STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNIVERSITY PROFESSIONAL AND TECHNICAL EMPLOYEES, UPTE-CWA, LOCAL 9119,	)	
Charging Party,	)	Case Nos. LA-CE-423-H LA-CE-456-H
v.	)	
	)	PERB Decision No. 1263-H
REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)	April 28, 1998
Respondent.	)	

Appearance: Belinda M. Hein, Labor Relations Advocate, for Regents of the University of California.

Before Johnson, Dyer and Jackson, Members.

DECISION

JOHNSON, Member: This case is before the Public Employment Relations Board (Board) on appeal by the Regents of the University of California (University) to an administrative law judge's (ALJ) proposed decision (attached). The ALJ found that the University violated the Higher Education Employer-Employee Relations Act (HEERA) section 3571(a) and (b)[1] when it imposed

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

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

reprisals on employees who participated in protected conduct.

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

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, the Board finds that the Regents of the University of California (University) has violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code sections 3571(a) and (b). The University violated HEERA section 3571(a) by: (1) issuing Gilberto Sandoval (Sandoval) and Ernie Dawn (Dawn), employees at the University of California, San Diego (UCSD), disciplinary letters in November 1994 for submitting the "potential sick leave" notices; (2) involuntarily transferring Sandoval from the Basic Science Building to Elliott Field Station on December 1, 1994; (3) issuing Sandoval a disciplinary letter dated December 5, 1994; (4) ordering a five-day suspension of Sandoval by its notice dated December 20, 1994; and (5) medically separating Sandoval from employment by its notice dated April 3, 1996. These reprisals were imposed on Sandoval and Dawn because of their

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

(b) Deny to employee organizations rights guaranteed to them by this chapter.

participation in the activities of the University Professional and Technical Employees, UPTE-CWA, Local 9119 (UPTE).

Because these actions had the additional effect of interfering with, and hence denying, the right of UPTE to represent its members, these actions also violated section 3571(b).

The allegations that the University violated section 3571(a) by threatening employees with loss of jobs and by laying off James Adamson, and all other allegations are hereby DISMISSED.

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

A. CEASE AND DESIST FROM:

1. Retaliating against UCSD employees Sandoval and Dawn because they participated in activities of an employee organization of their own choosing for the purpose of representation on matters of employer-employee relations; and

2. Denying the right of the UPTE to represent its members in their employment relations with the higher education employer by virtue of the acts of retaliation against its members.

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

1. Rescind the November 1994 disciplinary letters issued to Sandoval and Dawn regarding their submission of "potential sick leave" notices.

2. Reinstate Sandoval to his animal technician position at the Basic Science Building at UCSD, or a similar

facility with accommodations for his allergy to rabbits consistent with past practice.

3. Rescind, remove and destroy the December 5, 1994, disciplinary letter ("Written Warning") issued to Sandoval for falsification of animal care records.

4. Rescind, remove and destroy the December 20, 1994, Notice of Intent to Suspend (five-day suspension) issued to Sandoval for failing to follow a supervisor's directives.

5. Rescind the medical separation of Sandoval and reinstate him to his former position as an animal technician with the Office of Animal Resources.

6. Reimburse Sandoval for all lost wages and benefits he incurred due to the five-day suspension given to him as a result of the December 20, 1994, disciplinary action and due to the April 3, 1996, medical separation from employment. The amount of reimbursement is to be augmented by interest at the annual rate of seven (7) percent.

7. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all locations where notices to employees are customarily posted, copies of the Notice attached hereto as the Appendix. The Notice must be signed by an authorized agent for the University, indicating that the University will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered,

defaced or covered by any other material.

8. Notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, of the steps the University has taken to comply with the terms of this Order. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on UPTE.

Members Dyer and Jackson joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case Nos. LA-CE-423-H and LA-CE-456-H, University Professional and Technical Employees. UPTE-CWA, Local 9119 v. Regents of the University of California, in which all parties had the right to participate, it has been found that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a) and (b). The University violated HEERA by: (1) issuing Gilberto Sandoval (Sandoval) and Ernie Dawn (Dawn), employees at the University of California, San Diego (UCSD), disciplinary letters in November 1994 for submitting the "potential sick leave" notices; (2) involuntarily transferring Sandoval from the Basic Science Building to Elliott Field Station on December 1, 1994; (3) issuing Sandoval a disciplinary letter dated December 5, 1994; (4) ordering Sandoval suspended for five days by notice dated December 20, 1994; and (5) medically separating Sandoval from employment by notice dated April 3, 1996. These reprisals were imposed on Sandoval and Dawn because of their participation in the activities of the University Professional and Technical Employees, UPTE-CWA, Local 9119 (UPTE).

Because these actions had the additional effect of interfering with, and hence denying, the right of UPTE to represent its members, these actions also violated section 3571(b).

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

A. CEASE AND DESIST FROM:

1. Retaliating against UCSD employees Sandoval and Dawn because they participated in activities of an employee organization of their own choosing for the purpose of representation on matters of employer-employee relations; and

2. Denying the right of the UPTE to represent its members in their employment relations with the higher education employer by virtue of the acts of retaliation against its members.

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

1. Rescind the November 1994 disciplinary letters issued to Sandoval and Dawn regarding their submission of "potential sick leave" notices.

2. Reinstate Sandoval to his animal technician position at the Basic Science Building at UCSD, or a similar facility with accommodations for his allergy to rabbits consistent with past

practice.

