**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| UNIVERSITY PROFESSIONAL AND TECHNICAL EMPLOYEES, CWA LOCAL 9119, | ) | |
| Charging Party, | ) | Case No. SF-CE-428-H |
| v. | ) | PERB Decision No. 1182-H |
| THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, | ) | January 31, 1997 |
| Respondent. | ) | |

Appearances; Eggleston, Siegel & LeWitter by M. Jane Lawhon, Attorney, for University Professional and Technical Employees, CWA Local 9119; Edward M. Opton, Jr., Attorney, for the Regents of the University of California.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the University Professional and Technical Employees, CWA Local 9119 (UPTE) to an administrative law judge's (ALJ) proposed decision (attached). The ALJ dismissed UPTE's complaint alleging that the Regents of the University of California (University) violated section 3571(a), (b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA)[1] by unilaterally changing

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

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

employees' work schedules, reassigning employees from the graveyard or owl shift to the day shift, and abolishing the accelerator operator supervisor classification and transferring incumbent employees into the principal accelerator operator classification.

The Board has reviewed the entire record in this case including the original and amended unfair practice charges, the ALJ's proposed decision and the filings of the parties.[2] The Board affirms the ALJ's decision in part, and reverses it in part, in accordance with the following discussion.

DISCUSSION

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

The Board finds the ALJ's conclusions of law concerning the change in the work schedules of employees working on the Cyclotron at the Lawrence Berkeley National Laboratory

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

[2]UPTE's request to present oral argument to the Board was denied on January 17, 1997.

(Laboratory) to be free of prejudicial error and hereby adopts them as the decision of the Board itself. UPTE offers no exceptions to the ALJ's dismissal of its charge relating to this conduct.

The Board finds the ALJ's conclusions of law concerning the abolition of the accelerator operator supervisor classification and transfer of incumbent employees into the principal accelerator operator classification to be free of prejudicial error and hereby adopts them as the decision of the Board itself. UPTE offers no exceptions to the ALJ's dismissal of its charge relating to this conduct.

UPTE excepts only to the ALJ's dismissal of its allegation that the University violated the HEERA by unilaterally changing the work schedules and shifts of employees working on the Laboratory Advanced Light Source (ALS) machine. The ALJ found this allegation to be untimely.

HEERA section 3563.2 precludes PERB from issuing a complaint based on conduct that occurred more than six months prior to the filing of the charge.[3] Since the six-month statute of limitations is jurisdictional, the parties cannot waive it and

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[3]HEERA section 3563.2 provides, in pertinent part:

> (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.

need not affirmatively plead the defense. (California State University, San Diego (1989) PERB Decision No. 718-H.) The charging party must establish timeliness as part of its prima facie case. (Regents of the University of California (1990) PERB Decision No. 826-H.) The limitations period begins to run when the charging party has actual or constructive notice of the employer's clear intent to implement a unilateral change in policy. (Ibid.)

The ALJ concluded that a February 10, 1995, letter from the University provided UPTE with notice of the University's clear intent to change the work schedules and shifts of ALS employees. Therefore, the ALJ found the ALS work schedule and shift change allegation within UPTE's August 18, 1995, unfair practice charge untimely.

On appeal, UPTE argues that the February 10, 1995, letter from the University, concerning the ALS employee work schedule and shift changes, did not indicate the University's clear intent to implement the changes. UPTE argues that the letter specifically makes the University's implementation contingent on UPTE's agreement with the changes. Rather than agreeing, UPTE responded with a February 14, 1995, request to bargain over the changes. UPTE asserts that the earliest date it could have known of the clear intent to implement the work schedule and shift changes was February 21, 1995, the date the University unilaterally implemented them.

The University responds by supporting the ALJ's dismissal of the allegations as untimely. Furthermore, in the event the Board finds the allegations timely, the University asserts that its decision to eliminate the ALS owl shift is not negotiable. The University argues that its decision to eliminate night operations is a matter of managerial prerogative that lies outside the scope of representation. (Anaheim Union High School District (1981) PERB Decision No. 177.) Therefore, any decision issued by PERB on the merits of UPTE's allegations should omit an order to return to the operating hours status quo.

