employment, Silver had applied for many promotions at the University and had been turned down for all of them. Many of the positions Silver sought were supervisory in nature, and Silver felt his lack of any supervisory experience hampered his competitive standing.[3] Silver was then offered a supervisory job outside of the University. The job would have given him the supervisory experience he felt he lacked, so he decided to accept the job. At the same time,

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[3]There was no allegation that the lack of promotions was in any way discriminatory towards Silver.

Silver testified he wanted to continue his ties with the University in hopes of returning to a better University job after getting some supervisory experience. Silver felt he could accomplish that by switching from "career status" to "casual status" and working part-time for the University at the same he worked full-time elsewhere.

An employee with career status is employed to work at least 50 percent of a full-time position. A casual employee is either not committed to a fixed amount of time, or is committed to less than 50 percent of a full-time position. Casual employees are paid a different rate than career employees, and they do not receive University benefits.

According to Silver, he first looked into converting to a casual status as a staffing coordinator, but when he found out there weren't any such positions he then looked into a casual position within the secretarial float pool. The float pool consists of secretaries on casual status used to fill in for short-term vacancies.

On several occasions in the past Silver had filled in for the supervisor of the float pool who at that time was Sylvia Hinkle. It was Silver's understanding that Hinkle had complete control over hiring and scheduling the float pool secretaries, so he spoke to her about the possibility of being hired into the float pool. According to Silver, Hinkle assured him there would be a position for him, but told him it was

necessary for him to resign from his career status position in order to be hired as a casual employee. Silver testified that Hinkle told him it would be a pleasure to have him in the float pool.

Resigning from a career position prior to being hired into a casual position was consistent with Silver's own understanding of the procedure. Silver was personally aware of several other employees who had done just that. He understood that if an employee did not resign prior to converting to casual status, then there was no break in service and the University was required to continue providing benefits to the employee, even though the employee worked less than 50 percent time.

Hinkle's testimony supported Silver on several counts, but disputed him on others. Her testimony was straightforward, consistent with her earlier actions, and believable. She demonstrated no animosity towards Silver and, although she had trouble recalling dates, her recall of facts regarding the hiring and transfer of employees in the float pool was thorough. In all, she was one of the most credible witnesses at the hearing. For those reasons, where there is a discrepancy between her testimony and Silver's, Hinkle's testimony will be credited.

Hinkle testified that Silver came to her and asked if working on the float pool would be a possibility. She

indicated that it would be a possibility. He told her that he needed to maintain his benefits until a three-month waiting period at his new job allowed him coverage, and that he wanted to maintain his affiliation with the University. Silver indicated that he wanted to be a casual staffing coordinator, and if that plan failed, then Silver was going to get back to Hinkle and apply to the float pool. According to Hinkle, she made no commitment to Silver nor did she even interview him. She was waiting for him to exhaust his other possibilities and then get back to her to set up an appointment for an interview. Hinkle stated she doesn't even have the authority to make such a commitment to Silver without the approval of the personnel department. There is no credible evidence on the record that Silver went back to Hinkle until substantially after his resignation from the University. Nor is there evidence that Silver ever mentioned Hinkle's alleged "promise" of employment to any other management employee of the department until well after his resignation.

Hinkle supported Silver's testimony that to change from a career position to a casual one, an employee must first resign from the University and break service. Then the employee can be hired as casual. Hinkle did not tell Silver that before he could be hired, he would have to apply to the personnel office because she assumed he knew the procedure.

There was evidence that in the past employees could switch from casual to career and back to casual without formal action by the personnel department. For instance, Dan Parker testified he was hired in August 1980 as a casual unit secretary, working 40 percent of a full-time position. Approximately a year later he added an extra night to his schedule, thereby he increased his hours to 60 percent which gave him career status. In October 1981 he got a different job outside the University, reduced his hours at the University, presumably dropping him back to casual status, and began floating as vacation relief. His outside job lasted three months, then he increased his hours at the University to 75 percent. According to Parker, he didn't recall having to fill out any forms or go through any formal personnel procedure.

This apparently is not the case for employees seeking to change classifications. Kreer testified that anytime an employee would transfer from one classification to another, such as staffing coordinator to unit secretary, it must be done through the personnel department. Charging Party, however, was able to show at least one exception to that rule. Allie Farnlof, a unit secretary, began doing staffing coordinator work on a temporary and part-time basis to fill in for another employee on leave. Farnlof did not have to go through the personnel department. According to Kreer, the temporary nature of Farnlof's assignment distinguishes it from other cases.