3. Rescind, remove and destroy the December 5, 1994, disciplinary letter ("Written Warning") issued to Sandoval for falsification of animal care records.

4. Rescind, remove and destroy the December 20, 1994, Notice of Intent to Suspend (five-day suspension) issued to Sandoval for failing to follow a supervisor's directives.

5. Rescind the medical separation of Sandoval and reinstate him to his former position as an animal technician with the Office of Animal Resources.

6. Reimburse Sandoval for all lost wages and benefits he incurred due to the five-day suspension given to him as a result of the December 20, 1994, disciplinary action and due to the April 3, 1996, medical separation from employment. The amount of reimbursement is to be augmented by interest at the annual rate of seven (7) percent.

Dated: _____

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

UNIVERSITY PROFESSIONAL AND TECHNICAL EMPLOYEES - UPTE-CWA, LOCAL 9119,	)	Unfair Practice Case Nos. LA-CE-423-H LA-CE-456-H
Charging Party,	)	
v.	)	PROPOSED DECISION (11/5/97)
REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)	
Respondent.	)	

Appearances: Jelger Kalmijn, University of California at San Diego Chapter President, for University Professional and Technical Employees - UPTE-CWA, Local 9119; Belinda Marie Hein, Labor Relations Advocate, and Daniel Wyman, Labor Relations Specialist, for Regents of the University of California.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

This case, arising out of two unfair practice charges, involves allegations that a higher education employer threatened employees who were protesting a sick leave policy and subsequently imposed reprisals against several of the protesting employees.

The University Professional and Technical Employees - UPTE-CWA, Local 9119 (UPTE) initiated this action against the Regents of the University of California (University) by filing the first unfair practice charge on March 6, 1995.

The Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint in the unfair practice charge, case number LA-CE-423-H, on June 25, 1995,

alleging that the University threatened employees with loss of their jobs and retaliated against several of the same employees because they had protested the University's sick leave policy. By these acts, the complaint alleges, the University violated the Higher Education Employer-Employee Relations Act (HEERA or Act) section 3571(a) and (b).[1]

The University answered the complaint on July 24, 1995, denying the allegations that it engaged in unlawful threats or retaliation.[2] A settlement conference was conducted by PERB Administrative Law Judge (ALJ) W. Jean Thomas on September 8, 1995, but the dispute was not resolved.

Nine days of formal hearing were conducted in case number LA-CE-423-H between January 8, 1996 and March 21, 1996, on the campus of the University of California, San Diego (UCSD), in La Jolla, California. At the commencement of the hearing, UPTE

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

> It shall be unlawful for the higher education employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

[2]Simultaneously, the University filed a motion to dismiss the complaint. The motion was denied on September 26, 1995.

indicated that it wished to litigate allegations of subsequently-occurring reprisals related to those in the complaint. Due to the surprise nature of the claims, the undersigned directed UPTE to file a separate unfair practice charge for the purpose of litigating the additional claims.

On May 31, 1996, UPTE filed the second unfair practice charge in LA-CE-456-H. A complaint was issued on June 26, 1996, alleging that the University medically separated an employee named in the first complaint and laid off another employee not previously named, because they had participated in the sick leave policy protest. By these acts, the complaint alleges, the University violated section 3571(a) and (b).

The University answered the second complaint, denying the allegations that it engaged in unlawful retaliation.[3] After the informal conference was waived, the case was assigned to the undersigned for hearing. The two cases were ordered consolidated for purposes of decision. Three additional hearing days were conducted from February 24, through February 26, 1997.

With receipt of the post-hearing briefs on August 26, 1997, the case was submitted.[4]

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[3]Respondent again filed a motion to dismiss the complaint in case number LA-CE-456-H, which motion was denied on September 6, 1996.

[4]UPTE's brief was not filed in accordance with PERB regulations on the scheduled due date of June 30, 1997. However, good cause for late submission of the brief was found on August 26, 1997, and the brief was admitted over the objection of the University.

FINDINGS OF FACT

jurisdiction

The University is a higher education employer within the meaning of section 3562(h) of the HEERA. UPTE is an employee organization within the meaning of 3562(g), and the exclusive representative of a unit of University employees within the meaning of section 3562(j).

Office of Animal Resources

The Office of Animal Resources (OAR) at the UCSD campus operates facilities that house and care for animals utilized in scientific experiments. This animal research is conducted by researchers of the science departments, medical school, and veterinary school that are affiliated with UCSD. The researchers in charge of the experiments are referred to as Principal Investigators (Pis). Collectively, the UCSD researchers have secured research grants totaling $300 to $400 million. The research projects encompass a wide range of subjects including human disease, orthopedic devices, and basic science. Typical laboratory animals include rats, mice, rabbits, primates, dogs, swine, and goats.

The function of OAR is to receive laboratory animals, adapt them to a controlled environment that is conducive to investigative research, and maintain the animals during the life of the research project. The animal husbandry involved in this operation is performed principally by the classifications of employees known as animal technicians. Animal technicians

perform such tasks as feeding, watering, health checks, cage cleaning, and the like. The control conditions necessary to validate experimental data, such as the health of the animals, their regular feeding, and the temperature of the environment, are observed by the animal technicians and documented on sheets known as animal room checklists. OAR employs between 25 and 30 animal technicians on staff.

OAR animal technicians are responsible for animals housed in at least ten UCSD facilities, including the Basic Science Building, Clinical Science Building, Surgical Research Laboratory, Medical Teaching Facility, Clinical Teaching Facility, Elliott Field Station, McGill Hall, Center for Molecular Medicine - East, Center for Molecular Medicine - West, and the Engineering Building.