HEERA's statute of limitations period is a mandatory jurisdictional bar to charges filed more than six months after the date of the alleged unfair practice. (California State University, supra. PERB Decision No. 718-H.) Neither the parties or the Board may waive timeliness and the parties need not affirmatively plead the defense. (Regents of the University of California, supra. PERB Decision No. 826-H; Davis Teachers Association. CTA/NEA (Heffner) (1995) PERB Order No. Ad-270.)

For an alleged unilateral change violation, the statute of limitations commences on the date the charging party has actual or constructive notice of the employer's clear intent to implement the change. (Regents of the University of California, supra. PERB Decision No. 826-H.) Therefore, the key consideration in determining timeliness of the unilateral change allegations here is the date UPTE received notice of the

University's clear intent to take the action, not the date the University decided to take the action.

The University's February 10, 1995, letter to UPTE concerning the ALS work schedule and shift changes concludes, "If I have not heard from you by the close of business on February 24, 1995, I will assume you agree and we will proceed accordingly." This statement does not convey the University's clear intent to make the changes described irrespective of UPTE's response. UPTE could reasonably infer from this statement that if the University were to hear from UPTE by February 24, 1995, some other course of action would ensue. On February 14, 1995, UPTE responded to the University's letter with a request to meet and confer. Interestingly, the University implemented the ALS work schedule and shift changes on February 21, 1995, a date not referenced in its February 10 letter to UPTE. Clearly, UPTE received no notice of the University's intent to make the changes effective February 21, 1995.

Based on the wording of the University's February 10, 1995, letter, and the University's subsequent unannounced decision to implement the action on February 21, 1995, the Board concludes that UPTE did not have notice of the University's clear intent to proceed with the ALS work schedule and shift changes until the University implemented them on February 21, 1995. Therefore, the HEERA statute of limitations did not begin to run until

February 21, 1995, and the ALS schedule and shift change allegation in UPTE's August 18, 1995, unfair practice charge is timely.

ORDER

The Board hereby REMANDS Case No. SF-CE-428-H to the Chief ALJ for further proceedings in accordance with the foregoing discussion.[4]

The allegations concerning work schedule changes for Cyclotron employees, and the abolition of the accelerator operator supervisor classification and transfer of incumbent employees into the principal accelerator operator classification, are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Johnson and Dyer joined in this Decision.

[4]Since this case is being remanded to the Chief ALJ, the Board does not address the University's argument that its decision to eliminate ALS night operations is a matter of management prerogative outside the scope of representation.

**STATE OF CALIFORNIA**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| UNIVERSITY PROFESSIONAL AND TECHNICAL EMPLOYEES, CWA LOCAL 9119,<br><br>Charging Parties,<br><br>v.<br><br>THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,<br><br>Respondent. | ) | Unfair Practice Case No. SF-CE-428-H<br><br>PROPOSED DECISION (9/23/96) |

Appearances: Eggleston, Siegel & LeWitter by M. Jane Lawhon, Esq., for University Professional and Technical Employees, CWA Local 9119; Office of the General Counsel of the University of California by Edward M. Opton, Jr., Esq., for Regents of the University of California.

Before Ronald E. Blubaugh, Administrative Law Judge.

## PROCEDURAL HISTORY

A union representing employees at a research laboratory contends here that the university employer changed certain employee work shifts, hours and job classifications. The union, which was newly certified at the time, argues that the changes were made without prior negotiations. Procedurally, the university asserts that the charge should be dismissed as untimely filed. On the merits, the university acknowledges that some work shifts were changed but contends that at least in part the schedule changes were consistent with past practice.

This action was commenced on August 18, 1995, when the University Professional and Technical Employees, CWA Local 9119 (UPTE or Union), filed an unfair practice charge against the Regents of the University of California (University). There

followed a first amended charge on November 1, 1995. The charges alleged that the University made certain changes in employee work hours at the Lawrence Berkeley National Laboratory. The Office of the General Counsel of the Public Employment Relations Board" (PERB or Board) followed on January 10, 1996, with a complaint against the University.

The Union on February 27, 1996, filed a second amended charge which for the first time set out these additional allegations:

1. that during or about the month of April 1995, the University unilaterally changed the work schedule for unit members at the 88-inch Cyclotron from seven to 21 days; and

2. that "sometime after UPTE's certification" the University removed all incumbents from the position of accelerator operator supervisor into the position of principal accelerator operator and then abolished the position of accelerator operator supervisor.