On August 9, 1982, having decided to take the new job outside the University, Silver submitted the following letter to his supervisor, Gail Oakley:

> I have been offered and have accepted, a position as Assistant Director at the San Francisco office of Nursing Services International. As such, I wish to resign my position as Hospital Staffing Assistant II and convert to a casual appointment.
>
> My reason for accepting this position is to pursue my career goals in health service management. It was with great difficulty that I made my decision. My commitment and ties to this department run very deep.
>
> This letter being the standard two week notice, my last working day would fall on August 23. I look forward to discussing my change to casual status.

That same day Silver spoke to Kreer and told her that he had accepted another job and was resigning. According to Kreer, at no time did Silver ever discuss with her his desire to convert to a casual position.

Oakley was somewhat confused about exactly what Silver was seeking, however, she interpreted Silver's letter as an actual resignation from the University rather than merely a procedural step toward changing from career to casual employment status. Silver had never mentioned anything about going on casual status to Oakley prior to his resignation. Silver's reasons for not doing so are very unclear. At one point Silver testified he didn't discuss it with Oakley because "[he] didn't want to." At another point Silver testified that there was no

reason to discuss it with Oakley, presumably because he was seeking a position as a casual unit secretary, which was not under Oakley's control.[4]

Oakley testified there were two reasons for not approving Silver's request to change to casual status. The first was that she had no casual positions at all under her supervision, so she had no casual positions into which Silver could have moved.

The second was that Oakley was aware that there was a commitment from University management to hold as many jobs open as possible to be filled by employees affected by a drop in the hospital census and potential layoffs from hospital closures.[5]

Around the same time as Silver's request for a casual position, the University was anticipating the closure of several units in one of the hospitals. One 24-bed nursing unit was closed, with the nurses and secretaries from that unit expected to be absorbed into available open positions.

4This position is also inconsistent with Silver's later testimony that he was still seeking a position as a casual staffing coordinator.

5Kreer and Hinkle differ slightly in their testimony about when the drop in hospital census occurred. Kreer testified that it started dropping in July 1982. Hinkle testified that it did not go down drastically until September 1982. Both Kreer and Hinkle agreed that the census started climbing again in February 1983 when the University was awarded a large MediCal contract. Both also agreed that in August 1982, the time of Silver's resignation, the University was facing potential layoffs as a result of hospital closures.

Additionally, there was a potential reduction in workforce in the whole hospital. The University was in the process of closing the U.C. Hospital, which had 103 beds at that time, and opening up two new units in Long Hospital, which had 72 beds. This left 15 unit secretaries from U.C. Hospital that nursing administration was trying to place into jobs.

For those reasons, on August 10, the day after receiving Silver's resignation letter, Oakley sent the following letter to Silver:

> I accept your resignation of August 9, 1982. Congratulations and I do wish you well. According to the August schedule, including your pre-scheduled vacation, your final work day will be August 18.
>
> I appreciate your interest in and offer to help with staffing in the future, but at this time Nursing Administration is not approving changes in status from career to casual.
>
> Thank you and again, congratulations.

Silver testified that when he received Oakley's letter, he discussed it with her. Silver's account of the conversation was vague, saying only that he was not satisfied with her response. Oakley denied this conversation ever took place. Silver then requested to speak with Karen Day, the associate director of nursing and also Oakley's supervisor. Day and Silver were not able to meet until a day or two later. At the meeting, Silver was still exploring whether there were casual staffing coordinator positions available. This lends credence

to Hinkle's claim that Silver had indicated his intention to first seek a casual staffing coordinator position, and that he would get back to Hinkle if he wanted to pursue working in the float pool.

Day referred to a University policy which supposedly gave her the ultimate right to grant or deny changes from career to casual status, and denied his request. Silver was not shown a copy of that policy at that time. However, Day did have Oakley get a copy to Silver later that same week.

The following week Silver went on vacation and was out of town until August 29.

In either Silver's conversation with Day, or his conversation with Oakley later that week when he was shown a copy of the University policy, Silver raised the possibility of converting to casual status as a unit secretary. On August 18, Oakley sent Silver the following response:

> Karen [Day] and I have discussed your request for change in status from career to casual, if not as a Staffing Coordinator, then as a Unit Secretary. As you and I discussed, there are not now, and haven't been any opportunities to make this change as a Staffing Coordinator, and the Unit Secretary positions are subject to the approvals detailed in the policy you reviewed. In the past, Unit Secretaries may have changed status, but as the policy states, approval will not be granted in the future. In addition, approval could clearly not be granted to someone requiring orientation.
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> . . . . . .