Dr. Phillip Robinson is the director of OAR. Larry Gustafson, Associate Director for Animal Care, has primary responsibility for day-to-day operations. John Timms, Assistant Manager for Animal Care, is a supervisor reporting directly to Gustafson and has responsibility for disciplining employees. Pete Willhite, Milton Rodriguez, and Madison Lowe act as first line supervisors.

October 26, 1994, Meeting Regarding Sick Leave Policy

UPTE filed a petition for recognition as an exclusive representative of Unit 9, a system-wide technical unit on March 10, 1994. On June 30, 1994, PERB approved an election agreement between the University and UPTE calling for a PERB-

conducted mail ballot to determine whether UPTE should represent Unit 9. The election was to be finalized by a ballot count on November 15, 1994.[5]

Jelger Kalmijn is the president of the UPTE chapter at UCSD. Kalmijn testified that over some months prior to October 1994 numerous OAR employees complained about difficulties regarding promotion and an attendance policy which they thought was unfair. The group decided that the most viable issue to address through collective action was OAR's sick leave policy.

The sick leave policy requires that an employee give notice of his/her intention to use sick leave 24 hours in advance. The OAR employees felt that the policy was irrational and unreasonable because an employee might only become ill with less than 24 hours before the next work shift and therefore be incapable of giving the required notice in order to avoid a chargeable absence.

OAR's sick leave policy can be described as a "no-fault" policy. Employees are not required to provide an excuse for an absence and the basis for the absence is of no consequence. However, the written policy provides that employees with more than 10 absences in a year (including tardiness or early departure from work) are subject to discipline. A warning is given after the tenth unscheduled absence in one year. Progressive discipline is imposed thereafter with dismissal

[5]Judicial notice of these facts from the election records of PERB. (San Ysidro School District (1997) PERB Decision No. 1198.)

occurring on the thirteenth unscheduled absence in one year. There is a "wash-out" of accumulated absences at the end of the yearly accounting period.

Larry Gustafson testified that the policy was administered progressively. He noted one case involving an employee with a substance abuse problem in which OAR gave verbal warnings, letters of warning, a suspension, and finally termination -- and that only after more than 20 unscheduled absences.

In response to Kalmijn's request, the UCSD's Office of Employee and Labor Relations scheduled a meeting to discuss the sick leave policy. The meeting was held on October 26, 1994. Attending for UPTE were Kalmijn and four employee representatives, Jim Moore, Ernie Dawn, Rudolph Richardson and Gilberto Sandoval.[6]

Michael Melman, Director of Employee and Labor Relations, Larry Gustafson, John Timms, Belinda Hein, Labor Relations Advocate, and Jenni Liebman, Principal Personnel Analyst, represented UCSD.

Initially, Kalmijn, speaking for the employees, stated that the employees objected to the unfairness of the sick leave policy in general and the 24-hour notice rule in particular. Melman, speaking for UCSD, asserted that the sick leave policy was reasonable and satisfactory in management's view.

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[6]UPTE gave notice that Albert LeClair and Madison Lowe would be attending, but OAR declined to make them available.

Kalmijn acknowledged OAR's operational concerns underlying the policy but claimed that the 24-hour notice was arbitrary and unnecessary to meet those concerns. Near the end of the meeting, Kalmijn stated that if the University were unwilling to modify the policy the employees might choose to report to Pis that OAR's 24-hour notice rule was forcing employees to come to work sick. He stated that the employees felt that they simply had to be honest and inform the Pis that the "animals they were [caring] for . . . were in danger of becoming sick because a lot of the employees were going to work with . . . various illnesses." In addition, Kalmijn asserted that the animal care itself was compromised because the employees were not functioning "at 100 per cent."

There was no evidence offered by UPTE to support the extent to which human illnesses could be borne across species lines to the animals. To the contrary, Gustafson testified without contradiction that most human illnesses cannot be transmitted to laboratory animals. OAR's main concern in employees reporting to work ill, as expressed by Gustafson during the hearing, was the potential compromised job performance. But there was no evidence that the policy was actually compelling any significant number of employees to work sick to avoid discipline.[7]

[7]There was no evidence that employees were actually exhausting their available sick leave incidents so as to be in real danger of disciplinary action if they failed to report. According to the University, no grievances challenging the sick leave policy had been filed under the University-promulgated Staff Personnel Policy grievance procedure. Kalmijn testified that management had told him of only one employee disciplined

Melman responded that the University's policy did not require employees report to work sick, nor was that the University's desire. According to UPTE witnesses Kalmijn, Dawn, and Richardson, Melman also stated that contacting the Pis "would not be a good idea" because "people could lose their jobs." UPTE witnesses were generally consistent in testifying that Melman did not elaborate on how the job losses might occur.[8]

In the hearing, Melman denied making any statement that he threatened to terminate employees or shut down the laboratories if the employees notified Pis. But he also did not deny that he used the phrase "employees could lose their jobs." Melman testified that he stated that he did not "recommend" that the employees contact Pis because it was "360 degrees against what the policy stood for." Though he remembers having concerns at the time that the threatened action could result in job losses because researchers might withdraw funding, he did not recall articulating those concerns to the employees.

Other University witnesses' accounts of Melman's statements were inconsistent with Melman's version and, to a degree, with each other. Jenni Liebman testified that Melman stated that as a

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under the policy.