The second amended charge was followed on April 12, 1996, by a University motion to dismiss for Untimeliness. The Union responded to the motion to dismiss on April 23 and made a motion to amend the complaint. The motion to dismiss was denied by the undersigned on the ground that through their pleadings the parties had set out a factual dispute about when the Union knew of the changes. Accordingly, a first amended complaint issued by the undersigned on April 25, 1996.

The first amended complaint sets out three causes of action. The complaint alleges that on or about February 21, 1995, the University transferred certain employees from the standard, five-day 40-hour week to a 21-day rotating work schedule. Under the 21-day schedule, the affected employees are required to work seven days on, followed by three days off, followed by seven days on, followed by four days off. The complaint next alleges that on or about February 21, 1995, the University eliminated the graveyard or "owl" shift and transferred affected employees to the day shift causing a reduction in pay. Finally, the complaint alleges that the University abolished the position of accelerator operator supervisor and transferred employees into the new position of principal accelerator operator at a reduction in pay. By these acts, the complaint alleges, the University violated Higher Education Employer-Employee Relations Act (HEERA) section 3571(a), (b) and (c).[1]

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[1]HEERA is found at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3571 provides as follows:

> It shall be unlawful for the higher education employer to do any of the following:
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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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

The University filed an answer to the second amended unfair practice charge but never filed an answer to the complaint or the first amended complaint. A hearing into these matters was conducted in San Francisco on June 20 and 21, 1996. The University elected not to file a brief. With the filing of the Union's brief, the case was submitted for decision on September 12, 1996.

## FINDINGS OF FACT

The University is a higher education employer under HEERA. Since December 1, 1994, UPTE has been the exclusive representative of University unit no. 9, an appropriate, system-wide unit of 3,800 University technical employees.

The events at issue took place at the Lawrence Berkeley National Laboratory (Laboratory), a research laboratory on the Berkeley campus of the University of California. The employees affected by the alleged changes work on two giant machines at the Laboratory, the Advanced Light Source (ALS) and the 88-inch Cyclotron (Cyclotron).

The ALS was described as a machine approximately the size of two football fields that is a combination of several thousand smaller machines, all of which have to work simultaneously. The ALS accelerates electrons to a very high energy and then injects them into a storage ring where they circulate for periods of time. As they circulate, the electrons give off energy as light

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

in the x-ray and vacuum ultraviolet region of the spectrum, invisible to the human eye. The light is used by experimenters. The machine can be dangerous and employees working with it are required to follow significant safety rules. The ALS is the only machine of its type in the United States and is used by experimenters from throughout the country and world.

The Cyclotron makes particle accelerator beams for use in research by scientists and physicists. Like the ALS, the Cyclotron is composed of many smaller machines which must work simultaneously. The Cyclotron is smaller than the ALS but still occupies a building that was likened to the size of a football field. The Cyclotron is used by experimenters from locations away from Berkeley.

During or about the month of February 1995, the University changed the pay status of certain Laboratory employees from salaried to hourly. Among those affected were accelerator operators and electronic engineering technologists, job classes within the bargaining unit represented by UPTE. The apparent reason for the change was a determination by the University that the affected employees were not qualified as exempt under the federal Fair Labor Standards Act. The change in pay status meant that the affected employees would become entitled to premium pay when working overtime, something for which they were not eligible as salaried employees.[2]

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[2]The Union got notice of the change. The record does not disclose whether the Union demanded to bargain about the change or otherwise protested. In any event, the change of salary

Chancre in Hours at the ALS

Prior to February 21, 1995, the work schedule for accelerator operators working the day or swing shifts at the ALS was a five-day work week with two days off. Employees on those two shifts rotated back and forth between day and swing on a fixed schedule. Employees on the "owl" shift worked four ten-hour days which did not rotate. The work schedule was Monday through Friday and employees did not regularly work on weekends. Before February 21, 1995, the standard work week for electronic engineering technologists at the ALS was five days, Monday through Friday, weekends off.

On February 21, 1995, the Laboratory implemented a 21-day rotating shift for ALS accelerator operators and electronic engineering technologists. Under the 21-day schedule, employees work seven consecutive days, followed by three days off, followed by seven consecutive days of work, followed by four days off. The 21-day cycle then repeats.