> Please stop at Nursing Payroll before you leave today in order to sign your final papers. If this is not completed now, it will be handled by mail.

The policy to which Day and Oakley referred was only a draft of a policy which reads in pertinent part as follows:

III. Change of Employment Status

A. Career employees

1. The employee will request a change in percentage of time worked from the Head Nurse on the Recruitment/Change of Status form.

2. The Head Nurse may approve changes to no less than 50% time and send the Recruitment/Change of Status form to the Personnel Assistant.

3. If the employee is requesting to work less than 50% time (a casual status with career benefits), the Head Nurse will forward the request to the Assistant or Associate Director of Nursing with any recommendations.

4. The Assistant or Associate Director of Nursing will review each request and make a decision based on the individual circumstances whether to grant the reduction in work time for a specific period of time or recommend that the employee resign and be rehired as a Per Diem RN or LVN or a casual (classifications other than RN or LVN).

5. The employee will be paid all accrued comp time and vacation time prior to change in status to Casual/Per Diem.

There was some vague and uncertain testimony that the draft policy did nothing more than recite the existing practice, however, there was never any evidence submitted showing the

draft policy was ever revised, finalized or ever adopted by the University. One thing that is clear is that Oakley was not correct in claiming the policy prevented approval of changes in the future, within her unit.

Oakley admitted that she didn't state her position clearly and that the letter was a more general statement than it should have been. According to Oakley, what she was trying to tell Silver was that under the circumstances she would not grant approval for the kind of change he was requesting. Silver did not receive the letter immediately because he was on vacation.[6]

Two days later, on August 20, Oakley sent Silver another letter informing him that the use of vacation time following an employee's last working day was prohibited by University policy. She indicated that he would be paid in full for any vacation and comp time on his record, and reiterated that Silver's last working day would be considered August 18, as spelled out in Oakley's August 10 letter.

When Silver returned home from vacation on August 29, he also found a letter from the payroll department dated

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[6]There is a discrepancy about when Silver left on vacation. Oakley's letter of August 10 informed Silver that the University considered his last working day to be August 18. Silver testified that he left on vacation on August 14 or 15, but that he considered his last day on payroll to be August 23. Although the final work date may have had some significance to the timeliness of Silver's grievance on this matter, it is if little importance to the ultimate resolution of this unfair practice charge.

August 23, informing him that his termination had been processed and requesting him to sign some forms so he could get his retirement refund. According to Silver, he called someone in payroll and told them he was not terminating, so there was no need to fill out the forms.

On September 16, almost one full month after his last workday, Silver met with Helen Ripple, director of nursing, to discuss his status. Ripple indicated that she no longer considered him to be an employee of the University, but would meet with him as a courtesy. According to Silver, he discussed with Ripple his feeling that his resignation was contingent upon casual status and that he would reconsider his decision and take back his resignation. Ripple told him his position was absurd. Silver asked if he could apply from the outside and was told that he would be considered as anyone else would. Silver also testified that he asked Ripple if she would consider reinstating a grievance on the subject which, according to Silver, had been declared untimely. According to Silver, Ripple declined. This testimony is confusing and damaging to Silver's credibility in light of the fact that the grievance to which he was referring was not even filed until October 1, 1982, two weeks after the alleged conversation with Ripple took place.

In any case, a grievance was filed on October 1, 1982, on the issue of Silver's employment status as well as removal of

conference forms from his file.[7] On October 11, 1982, Silver's grievance was denied as untimely by the University. Silver appealed that decision and on November 22, 1982, the appeal was denied by University systemwide administration.

Silver testified that he would not have resigned if he had known he could not have converted from career to casual status and that, in fact, his resignation was contingent upon casual status. When questioned on this point by the administrative law judge, Silver indicated that his efforts went into getting a new casual position rather than regaining his old staffing coordinator position. Silver made it clear at the hearing that he was not, even at that point, seeking to retain his former staffing coordinator position.[8]

Silver testified that he turned in an application form to the personnel department some time in fall 1982, however Hinkle testified that she never received that application. Silver apparently did not follow up on the application at that time. Then, in late spring 1983 or early summer, pursuant to informal settlement discussions of this unfair practice charge, Silver reapplied for a casual unit secretary position in the float

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[7]The conference form issue is dealt with later in this decision.