UPTE introduced a copy of an electronic-mail message sent by Gustafson to a Massachusetts management employee seeking advice on how to discipline a unionized workforce with attendance problems. In what can only be construed as a boast, Gustafson asserted that OAR's sick leave policy was successful in terminating six employees.

[8]UPTE witness Sandoval recalled Melman stating that employees could be "fired" as a consequence.

result of contacting PIs, some "employees could lose their jobs." According to Liebman, Melman elaborated on this statement by explaining that the action could "affect the contracts and grants" for positions at UCSD. She claimed, however, that Melman also conveyed that he was not referring specifically to OAR employees, but rather University employees under the grants generally.

Gustafson testified that Melman told Kalmijn that he did not appreciate Kalmijn's threat and that his plan was "not a good idea" because it could affect the University's research programs. Gustafson did not hear the statement, "employees could lose their jobs." He believed that Melman may have implied that all UCSD employees under grants were endangered.

As to this conflict in the testimony concerning Melman's response to Kalmijn's threat to notify PIs, I find that Melman did make the statement that employees "could lose their jobs." The UPTE witnesses were credible and their testimony generally consistent. In contrast, on the University side, there are several significant conflicts. Melman himself did not remember explaining that statement to mean that he viewed the potential consequences of notification to PIs to include loss of grants, and thereby, loss of jobs, in contrast to the testimony of Liebman and Gustafson. Judging also from Melman's direct and austere demeanor, I do not believe it likely that under the circumstances, faced with what he viewed to be the threat of an

unwarranted job action, he would qualify his own statement in the manner suggested by either Liebman or Gustafson.

The meeting was concluded with a promise by the University to consider the employees' concerns and evaluate the sick leave policy in light of those concerns. OAR subsequently did modify the policy by reducing the advance notice requirement to 18 hours and by providing employees quarterly notice of their accrued absences.

"Potential Sick Leave" Notices and the Warning Letters

Following the October 26 meeting, the OAR employees and Kalmijn decided against contacting the PIs as they had threatened. UPTE offered the idea of an alternative strategy to continue the protest. The plan was to prepare written forms notifying OAR of an employee's "potential" absence due to sickness and have employees collectively submit them to supervisors on a daily basis at the end of the day. The notice read:

POTENTIAL SICK NOTICE

> This is to inform you that, in the event that I am too sick to work tomorrow, I will be unable to come to work. Please accept this as my twenty-four hour notice, as mandated in the OAR departmental procedures for sick leave.
>
> Thank you in advance for understanding. . . .

Beginning November 2 and continuing through November 5, 1994, several OAR employees submitted these notices on a daily basis, including Gilberto Sandoval, Ernie Dawn and Jim Moore. After approximately the third occasion, the employees were verbally

warned to cease submitting the notices. Some of the employees persisted after the verbal warning. OAR responded with letters of warning issued to the employees at their home addresses. Gilberto Sandoval and Ernie Dawn received such letters.[9] The November 4, 1994, letter from Larry Gustafson to Sandoval explained the sick leave policy, the University's rationale for the 24-hour notice rule, and the adverse impact the notices had on staffing decisions. Gustafson warned that if the employees did not cease submitting the notices, the employees would face discipline for insubordination. After issuance of the warning letter, the employees ceased submitting the notices.

Gustafson asserted that submission of the notices created scheduling "havoc" for OAR. However, on cross-examination, this claim proved to be exaggerated. Gustafson could only identify

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[9]The complaint in case number LA-CE-423-H alleges that OAR animal technician Jim Moore also received a warning letter. However, Moore elected not to testify in the hearing. Accordingly, this allegation as well as all other allegations of retaliation contained in the complaint as to Moore are hereby dismissed for failure to state a prima facie violation.

The complaint in case number LA-CE-423-H also alleges that the University retaliated against Sandoval and Dawn by misinforming them that a training class had been cancelled. The class was scheduled to include a practice examination for employees seeking a certification from a particular professional association, which OAR deemed a desirable qualification. In its post-hearing brief, UPTE did not cite any of the evidence concerning this event either as evidence of anti-union animus or as an independent act of retaliation. I find that evidence fails to demonstrate that an adverse action occurred, since OAR management acknowledged the confusion about the scheduling and permitted employees to re-take the practice examination. (Palo Verde Unified School District (1988) PERB Decision No. 689 [requirement of proving an adverse action].) The allegation of retaliation is therefore dismissed. Moreover, I find this evidence to be inconclusive as to anti-union animus.

one animal technician, Jim Moore, who was reassigned due to the sensitive nature of his duties coupled with his submission of the notices. Gustafson claimed that double coverage resulted on other occasions due to the borrowing of "one or two" employees to cover the potential absence of the "two or three" employees who submitted the notices. It is undisputed that no more than three employees persisted in submitting the notices.[10] There was no evidence that employees submitting the notices actually failed to report to work the following day.

Adverse Actions Against Gilberto Sandoval

Sandoval has been employed at UCSD as an animal caretaker for approximately 20 years. He began employment in the Pulmonary Department of the Medical School in 1970 and continued there until 1979. After leaving UCSD from 1980 to 1983, he returned in October 1984, commencing his employment with OAR as an Assistant Animal Technician. His supervisor at the time, Stephen Gardella, rated him "more than satisfactory" in both of his probationary evaluations. His regular evaluations covering the periods from 1985 through 1987, 1987 through 1988, 1988 through 1990, and 1990 through 1992 each rated him "above expectations" overall. In his best evaluation, for the period ending in 1990, Sandoval received "above average" for both of the most critical job function review categories and for all five of the performance review categories.