Also on February 21, 1995, the Laboratory eliminated the owl shift at the ALS. Suzanne Daly, an accelerator operator who was working the owl shift, testified that her supervisor told her that the shift was being eliminated because some of the experimenters using the ALS did not like to work at night. The owl shift ultimately was restored at the ALS on September 17, 1995.

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status is not an issue in the present case.

Employees receive premium pay when working both the owl and swing shifts. The premium for the owl shift is a bonus of 15 percent of the employee's base pay. The premium for the swing shift is 7.5 percent. Employees transferred off the owl shift lost the premium pay for the period that the shift was eliminated.

Change in Hours at the Cyclotron

As of December 1, 1994, the date UPTE was certified as exclusive representative, the work schedule at the 88-inch Cyclotron was eight hours a day for five days per week with two days off. On or about April 1, 1995, every full-time accelerator operator at the Cyclotron was placed on the 21-day schedule of seven days on duty followed by three days off followed by seven days on followed by four days off. Only one operator was not placed on the 21-day schedule and she was a part-time employee.

Unlike the ALS, the Cyclotron has a history of employees working the 21-day schedule. The operation schedule for the Cyclotron is determined by a program committee that reviews researcher applications and decides which experiments to conduct. The operation schedule then dictates the work schedule. Historically, a 21-day schedule has been worked by some or all operators whenever the Cyclotron is operating at or near full capacity.

Another difference between the work schedules at the Cyclotron and the ALS is that the Cyclotron has a history of some employees remaining on a traditional seven-day schedule while

others worked the 21-day schedule. The record contains the work schedules of Cyclotron employees from June of 1991 through February of 1996. The evidence shows that from June through September of 1993, all operators at the Cyclotron worked the 21-day schedule of seven on, three off, seven on, four off. From October of 1993 through August of 1994, two operators worked the 21-day schedule while four worked the traditional seven-day schedule of five work days followed by two days off. From September of 1994 until the change in April of 1995, all operators worked the seven-day schedule. Since April of 1995, employees have worked the 21-day schedule except during shutdown periods when they went back to a seven-day schedule.

Effects of the 21-Day Schedule

Employees working the 21-day schedule do not work the same number of hours in a three-week period as do employees on a traditional seven-day schedule. During a 21-day period, an operator working a traditional seven-day schedule will have worked 15 days and had six days off for a total of 120 hours of work. Over the same period, an operator on the 21-day schedule will have worked 14 days and had seven days off for a total of 112 hours of work.

For salaried employees, a switch from seven to 21-day schedules would have no impact. But when the Laboratory changed the method of pay for accelerator operators and electronic engineering technologists to hourly, the 21-day schedule had salary implications. To compensate for the drop in pay that

would have occurred with a conversion to the 21-day schedule, the Laboratory imposed mandatory overtime of 30 minutes per work shift for employees on the 21-day schedule. The overtime was divided into two 15-minute increments, one prior to the start of the shift and one after the completion of a shift.

With the overtime hours, the total hours worked by employees on a 21-day schedule was 119. Although this remains one hour less than an employee would work on a traditional seven day schedule, the pay compensation was higher because the overtime was compensated at the rate of time and a half.

Overtime, however, is not considered part of an employee's base pay by the University. One employee testified that as a result of the changeover to the 21-day schedule her base pay was reduced by $300 per month.

Both parties presented a considerable amount of evidence about whether the assignment of employees to work a 21-day schedule would affect future retirement benefits. Under the University retirement plan benefits are calculated on the basis of three components fixed at the time of retirement: service credit (months of covered employment), age and highest average plan compensation. An employee's highest average plan compensation is based upon that employee's highest rate of pay, not actual earnings.

The problem created by the 21-day schedule is that employees working the schedule have a reduced number of hours in certain reporting periods. Since part time employees are not covered and

overtime hours do not count toward covered compensation, employees on the 21-day schedule were not receiving the correct amount of service credit. Lorna Rodriguez, a benefits representative for the Laboratory, described the incorrect reporting as a problem of system design. She said employees were coming up short on hours reported to the retirement system.