[8]At a later point in the hearing Silver did indicate that he would be willing to take his old job back if it would settle the matter, however, that was clearly a change from an earlier position.

pool. The application was eventually forwarded by personnel to Hinkle, and Silver was interviewed.

Hinkle testified that her first concern in interviewing candidates is the amount of time they would be available to work and the flexibility of their schedule. Her second concern is their qualifications. Hinkle places greater weight on the applicants' availability and schedule flexibility, because personnel has already screened applicants for their job skills. Hinkle looks for applicants who can work either on short notice (within two hours) or frequently enough that she can depend on them being available when she needs them.

On his application Silver indicated that he had a current full-time position that required in excess of 40 hours per week. During the interview, Silver also indicated that his real reason for applying for the position was to get his foot in the door in case another job should come up to which he could transfer. Silver told Hinkle he could be available to work 16-24 hours per week, however, Hinkle had serious doubts that Silver would maintain that commitment for any length of time. Silver was working 8:00 a.m. to 5:00 p.m., which overlapped the two day shifts at the hospital. The morning shift was 7:15 a.m. to 3:45 p.m. The evening shift was 3:15 p.m. to 11:45 p.m. Silver indicated that he could leave his full-time job early a couple of nights a week to make the evening shift. However, that was complicated by the fact that

in his full-time job he had to carry a beeper, which he would have had to give to his boss if he left early. Hinkle doubted any employer would allow that to go on over a long period.

Although Hinkle had no questions as to his job skills, she testified that she did not believe Silver about his work availability, nor did she see much value in investing in an employee who would,

> . . . come in to a job interview and say that they are really looking for another job, but they will take what you can give them for the time being.

Hinkle has had experience with float pool employees who have had full-time positions outside the University, and has found their value minimal. These employees had already been hired when Hinkle became supervisor. She finds they work only when it fits into their schedule, varying from once per month to once every three months. Hinkle never has hired an outside applicant with a full-time job elsewhere, and has on occasion removed casual employees from the float pool because of their lack of availability.

From August 18, 1982, Silver's last day, up through January 1983, Hinkle hired only one outside applicant into the float pool. Patrick Browning was hired in October 1982.9

9The record is devoid of any information about the number of hours he worked or the shifts he worked.

Although outside applicants were not generally hired into the float pool, there were several University employees who transferred to the float pool. The following examples are typical of such transfers.

Laura Klepfer worked at a unit of U.C. Hospital which was shut down. In order to keep from laying Klepfer off, she was transferred into the float pool. In calling float pool employees in to work, Hinkle would give priority to those like Klepfer whose jobs had been phased out.

Mark Barmore was already a casual unit secretary when he transferred into the float pool. By transferring to the float pool it opened up his former job, so the transfer had no adverse impact on the total number of positions available to employees facing layoff.

When Roselyn Livingston's unit was closed she was moved to another unit secretary position with fewer hours than her former position. In order to maintain her same number of hours, she was guaranteed one night per week on the float pool.

Judy Sorko-Ram was transferred out of her regular unit secretary job and into the float pool when a conflict developed between Sorko-Ram and her supervisor.

Marilyn Gerdason-Bowman had been in the float pool in 1981, then transferred out to take a temporary assignment. When the assignment ended in December 1982, she returned to the float pool.

By February 1983 the hospital census started to rise again when the University was awarded a large MediCal contract. By June 1983, the rise in census combined with attrition to open up enough jobs so that all those employees facing potential layoff were no longer threatened, even though all the moves from one hospital to another had not yet been completed. At that time Hinkle started hiring unit secretaries for the float pool again. All those hired, however, had a greater availability and flexibility than Silver. Furthermore, none of those hired at that time had outside full-time employment.

Charging Party produced one witness who was about to take a full-time job, who testified that Hinkle nevertheless promised him a job in the float pool. This was contradicted in a credible manner by Hinkle who testified that the individual in question had indicated to Hinkle that he wanted to discuss being a casual float pool employee. Hinkle told him the procedure, told him they could discuss it, and that she didn't see any problems with it. Hinkle testified that she was not aware the individual was about to get a full-time job outside the University and, if in fact that happened, Hinkle would have a problem hiring him. Hinkle had not yet conducted an interview with the individual, and hadn't yet hired him for casual status for the float pool.