[10]Gustafson testified that Madison Lowe, a Senior Animal Technician at the time, who attended the October 26 meeting, submitted the notices but was not disciplined and was subsequently promoted to supervisor. He ceased submitting the notices after being verbally warned.

In two of the five performance review categories, "quality" (i.e., "accuracy, completeness, and follow-through of work") and "dependability" (i.e., "punctuality, regularity in attendance, meeting deadlines and performing work without close supervision") Sandoval's rating was "A+." In the "comments" section, Gustafson offered such praise as: "Your quality of work has always been good, but your attitude and general support to the facilities has improved greatly this past year; You have become very dependable and conscientious [sic]; I really appreciate your willingness to perform extra duties and volunteering to assist on many special occasions." In another of the evaluations, Sandoval was described as "one of the hardest working employees" in OAR.[11]

There was no evidence that Sandoval had received any written warnings or other formal disciplinary actions prior to the adverse actions described following.

A. Transfer to Elliott Field Station

On December 1, 1994, OAR management decided to transfer Sandoval to Elliott Field Station from his existing assignment at the Basic Science Building. Elliott Field Station is a "ranch-style," outdoor facility containing swine, rabbits, goats, and dogs. Unique among the facilities, it is located 17 miles from

[11]In the period from January 1993 through May 1995, Sandoval received only "met expectations" and "below expectations" ratings in the six job function categories and seven performance review categories. The "below expectations" ratings were received in "record keeping," "planning/organizing," and "coordination/cooperation." This evaluation was issued in mid-May 1995, after the adverse actions challenged here commenced. UPTE did not allege in either unfair practice charge that this evaluation was a retaliatory action.

the campus. There was only one animal technician, Albert LeClair, assigned to handle duties at the facility at the time. But due to plans to increase the number of animals housed there, another employee was needed, according to Gustafson.

Sandoval testified that upon learning of a potential departmental assignment to Elliott.Field Station he mentioned to Gustafson that he did not want to be assigned there due to his allergic reaction to rabbits. Sandoval suffers from an allergic reaction to rabbit hair and dander that may be accompanied by an asthmatic attack. In some cases, the asthmatic attack can be life-threatening. Sandoval has a confirmed allergic sensitivity to other animals but no history of asthmatic or other debilitating reactions to any animal housed by OAR other than rabbits. Gustafson and OAR have known about Sandoval's condition for many years. Sandoval did not want the Elliott Field Station assignment because of potentially greater exposure to rabbits and the fact that only two employees were assigned there, requiring at least back-up coverage of rabbits.

Sandoval was not working with rabbits at the Basic Science Building at the time of his transfer. In the past when rabbit care was unavoidable, Sandoval used a face mask. He had one prior incident of an on-the-job allergic reaction to rabbits prior to his December 1994 assignment to Elliott Field Station. There was a history of OAR accommodation of Sandoval's rabbit allergy. In approximately 1988, former OAR director Jack

Vanderlip granted Sandoval's request to work at Elliott Field Station and not have rabbit duties.

Sandoval testified that Gustafson acknowledged his concern and promised that a transfer to Elliott Field Station would not happen. In contrast, Gustafson denied any such conversation or promise. Gustafson claimed that Elliott Field Station is considered a desirable assignment by many animal technicians due to its setting.

Here I credit Sandoval's testimony that Gustafson assured him that he would not be considered for the Elliott Field Station assignment. I base this on his demeanor throughout the hearing, his reputation for earnestness, and the general consistency of his testimony. I find Gustafson was not credible as to this and many other factual disputes. He was often exaggerated in his direct testimony and evasive on cross-examination. Gustafson's testimony conflicted with other witnesses having no apparent bias or interest in the case on a number of significant points.

Gustafson testified that the decision to transfer Sandoval was an operational decision of the department made by the management team. Such reassignments are commonplace, occurring "weekly," he testified. Gustafson stated that the rationale for choosing Sandoval was because he had worked there in the past for several years and was familiar with the Pis there. Gustafson believed that it would be necessary to retrain any other employee. This was contradicted to some degree, however, by Gustafson's statement that Sandoval was moved from Elliott Field

Station following his first assignment there because he was having problems with some of the PIs there and needed more direct supervision.

Gustafson also believed that the outdoor environment would be an improvement for Sandoval's asthma condition. He made the decision to "accommodate" Sandoval's health problem, based largely on the fact that Sandoval had requested the outdoor assignment previously.[12] However, Barry Niman, manager of the Campus Employee Rehabilitation Program,[13] recalled he understood that in the first assignment OAR arranged for Sandoval to have no contact with rabbits and to not work alone on weekends. No such arrangements were contemplated by OAR in making the 1994 assignment.

Immediately upon his transfer to Elliott Field Station, John Timms ordered Sandoval to daily rabbit care. Timms explained to Sandoval that he wanted the cages cleaned before the PIs arrived for their morning visits. LeClair, the other Elliott Field Station animal technician, was working a shift that started one hour later and ended one hour later than Sandoval's. On December 27, less than a month after his assignment, Sandoval suffered an asthmatic attack and was required to see a physician.

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[12]Gustafson testified that rabbits were at Elliott Field Station during Sandoval's previous assignment.

[13]In the late 1980s, Sandoval contacted the rehabilitation offices to seek assistance in finding a position that would not involve exposure to rabbits. He later reported to the offices that he had received accommodation by OAR.

Shortly thereafter, he filed a Worker's Compensation first-report-of-injury form.