She testified that when the problem was discovered, the Laboratory made retroactive adjustments in the hours reported to the retirement system. She said that these adjustments were made for employees at the ALS and the Cyclotron. Ms. Rodriguez testified that the reporting mechanism still has not been corrected so individual adjustments are made each month in the retirement service credits for each affected worker. She testified that a system correction is being designed by the University to ensure that correct reporting is made automatically in the future.

The change in hours had one other potential effect on employee retirement compensation. Because shift differential is counted as covered compensation, the highest average plan compensation possibly could be lower for employees who lost shift differential. There would be no effect, however, if such an employee continued to work and his or her subsequent compensation rose to a level higher than what would have been covered with the shift differential included.

Change in Job Title

At the time UPTE was certified as exclusive representative in unit 9, there existed at the Laboratory a job classification entitled accelerator operator supervisor, classification code 374.3. This position was in the bargaining unit represented by UPTE. During or about late January or early February of 1995,[3] the Laboratory eliminated the classification of accelerator operator supervisor. Persons occupying the position were transferred to the position of principal accelerator operator, classification code 650.2.

The incumbent employees suffered no loss in pay as a result of the change. Regarding a co-worker, one witness testified that as a result of the change "[h]e was demoted and kept the same . pay." Regarding another co-worker, the same witness testified that as far as she knew, the co-worker's pay was not affected by the change in job classification. The pay range for the 650.2 position is lower than that for the 3 74.3 position.

When UPTE Learned of Changes

Libby Sayre is the president of UPTE and the chief negotiator. She is the person that the University notifies about all planned changes in negotiable subjects that would affect members of unit 9. Ms. Sayre testified that she did not receive notification from the University about the changes in hours at either the ALS or the Cyclotron.

[3]The only evidence in the record about when this change occurred is through the affirmance by a witness to the date posed in a question. (See Reporter's Transcript, Vol. I, p. no. 35.)

However, the University introduced a letter sent by the University to Ms. Sayre on February 10, 1995. The letter clearly provides notice of an intent to change the hours of unit members at the ALS.[4] In relevant part, the letter reads:

> Moving from the current 5 day schedule of Monday (swing shift) through Friday (swing shift), we plan to operate the Storage Ring from Tuesday (day shift) through Sunday (swing shift). The shift change will allow approximately the same number of operating hours as was previously available, but with greater prime operating hours of access to users for 6 days.
>
> The impact of this change to the assigned Technical employees (Accelerator Operators and Electronic Engineering Technologists) is that owl shift work will be temporarily eliminated. The employees will work on three week rotations, and during any one week an employee will work no more than 5 days. To provide maximum coverage and allow for the needed start-up each day, each work shift will be 9 hours. When the employees work a swing shift, applicable shift differential will be provided in accordance with policy.

When given a copy of the letter on cross-examination, Ms. Sayre testified that the letter refreshed her recollection and that she believed she did receive it on or about February 10. She said that when received the letter she,

> . . . didn't really under -- connect this with the seven/four/seven/three idea, but I must say that I spent several months in a state of a lot of confusion about exactly how the shifts worked and were proposed to work when they changed.

Nevertheless, it is clear that Ms. Sayre knew that the University was planning to make shift changes affecting employees

[4]See Respondent's Exhibit D.

at the ALS. On February 14, 1995, Ms. Sayre sent the University a written demand to bargain.[5] Her letter reads:

> It has come to our attention that management at the Lawrence Berkeley Lab proposes to implement a rotation shift for it[s] Accelerator Operators on the ALS Operations Crew. This is clearly an issue within the scope of bargaining.
>
> The University has an obligation to bargain over this decision, and an obligation to maintain the status quo pending the satisfaction of its bargaining obligation.
>
> Please send us the relevant information. I would be glad to make some arrangement with you to discuss this further. Thank you.

When UPTE learned about the planned change in hours at the Cyclotron is much less clear. Ms. Sayre testified that for a time she did not know of the existence of the 88-inch Cyclotron. She testified that she "wasn't sure there were any accelerators other than the ALS." She acknowledged that she was concerned that if the University had made a change in hours at one place in the Laboratory it might have made it at another.

Ms. Sayre testified that when she first learned of the existence of the 88-inch Cyclotron, whenever that was, she commenced an investigation. She said she asked the UPTE organizer assigned to the Laboratory to find out if the hours of employees at the 88-inch Cyclotron had been changed. Ultimately, she testified, what she learned from her organizer was that the situation at the Cyclotron was not the same as at the ALS. She said she understood "that it wasn't exactly the same, but

[5]Charging Party Exhibit No. 4.

something had happened to their shifts and hours." Therefore, she said, she asked the University for information about any hours changes at the Cyclotron.