Charging Party also introduced testimony showing that there recently existed a lack of secretarial coverage on weekends and

evenings that Silver could have filled. Hinkle disputed this claim, explaining that there had been some openings on weekends and evenings, however, they had been filled on a permanent basis, and that the lack of coverage was a temporary situation. According to Hinkle, the only current need for coverage is for the Monday through Friday day shift.

Conference Forms Issue

The Charging Party entered a substantial amount of evidence into the record about two conference forms (similar to written warning notices) which were included in Silver's personnel file. They can be summarized as follows:

On August 13, 1982, several days after his letter of resignation, Silver wrote to Oakley asking that she remove two 1979 and 1980 conference forms from his personnel file. Oakley was not sure if that was proper, so she consulted someone in the personnel office and was told that letters should not be removed from personnel files without permission of the author.

Therefore, in Oakley's August 18 letter to Silver, she wrote,

> . . . according to Personnel Policy, items are not to be removed from Personnel files without the consent of the author.

On September 13, prior to his meeting with Ripple, Silver wrote to Ripple requesting that she remove the two conference forms from his file. During their September 16 meeting, Ripple told Silver she would get back to him about the forms.

In Silver's October 1 grievance he included a request that the conference forms be removed from his file. On October 7, four days prior to Silver's grievance being rejected as untimely, the forms were removed from Silver's file and returned to him.

The forms were not entered into the record. There was no evidence whatsoever about the nature of the conference forms, nor about the circumstances surrounding their placement into Silver's file. When Silver was asked on cross-examination if the conference form from Kreer, referred to earlier in this decision (about improperly disseminating information addressed to "hospital directors"), was one of the conference forms he was seeking to have removed from his file, Silver said that he could not remember.

This evidence was not mentioned in Charging Party's brief and its purpose remains a mystery. If its purpose was to demonstrate anti-union animus as support for Charging Party's claim of unlawful motivation, it does not do so, especially since Silver's request was granted. If it was meant to show the conference forms were discriminatory in nature, there is no evidence demonstrating that. If it was meant to show harassment, it doesn't do that, because the forms were returned even though Silver's grievance on the subject was held to be untimely. Finally, if it was meant to show Oakley's lack of understanding of University policy, it is redundant. Oakley's

own testimony was more than sufficient to demonstrate her lack of understanding of University policies.

Arguments of the Parties.

The Charging Party argues that Silver had been promised a casual position and would not have resigned if he had known he would not have been allowed to work as a casual employee. Charging Party also argues that there exists a history of anti-union animus and that management's reasons given to Silver hinge on a misapplication of a University policy which also violated the University's obligation to meet and discuss the policy with the Charging Party. According to Charging Party, management's current explanations for its actions involving the drop in census and potential layoffs of unit secretaries are inconsistent. Furthermore, Charging Party argues that the University's refusal to hire Silver into the float pool in the summer of 1983 was an additional violation.

The University argues that the Charging Party has failed to show that any of the University's actions were motivated by Silver's protected activities. According to the University, Silver resigned and indicated he wished to be considered for casual status. He didn't arrange for casual status with the supervisor prior to his resignation. At no time was he promised such status, nor did Silver follow the proper procedure with the personnel office. Silver was told such changes were not being approved, and he left on vacation. When

he returned he was no longer a University employee. At no time did he ever tell his supervisor he was not resigning, nor did he make clear that his resignation was contingent upon his change to casual status. The University argues that Silver was denied casual status employment in August 1982 due to potential hospital closures, and in the summer of 1983 primarily because of his lack of availability.

DISCUSSION

Section 3571(a) of the Act prohibits discriminatory action against an employee for engaging in conduct protected by the HEERA. In Novato Unified School District (4/30/82) PERB Decision No. 210, the Board set forth the standard by which charges alleging discriminatory conduct under section 3571(a) are to be decided. The Board summarized its test in a decision under HEERA issued the same day as Novato;

> . . . a party alleging a violation . . . has the burden of making a showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision to engage in the conduct of which the employee complains. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected conduct. As noted in Novato, this shift in the burden of producing evidence must operate consistently with the charging party's obligation to establish an unfair practice by the preponderance of the evidence. (California State University, Sacramento (4/30/82) PERB Decision No. 211-H at pp. 13-14.)