Following his attack, Gustafson and Dr. Robinson met with Sandoval to discuss his problem. They then assigned LeClair to handle the rabbits and removed Sandoval from weekend coverage. OAR assigned other employees for weekend and back-up duty. Sandoval did not have any other medical problems thereafter.

B. December 5, 1994, Disciplinary Letter

1. Basis for the Discipline

Sandoval had worked his regular schedule at the Basic Science Building during the week of October 31 through November 4, 1994. He volunteered to work on Saturday, November 5, 1994, at the "barrier" facility at the Clinical Sciences Building. A "barrier" facility is a sterile facility for special research animals, such as immune-compromised species. Rules require employees to complete sanitizing procedures before entry. Sandoval forgot his assignment and failed to report on November 5 because he began painting his apartment that morning. He did not remember his assignment until the following Monday.

After completing his morning duties on Monday, Sandoval approached his supervisor, Pete Willhite. He informed Willhite that he failed to report Saturday.. Sandoval testified that Willhite responded by instructing him to go to the barrier facility, check the animals, and sign off the room checklist as

if he had come in.[14] Sandoval testified that Willhite then told him that the matter was "just between you and me."

In his testimony, Willhite acknowledged that he instructed Sandoval to check the animals that day, but used the phrase "document the weekend" to describe his instructions with respect to the room checklist. Timms subsequently noted the discrepancy and investigated the situation. He questioned Willhite as to whether Sandoval had actually come in on November 5. Willhite told him that Sandoval had not and had told him so on Monday, November 7. However, Willhite did not explain to Timms that, after instructing Sandoval to check the animals on Monday, he told him to "document . . . the weekend."

Two investigatory meetings were then held with Sandoval. The first was attended by Timms, Gustafson, Willhite and Sandoval. Sandoval was asked only one question: if he had come in to work on the November 5. He admitted that he had not. Sandoval was about to volunteer more information, but stopped and just stared at Willhite, before looking at Timms and then Gustafson. Willhite said nothing. Gustafson then terminated the meeting. Sandoval did not mention that Willhite told him to "sign off" the form. Following the meeting, Gustafson, Timms and Willhite met and summarized the facts they had.

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[14]The room checklists are collected monthly. The animal technician assigned to duty on a particular day is required to enter his/her initials signifying the completion of typically five or six tasks as well as recording data such as the room temperature and health of the animals.

The second meeting was called to find out an explanation for why Sandoval had entered his initials on November 5. Sandoval was asked this question and he responded that he did so at Willhite's direction. Willhite denied that he so instructed Sandoval. The meeting again was very brief. Gustafson testified that he believed Willhite because his version of the incident never changed, but Sandoval's did.[15] Further he believed that even if Willhite had told Sandoval to document the weekend, Sandoval should have known from training that he was to have placed asterisks in the columns for those dates and explained in the section below reserved for comments that his observations occurred after-the-fact.

Timms issued Sandoval the December 5, 1994, written letter of warning, intended as a corrective action. The letter states that the basis for the letter was Sandoval's falsification of the entries on the checklist.

2. Evidence of Disparate Treatment

In an attempt to establish disparate treatment of Sandoval by OAR, UPTE offered evidence of numerous discrepancies in animal room checklists for which no disciplinary action or investigation had taken place. The same checklist indicating Sandoval's November 5 and 6 absences indicates that one other employee in addition to Sandoval was assigned to coverage of the barrier facility during the month of November 1994. On five other days

[15]Willhite contradicted Gustafson, agreeing on cross-examination by UPTE, that Sandoval's story did not change.

in the month of November, no coverage was indicated (i.e., none of the boxes were initialed). At least three and possibly five of those days were the responsibility of the other employee.

There were similar discrepancies indicated in other checklists. For example, another animal technician, Rudolph Richardson, testified that on one occasion, he was absent from duty and Timms was responsible for covering for him. Upon his return, Richardson noted that the days were not initialed. He testified without contradiction that he raised it with Timms, and Timms told him to "sign it off." Richardson did not because he did not know if the work was actually done.

An October 1994 checklist for the Clinical Science Building reveals apparently two different handwritings for the initials of the same individual. Sandoval recognized one of the signatures as that of Larry Gustafson, but credibly claimed that the other was not that of Gustafson. Gustafson testified that both signatures were his, but that the first did not look like his because he had broken his hand at the time.[16] This explanation was not credible since the two signatures were on consecutive days.

One of the checklists offered by UPTE does indicate possible falsification, similar and perhaps more serious than that of Sandoval's. In that case, Sandoval notes in the comment section that he performed work for rabbits on January 6, 1995, but could

[16]There was evidence that Gustafson indeed had a broken hand, but it was in June 1995.

not put his initials in all of the boxes because Senior Animal Technician Tom Blaze had entered his initials prior to that day.

Records indicate that on numerous occasions LeClair filled in initials on behalf of Blaze who had neglected to initial that he had done work. LeClair noted this fact in the comments section at the bottom of the form. LeClair felt justified in correcting these omissions on his own because he could visually verify that the work had previously been done.

As to all of the foregoing instances, there was no evidence of any investigation or disciplinary action for any of these recordkeeping errors. Willhite acknowledged that checklists have been filled in after the fact in the past. He also testified that as a supervisor he does not carefully review the checklists, but leaves that to the compliance officer, Stephen Gardella.