This testimony varies from other evidence, in particular a letter of September 19, 1995, which Ms. Sayre had sent to Delores Gaines, labor relations manager at the Laboratory.[6] In that letter, Ms. Sayre asserts that she first learned of possible changes in hours of employees at the 88-inch Cyclotron during a September 18 meeting between herself and Ms. Gaines. In the letter, Ms. Sayre requests information about the hours and work schedules of employees working at the Cyclotron.

By letter of November 7, 1995, the University responded to UPTE's September 19 letter and provided Ms. Sayre with copies of the work schedules of Cyclotron operators from May of 1991.[7] Ms. Sayre testified that it was only when she received the University's letter of November 7, 1995, and attached work schedules that she learned of the changes in hours that had taken place at the Cyclotron the preceding April.

LEGAL ISSUES

1. Was the charge timely filed regarding the:

A. Schedule change on February 21, 1995, at the ALS?

B. Schedule change on April 1, 1995, at the Cyclotron?

C. Abolition in late January or early February of 1995 of the position of accelerator operator supervisor and

[6]Charging Party Exhibit No. 5.

[7]Charging Party Exhibit No. 3.

transfer of employees into the new position of principal accelerator operator?

2. If the charge was timely, did the University make a unilateral change in a negotiable subject and thereby fail to negotiate in good faith when it:

A. Assigned unit members at the ALS to work a 21-day schedule commencing on or about February 21, 1995;

B. Assigned unit members at the 88-inch Cyclotron to work a 21-day schedule commencing on or about April 1, 1995;

C. Eliminated the graveyard or "owl" shift unit members working at the ALS and transferred affected employees to the day shift on or about February 21, 1995.

D. Abolished the position of accelerator operator supervisor and transferred employees into the new position of principal accelerator operator?

## CONCLUSIONS OF LAW

### Rules on Timeliness

Under HEERA section 3563.2, the PERB is precluded from issuing a complaint based upon conduct that occurred more than six months prior to the filing of the charge.[8] In interpreting this section, the PERB has held that the six-month time period is

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[13]In relevant part, section 3563.2 reads 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.

jurisdictional. (California State University (San Diego) (1989) PERB Decision No. 718-H.) Timeliness cannot be waived either by the parties or the Board itself and need not be plead affirmatively. It is the charging party's burden to show timeliness as part of its prima facie case. (Regents of the University of California (1990) PERB Decision No. 826-H.)

The limitations period "begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, providing that nothing subsequent to that date evinces a wavering of that intent." (Regents of the University of California, supra, PERB Decision No. 826-H.) The critical date in calculating the running of the limitations period is the date that the charging party was informed of the intended unilateral change, not the subsequent date when the change occurs. (See e.g., State of California (Department of Personnel Administration) (1996) PERB Decision No. 1145-S, adopting dismissal of regional attorney, and State of California (Department of Corrections) (1994) PERB Decision No. 1056-S.)

The six-month period is to be computed by excluding the day the alleged misconduct took place and including the last day, unless the last day is a holiday, and then it also is excluded. (Saddleback Valley Unified School District (1985) PERB Decision No. 558.)

Charge Regarding the ALS

The University notified the Union by letter of February 10, 1995, that it intended to change employee hours at the ALS. The letter states that the University would reassign employees from the then current five-day schedule to "three week rotations" with workshifts of nine hours. The letter further informed the Union that the "owl shift work will be temporarily eliminated." Ms. Sayre acknowledged on cross-examination that she received the letter on or about February 10, 1995, but did not "connect this with the seven/four/seven/three idea."

Even though Ms. Sayre did not understand the full implication of the hours change, it is clear that as of February 10 she knew the University was planning a shift change at the ALS. Accordingly, by letter of February 14, Ms. Sayre demanded that the University meet and negotiate before implementing a shift rotation at the ALS. She also asked that the University maintain the status quo until the completion of bargaining. But the University rejected her demand and, on February 21, unilaterally implemented the change in hours and temporary elimination of the owl shift at the ALS.