The test adopted by the Board is consistent with precedent in California and under the National Labor Relations Act (NLRA) requiring the trier of fact to weigh both direct and circumstantial evidence in order to determine whether an action would not have been taken against an employee but for the exercise of protected rights. See, e.g., Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Ca.3d 721, 727-730; Wright Line, Inc. (1980) 251 NLRB 150 [105 LRRM 1167] enf., in part (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513]; NLRB v. Transportation Management Corp. (6/15/83) _____ U.S. _____ [113 LRRM 2857].[10]

Hence, assuming a prima facie case is presented, an employer carries the burden of producing evidence that the action "would have occurred in any event." Martori Brothers Distributors v. Agricultural Labor Relations Bd., supra, 29 Ca.3d at 730. Once employer misconduct is demonstrated, the employer's action,

> . . . should not be deemed an unfair labor practice unless the Board determines that the employee would have been retained "but for" his union membership or his performance of other protected activities. (Ibid.)

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[10]The construction of similar or identical provisions of the NLRA, as amended, 29 U.S.C. 151 et seq., may be used to guide interpretation of the EERA. See, e.g., San Diego Teachers Assn, v. Superior Court (1979) 12 Ca.3d 608, 616. Compare section 3571(a) of the Act with section 8(a)(3) of the NLRA, also prohibiting discrimination for the exercise of protected rights.

Silver's Protected Activity

Applying that test to this case, it is found that Silver did indeed engage in protected activity. Silver had been treasurer of the Local for several previous years, and his involvement with the union was generally known throughout his work place. This, however, by itself, is insufficient evidence from which an inference can be drawn that Silver's union activities were of the nature that would invite reprisals. Silver had never filed a grievance on behalf of another employee.[11] Furthermore, no witnesses for either the Charging Party or the University had ever seen Silver handing out union literature or posting union literature on bulletin boards.

Charging Party also argues that other evidence of a history of anti-union animus gives weight to the inference of unlawful motivation in this instance. The first incident cited was the April 1980 Weaver memo reciting Kreer's comments about Silver's possible union activity. Although the memo demonstrates anti-union animus on Kreer's part, and possibly Weaver's, neither of those employees had anything to do with the decision to deny casual status to Silver. Weaver left the University over a year and one-half prior to Silver's resignation. Kreer,

[11]The only grievance Silver ever filed was his own, which was filed after he had resigned and was denied casual status. Therefore, that grievance could not have had a motivating impact on Oakley's decision.

although still at the University, was not aware that Silver had asked for casual status at the time of his resignation. Silver merely told her that he was resigning from the University to accept another job. There was no evidence that she had any involvement whatsoever in either Oakley's or Hinkle's decision not to grant casual status.

The second incident was the May 1980 conference form given to Silver for unauthorized dissemination of information addressed to hospital directors. This incident is unconvincing for the same reason as the Weaver notes. It occurred over two years earlier, and Kreer had nothing to do with the decision to deny casual status to Silver.

The next two incidents involved the throwing away of union literature sometime during 1980 or 1981. The vagueness of testimony regarding these incidents and their remoteness in time require that little, if any, weight be given to this evidence.

Silver's role in representing other staffing coordinators in their scheduling disputes with Oakley over the night shift addition is, however, also protected activity. Section 3565 of HEERA states in relevant part,

> Higher education employees shall have 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 and for the purpose of meeting and conferring.

To find any of Silver's actions regarding his work schedule protected under this section, it must be found that he actively participated in an employee organization, and that the organization existed for the purpose of representation regarding matters of employer-employee relations. See Monsoor v. State of California, Department of Developmental Services (7/28/82) PERB Decision No. 228-S (hereafter Monsoor). Under the act, an employee organization is defined in section 3562(g) as,

> . . . any organization of any kind in which higher education employees participate and which exists for the purpose, in whole or in part, of dealing with higher education employers concerning grievances, labor disputes, wages, hours and other terms and conditions of employment of employees. . . .

Taking guidance from the private sector, the Board has interpreted similar language under the State Employer-Employee Relations Act to mean that a given aggregation of employees, to be considered an employee organization, need not be formally constituted, have formal membership requirements, hold regular meetings, have constitutions or by-laws, or in any other manner conform to the common definition of an "organization." Rather, the Board placed the central focus on whether the group has, as a key purpose, the representation of employees on employment-related matters. Monsoor, supra, p. 7. Under this test, the Board observed that even two employees who act in concert to present grievances about cuts in overtime and loss

of jobs may be viewed to have constituted themselves an employee organization because they had joined together to represent employees concerning working conditions. It follows that interfering with employees who engage in such activity has the effect of discouraging employees in general from continuing to act in concert through an employee organization. Ohio Oil Company (1951) 92 NLRB 1597 [27 LRRM 1288] cited with approval in Monsoor, supra.