In rebuttal, the University presented two incidents of discipline for recordkeeping errors by employees who had not engaged in protected activity. In a December 1994 incident, a Principal Animal Technician received a counseling memorandum for incorrectly reading a high/low thermometer. The memorandum noted the importance of an employee with supervisory responsibilities knowing how to correctly record data. In a January 1995 incident, an animal technician did not report to work and was told to check the animals. After doing so, he initialed as if he had checked on the day he was absent. The employee was issued a

counseling memorandum for entering "incorrect data."[17] OAR stresses the importance of accurate recordkeeping in annual trainings for animal technicians. The records are inspected periodically by federal regulatory agencies. Compliance is necessary to insure continued funding of UCSD's animal program.

C. December 20, 1994, Suspension

Sandoval testified that on December 5 and 6, 1994, while he was assigned to cover the Salk Institute rabbit colony at Elliott Field Station[18], he recorded temperatures from a thermometer for the ambient temperature that was not the type traditionally in use. Rather than the normal fahrenheit "high-low" type, it was a temporarily substituted, fahrenheit-and-celsius-reading thermometer recording only the current temperature. Sandoval read the fahrenheit and Celsius figures and recorded both as if they were high-low fahrenheit readings. He was unaware at the time that he was entering fahrenheit and celsius figures. The sheet indicates that Tom Blaze, the person previously assigned to the rabbitry immediately before Sandoval's first day (December 5), recorded only one temperature and that two days after December 6, a new high-low thermometer was purchased to replace the temporary replacement.

[17]Gustafson could not recall the specific circumstances of these two disciplinary actions. He remembered a third disciplinary action involving an employee who had not engaged in protected activity. That employee physically assaulted a supervisor, which resulted in his immediate termination. The incident was not comparable to Sandoval's case.

[18]The Salk Institute, located in La Jolla, had recently contracted with OAR for rabbit care.

According to Sandoval, the error was brought to his attention during a meeting attended by Gustafson and Timms. They told Sandoval that the lower Celsius temperature should not have been recorded. Gustafson left the room first, leaving Timms and Sandoval alone momentarily. At that time, Sandoval volunteered to change it, to "white it out." Timms said, "No, no. You can take care of that tomorrow." Timms did not testify to refute this statement. Sandoval later blacked out the Celsius figures.

Gustafson disputed this testimony. Gustafson testified that he and Timms had noticed that Sandoval had entered two temperatures. He instructed Timms as the first line supervisor to investigate. Timms confronted Sandoval in a room at Elliott Field Station, with Gustafson standing in the background.[19] Timms accused Sandoval of entering high/low temperatures when the previous entries were single temperature entries. When Sandoval admitted that he had written fahrenheit and Celsius figures, Timms then told Sandoval that that explanation was unsatisfactory because if 56 fahrenheit was equivalent to 17 Celsius, then 60 fahrenheit could not be equivalent to 16 Celsius. Sandoval asked if he should correct it. According to Gustafson, Timms told Sandoval that was "the worst thing you could do." Gustafson testified that Timms told him more than once not to change it, adding "we have reasons for not doing that." According to Gustafson, he and Timms then left together. After later learning that Sandoval had changed the entry, Timms and Gustafson in a

[19]This was the same meeting to which Sandoval referred.

second meeting asked Sandoval if he had changed the entry. He admitted that he had.

As a result, by letter dated December 20, 1994, Timms imposed a five-day suspension against Sandoval for insubordination.

Again, I credit the testimony of Sandoval over that of Gustafson for the reasons noted previously.

D. September 22, 1995, Suspension[20]

On the Saturday evening of August 19, 1995, Sandoval became ill due to food poisoning. He was scheduled to perform animal care duties at Elliott Field Station on August 20, 1995, the following day. Sandoval testified that he had a high temperature and slept most of the day. As a consequence, he failed to call in to give notice that he would not be in that Sunday. The following day, Monday, August 21, he remembered he had failed to call in. He spoke to Timms by telephone that day to indicate he would continue to be out due to illness. After acknowledging this, Timms then stated, "I'm sure something will come out of this." Gustafson was out of town at that time, so Timms added, "Well, we'll just have to wait until Larry comes into town and then further discuss it."

In a meeting on September 13, 1995, Sandoval requested a meeting to discuss the potential consequences of his failure to report for work on August 20. He told Timms that he was very

[20]This incident was not alleged by UPTE as an adverse action and so it is considered only as evidence of unlawful intent.

fearful of being suspended and proposed that the meeting take place without UPTE representation. In the meeting he stated he had "screwed up" and was ready to "take his medicine."

On September 22, 1995, Gustafson issued Sandoval a notice of intent to suspend for ten days. The letter warned Sandoval to "immediately follow the OAR policy of reporting in to your supervisor on days you cannot report due to illness or other reasons." Gustafson said that if the employee's situation were dire or unexpected, such as an injury in an automobile accident, he would excuse the failure to report. His practice was generally not to question an employee's claim of illness. He contended that Sandoval's situation did not fall into the category of an excusable failure to notify his supervisor, because Sandoval admitted that he was able to call. Though he admitted that Sandoval told him that he had had a hard time just making it to the bathroom, Gustafson nevertheless concluded that Sandoval could have used that opportunity to call in. Sandoval credibly testified that he told Gustafson he was unable to get out of bed all day.[21]

Claiming that he had acted leniently with Sandoval on this occasion, Gustafson believed that Sandoval's absence was serious enough to have warranted dismissal, citing the Staff Personnel Policy section allowing for immediate dismissal in serious cases,

[21]It was apparent that Sandoval's failure to report did not justify suspension under the no-fault sick leave policy because Sandoval had only six recorded absences and the policy does not permit a suspension until the twelfth unscheduled absence.

such as for dishonesty, theft or misappropriation of University-property, fighting on the job, insubordination, acts endangering others. Gustafson also maintained that the suspension was simply part of the graduated pattern of progressive discipline of Sandoval.