From these facts, I conclude that UPTE had actual notice on February 10, 1995, of the University's clear intent to implement a change in hours for employees at the ALS. Although Ms. Sayre did not understand every nuance of the planned change, the notice given by the University was sufficient to alert her to the need to demand to bargain and to demand that the University maintain

the status quo in the interim. There is no evidence of any act by the University subsequent to February 10 to indicate a wavering of intent. Indeed, the University implemented the change only 11 days after it notified the Union of its plan.

The critical date in calculating the running of the limitations period is February 10, 1995, the date that UPTE was informed of the intended change. UPTE thus had until August 10 to timely file a charge contesting the change in hours and the temporary abolition of owl shift deferential at the ALS. The charge regarding the ALS was filed on August 18, eight days past the deadline.

UPTE, therefore, has failed to meet its burden of showing that its charge was timely filed regarding the hours change at the ALS. Since matters of timeliness are jurisdictional, it is irrelevant that the University failed to file an answer setting out a statute of limitations defense. Accordingly, I conclude that all allegations in the charge and complaint regarding the change in hours and elimination of shift deferential at the ALS were untimely filed and must be dismissed,

Charge Regarding the Cyclotron

There is no evidence that the University ever notified UPTE in April of 1995 that it was assigning accelerator operators at the Cyclotron to work a 21-day schedule. The question, therefore, is when UPTE learned, or reasonably should have learned, of the hours change.

Ms. Sayre testified that she commenced an investigation when she first learned of the existence of the 88-inch Cyclotron. She said when she learned from an UPTE organizer that "something had happened" to employee shifts and hours at the Cyclotron, she asked the University for information about any hours changes. She put the request into writing in a September 19, 1995, letter to Delores Gaines, labor relations manager at the Laboratory.

By letter of November 7, 1995, the University responded to UPTE's September 19 letter and provided Ms. Sayre with copies of the work schedules of Cyclotron operators from May of 1991. Ms. Sayre testified that it was only when she received the University's letter of November 7, 1995, and attached work schedules that she learned of the changes in hours that had taken place at the Cyclotron the preceding April. The second amended charge, which sets out the allegation regarding the Cyclotron, was filed on February 27, 1996, well within six months of UPTE's receipt of the November 7 letter.

There is no evidence in the record to rebut Ms. Sayre's testimony about when she learned of the hours change at the Cyclotron. The Cyclotron is a self-contained research facility somewhat apart from the central campus. Fewer than ten employees were affected and there was no evidence that any of them were UPTE officers or stewards. I cannot find that Ms. Sayre acted unreasonably when, upon discovering the possibility of a change, she asked the University to provide the information that would show what occurred.

Accordingly, I find that the allegation regarding the alleged unilateral change at the Cyclotron was timely filed.

Charge Regarding the Job Titles

As UPTE notes in its brief, "[i]t is undisputed that in late January or early February 1995, management at both the ALS and the 88 [inch Cyclotron] unilaterally eliminated the 374.3 accelerator operator supervisor position." At the same time, UPTE notes, management moved employees in that position into the class of principal accelerator supervisor. These changes, UPTE contends, were made without prior negotiations.

UPTE, however, did not challenge the change in job titles until the filing of its second amended charge on February 27, 1996. This was more than one year after the alleged occurrence of the change in early 1995. Thus, on its face, the charge was not filed within six months of the date of the alleged change. The lateness of the filing can be excused only if the charging party establishes that it did not know and reasonably could not have known about the change within the statutory period. Since the burden of showing timeliness is that of the charging party, it was for UPTE to show that it did not have actual knowledge of the change within the statutory period of limitations.

Here, unlike the record it made regarding the Cyclotron, UPTE presented no evidence about the circumstances of its discovery of the change in accelerator operator job classifications. I find therefore, that UPTE has not met its burden of showing that its allegation about this matter was

timely filed. Accordingly, the allegation about the abolition of the position of accelerator operator supervisor and transfer of employees into another class must be dismissed.

Alleged Unilateral Change

It is well settled that an employer that makes a pre-impasse unilateral change in an established, negotiable practice violates its duty to meet and confer in good faith. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) Such unilateral changes are inherently destructive of employee rights and are a failure per se of the duty to negotiate in good faith. (See Davis Unified School District, et al. (1980) PERB Decision No. 116; State of California (Department of Transportation) (1983) PERB Decision No. 361-S.) These principles are applicable to cases decided under HEERA. (See Regents of the University of California (1983) PERB Decision No. 356-H.)