In Silver's efforts regarding the scheduling process, he was clearly representing the other staffing coordinators at the University regarding matters within the scope of representation, namely, wages and hours. The fact that he was leading the fight not in his role as a union official, but rather as a fellow staffing coordinator, does not alter the protected nature of his activity.

Furthermore, although management's knowledge of the specific nature of Silver's involvement with the union was never clearly established, that is not the case with respect to his involvement with the scheduling problems. The primary management representative that Silver dealt with on that issue was Gail Oakley, the supervisor who made the decision not to grant Silver casual status approximately one year later.

Oakley's Decision

The University argues that Oakley's decision was motivated by two factors. First, that she did not have any casual

positions under her control. That fact was undisputed at the hearing. Second, that the University was facing potential layoffs and the University administration was making an effort to hold as many open positions as possible for those affected by the layoff.

This second reason is disputed by the Charging Party, who argues that the testimony of Oakley, Kreer and Hinkle was inconsistent and unconvincing. Quite the contrary is true. Although Hinkle and Kreer differed in their testimony about when the census dropped, all three witnesses agreed that in August 1982 at the time of Silver's resignation, the University was facing a layoff due to hospital closures. This meant that positions would have to be either found or created for a number of unit secretaries.

That testimony is even supported by Silver, who testified that the hospital moves were supposed to do away with a number of full-time positions, but that full-time employees were not going to be laid off because they had been guaranteed there would be jobs found for them.

Silver testified that the hospital closures could have, in fact, created more jobs because it was at the end of the summer when turnover was high anyway, and because a number of people would quit rather than change positions in the hospital reorganization. This testimony, however, was speculation on Silver's part and unsupported by the record. Thus, at a time

when the University was having to find jobs for full-time employees whose positions had been eliminated, Silver was resigning and then asking to be placed in an open job as a casual employee.

The Charging Party disputes this characterization, arguing rather that Silver's resignation was contingent upon him being given casual status. This argument is simply not credible. Silver never even raised the subject of casual status with his supervisor prior to his resignation. Furthermore, there was not a single occasion, either before or after his resignation, in any conversation with Hinkle, Oakley, Kreer, Day or Ripple that Silver said outright that he would not resign if he could not have casual status. At most, Silver indicated to Ripple almost a month after he had resigned that he might reconsider his decision and take back his resignation. The day after receiving Silver's resignation letter, Oakley informed him that she would not approve the change to a casual job, and yet Silver still left on vacation and did not return until even after his proposed last day on the University payroll. These are not the actions of someone whose resignation was contingent upon anything.

Nor is it any easier to believe that Silver's resignation was merely a procedural step in changing his status from career to casual. If that were the case, it would seem reasonable that he would have raised the issue with his supervisor,

Oakley, prior to his resignation. Furthermore, if Silver had been promised a casual job by Hinkle prior to his resignation, a fact disputed by Hinkle, it would have been logical for Silver to have returned to Hinkle after being denied by Oakley, and pursue the issue with Hinkle. Hinkle denies that that ever happened, and her testimony is credited.

Charging Party bases a large part of its argument upon Oakley's misapplication of the draft policy regarding changes in status. It is clear that the policy did not require that Silver's request be denied, and that Oakley was incorrect when she stated in her August 18 letter that it did. However, Oakley amply demonstrated her lack of understanding of University policy on numerous occasions, in both testimony and her actions, and it is more likely that she cited the policy in a clumsy and erroneous attempt to add weight to what was already an appropriate decision under the circumstances.

Although Oakley's statement lessens her credibility and arguably indicates contradictory justification for the University's action, the weight of evidence indicates Silver was denied casual status for the reasons given by Oakley in her testimony, specifically, that she had no such openings under her control and the very real threat of the layoff facing the University.[12]

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[12]It should be noted that in reaching this conclusion no weight whatsoever is given to the University's argument that

Furthermore, even if Silver's request was denied by Oakley for unlawful reasons, there were no such jobs under Oakley's control. Therefore, what Silver was denied was an opportunity to be considered for the casual float pool position by Hinkle.