Because of the problems of Untimeliness discussed above, the only University action that can be tested against the rules of unilateral change is the hours change at the 88-inch Cyclotron. Hours of work is negotiable subject[9] under the HEERA. The term "hours" includes not only the number of hours to be worked but also the time of day when they are to be worked. Thus, a change in work shifts is a change in hours and is a negotiable action. (Los Angeles Community College District (1982) PERB Decision No. 252.)

[9]See section 3562 (q) .

It is clear, also, that the shift change at the Cyclotron had both "a generalized effect" and a "continuing impact" on the members of the negotiating unit. (Grant Joint Union High School District (1982) PERB Decision No. 196.) The assignment of operators to work on the 21-day schedule affected all accelerator operators at the Cyclotron. It is apparent that in making the change the University was asserting a right to change employee hours as it saw fit.

UPTE argues that since at least September of 1994, which was prior to UPTE's certification as exclusive representative, accelerator operators at the Cyclotron had worked seven-day schedules, five days on and two off. Thus, UPTE argues, the status quo was a seven-day work schedule. UPTE rejects the evidence the University offered to show a past practice of shift changes at the Cyclotron. UPTE argues that only a practice that is "regular and consistent" or "historic or accepted" may be considered, citing Pajaro Valley Unified School District (1978) PERB Decision No. 51. UPTE argues that there was only a single nine-month period in the four years preceding April 1, 1995, that all accelerator operators at the Cyclotron worked on a 21-day schedule. This is insufficient, UPTE argues, to establish a past practice of 21-day work cycles.

It is settled under PERB cases that the past practice against which an employer's change is tested is not the exact wage or hours that may be in effect at any certain time. Rather, the past practice is a "dynamic status quo" under which "change

can be a normal part of the pattern of conduct between employer and a union." (Regents of the University of California (1996) PERB Decision No. 1169-H.) Thus it is not the exact hours that employees worked at or just before the date of UPTE's certification that will determine the past practice. The past practice here is the pattern of shift schedules under which accelerator operators worked at the Cyclotron over the years prior to April of 1995.

As UPTE argues, it is true that there was only one period, lasting nine months, during the four years prior to April 1, 1995, when all Cyclotron operators worked a 21-day schedule. It also is true that there was only one period, lasting seven months, when all Cyclotron operators worked a seven-day schedule. At all other times, some operators worked a 21-day schedule and some worked a seven-day schedule. In its search for the status quo, UPTE chooses the one seven-month period when all Cyclotron operators worked a seven-day schedule.

The status quo, however, was not a seven-day schedule or a 21-day schedule. This is because there was no single work schedule or combination of schedules during the four years prior to the certification of UPTE. The status quo was one of constantly changing work schedules, sometimes a seven-day schedule, sometimes 21 days, sometimes a combination of both. Hours were set according to demands of experimenters and managerial preferences. The status quo was a work environment of fluctuating hours and schedules.

In such an environment, it cannot be said that the University changed a past practice when in April of 1995 it directed all employees to work a 21-day schedule. Such an assignment at the Cyclotron was consistent with what had occurred before. I conclude, therefore, that UPTE has failed to establish a change in the past practice at the 88-inch Cyclotron.[10] Accordingly, I conclude that the charge and complaint must be dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, unfair practice charge SF-CE-428-H, University Professional and Technical Employees, CWA Local 9119, v. The Regents of the University of California and companion PERB complaint are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB

[10]In the absence of a showing of consistent hours worked by employees at the Cyclotron, I cannot find a unilateral change in the unalleged violation regarding Vickie Saling which is set out in UPTE's brief. Although there was no evidence any other employee ever had been required to work split shifts, I cannot conclude that this assignment so deviates from the past practice as to change its "quantity and kind." (Oakland Unified School District (1983) PERB Decision No. 367.) Nor is there evidence that such an assignment, made to a single employee, had both "a generalized effect" and a "continuing impact" on the members of the negotiating unit. (Grant Joint Union High School District, supra, PERB Decision No. 196.)

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

Dated: September 23, 1996

Ronald E. Blubaugh
Administrative Law Judge