Denial of Casual Status by Hinkle

There was no evidence of any animosity towards Silver by Hinkle. Quite the contrary is true. They seemed to have had a cordial relationship. Although Hinkle was aware that Silver was an officer in the union, they had had no negative incidents regarding his union involvement.

As mentioned earlier, Hinkle was one of the most credible witnesses at the hearing, and it is clear that she based her decision not to hire Silver into the float pool on reasons other than his protected activity.

Charging Party says Silver made it clear that he would have been willing to work 16 to 24 hours per week, which even Hinkle admitted would have been an acceptable workload. He also indicated he would be willing to leave his full-time job early a couple of days a week to make the University's evening shift. According to Silver, he told his new employer that he was seeking evening and weekend work with the University, and that his employer actually encouraged it. Additionally,

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Silver's efforts were deficient because he never went through proper personnel department procedures. No management employee ever told Silver that he had to work though the personnel office. To fault him for not doing so is unreasonable.

Silver's new employer was a nursing registry, therefore we should assume they were aware that the University's evening shift began between 3:00 and 3:30 p.m., thus requiring Silver to leave work early.

However, just because Silver said he would be available to work does not mean that Hinkle had to believe him in the face of evidence to the contrary. Hinkle had had experience with float pool employees with outside full-time jobs in the past, with the results being less than satisfactory. Here, Silver indicated he was working in excess of 40 hours per week in his full-time job. Hinkle knew that his hours overlapped with the University's, and that for Silver to leave early he would have to give his beeper to his supervisor to cover for him. She reasonably felt that Silver's supervisor might not be willing to take on Silver's duties over a long period with any consistency. Additionally, Hinkle was not very impressed with Silver's attitude during the interview, which would naturally increase concern about his willingness to work the 16 to 24 hours per week he said he would be available. Therefore, Hinkle's actions appear justified and not based upon unlawful motivation.

Failure to Meet and Discuss

The Charging Party alleges in its charge that Silver was shown a proposed policy which would have prevented all changes from career to casual status. Furthermore, Charging Party

alleges that the policy had not been previously applied to clerical employees, nor had it been circulated to employee organizations for review and comment. This was, according to the Charging Party, a violation of the University's duty to provide the non-exclusive representative of its employees with a reasonable opportunity to meet and discuss pursuant to California State University, Sacramento (4/30/82) PERB Decision No. 211-H.

That allegation is not supported by the record. Oakley gave Silver a draft of a policy claiming that it provided one thing when, in fact, on its face it did not. There is no evidence that the draft was ever anything more than a draft. Charging Party admitted there was no evidence that it had ever been adopted. Even if it had been adopted, there was no evidence showing that the draft policy was a change to the existing practice. Furthermore, there was no showing that Oakley's assertions about the policy had any generalized effect or continuing impact on the terms and conditions of employment of bargaining unit members as required by Grant Joint Union High School District (2/26/82) PERB Decision No. 196, and Placer Hills Union School District (11/30/82) PERB Decision No. 262. A mere isolated act against a single employee is insufficient to establish a unilateral change in or repudiation of an established policy. North Sacramento School District (12/20/82) PERB Decision No. 264.

The record in this case shows little more than a single instance of a supervisor incorrectly citing a draft of a policy about which we have little evidence.

CONCLUSIONS

Cory Silver was denied casual status by Gail Oakley for two reasons. First, because she had no such positions under her control. Second, because the University was trying to keep positions open for those employees facing a potential layoff. Silver was denied the position as a casual unit secretary on the float pool by Sylvia Hinkle primarily due to a perceived lack of availability for work. Charging Party has failed to prove by a preponderance of the evidence that either of those decisions were unlawfully motivated by Silver's protected activity.

Charging Party has also failed to establish that the University unilaterally changed the practice regarding changes from career to casual status in violation of its duty to meet and discuss the issue with the Charging Party. Thus, it is concluded that the University did not interfere with any rights protected by the HEERA.

PROPOSED ORDER

Based upon the findings of fact, conclusions of law and the entire record in this matter, the unfair practice charge in Case No. SF-CE-143-H filed by the American Federation of State, County and Municipal Employees Local 1650 against the Regents

of the University of California (San Francisco Medical Center) and the incorporated PERB complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on May 17, 1984, 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 Public Employment Relations Board at its headquarters office in Sacramento before the close of business (5:00 p.m.) on May 17, 1984, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305.

Dated: April 27, 1984

JAMES W. TAMM
Administrative Law Judge