E. Medical Separation

1. Sandoval's Medical History and OAR'S Justification

Following the transfer of rabbit duties to other employees at Elliott Field Station, Sandoval performed his duties there without further medical incident. Nevertheless, based on medical reports by Sandoval's own treating physician, Dr. Reuben Falkoff and the University's examining physician, Dr. Jonathan Greenberger, Gustafson made the decision first to place Sandoval on involuntary medical leave for a period of 12 weeks beginning on December 16, 1995,[22] and subsequently to medically separate him from employment on April 3, 1996.

Sandoval's assignment to handle rabbits at the beginning of his reassignment to Elliott Field Station in early December 1994 caused him to suffer the asthmatic attack on December 27. Sandoval sought treatment from Dr. Falkoff, who had been treating him for his allergic condition to animals since 1986. On January 4, 1995, Falkoff wrote the first of two advice letters addressed to Sandoval explaining his condition.

The first letter noted that in 1986 he determined Sandoval's condition had been caused by a "severe" exposure to rabbits but

[22]UPTE failed to allege this action as a retaliatory act.

that it was subsequently controlled as a result of arrangements at work limiting his exposure. Addressing Sandoval, Falkoff concluded that "it would certainly be preferable if you could arrange to totally avoid working with rabbits." After presenting this letter to Gustafson in an attempt to have his assignment to the rabbitry changed, Gustafson responded in writing that he questioned whether Sandoval's continued employment with OAR was viable. He also accused Sandoval of failing to wear his respirator consistently while working with rabbits.[23]

In response to this letter, Falkoff wrote the second letter to Sandoval dated January 10, 1995. Falkoff explained to Sandoval that he could continue to work in OAR:

> . . . as long as your supervisors do not contrive to make your work conditions medically unacceptable. Your own observations have taught you, over the years, what animals you can work with routinely without significant allergic problems, and which ones cause problems when the exposure becomes significant.

Although acknowledging cases such as Sandoval's where skin tests reveal the potential for allergies to numerous types of animals, Falkoff stated that the body may tolerate these animals due to the presence of allergic antibodies, or "blocking antibodies." Sandoval shared this second letter with Gustafson as well.

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[23]Gustafson testified that he had heard some reports that Sandoval did not always wear his mask. He did not elaborate. Sandoval, on his Worker's Compensation form, charged that his face mask was eight years old and he believed it to be defective. There was credible evidence that Sandoval resisted OAR's attempts to fit him with a full-face respirator, but that was after his rabbit duties were removed.

Gustafson responded to Falkoffs two letters in his own to Falkoff dated February 7, 1995, stating:

> We disagree with [Sandoval's] contention that he can be full time employed here in OAR and have no contact with rabbits. We have a variety of animal species at most OAR facilities many of which include rabbits. Accommodating [Sandoval's] restrictions in working with only certain species is very difficult, and we can in no way guarantee that he will not come into contact with rabbits, rabbit hair, or dander. This simply is not possible.

Gustafson then propounded seven questions, including whether an asthmatic attack could be life-threatening to Sandoval and whether it was possible to offer assurance that Sandoval "would not die or suffer permanent damage from incidental and unavoidable exposure on the job."

In responding to the former question in a February 15, 1995, letter, Falkoff stated:

> Yes, it could be [life-threatening], but [Sandoval] has the good sense to try to avoid prolonged or intensive exposures to the conditions which would result in such a severe attack. It would be nice if you would cooperate and help him avoid such exposures.

In response to the question regarding permanent injury, Falkoff stated:

> Yes, it is possible to offer assurance that incidental exposure will not result in permanent damage. In terms of unavoidable, that depends on your definition. If, as you indicated in the earlier part of your letter, you cannot accommodate Mr. Sandoval's restrictions and intend to expose him heavily to rabbit dander, then you can arrange for bad things to happen. I, however, would not consider that to be reasonable definition of unavoidable or incidental.

Falkoff concluded his letter by expressing his dismay that Gustafson would show so little enthusiasm for attempting to accommodate Sandoval and to assert that it was "impossible" to accommodate "what should probably be considered a minor medical handicap."[24]

At the request of Gustafson, Dr. Greenberger evaluated Sandoval in May 1995. Greenberger noted Sandoval's documented allergy to various animals and thought it was "amazing" that Sandoval had been able to work as an animal technician for as long as he had. He recommended a work preclusion to avoid any exposure to rabbits, based in part on anticipated guidelines of the California Industrial Medical Council counseling that individuals who have asthma due to allergic sensitivities be removed from that environment. Greenberger believed that a respirator would be ineffective because even a small amount of allergin could cause an asthmatic attack. He did note that Sandoval's asthmatic condition could have been progressing to a "baseline" status based on Sandoval's symptoms after four months without exposure to rabbits. He recommended a follow-up examination in two months. But none was ever conducted. At the time of the letter, Greenberger predicted that Sandoval, if he

[24]Gustafson was particularly agitated in testifying regarding this letter from Falkoff. He was indignant that Falkoff refused an invitation to inspect the facilities. He claimed that Falkoff insulted his intelligence by implying that OAR would arrange Sandoval's working conditions so as to intensify his exposure to rabbits. Yet, that is in fact what OAR did in assigning him to rabbit care duties at Elliott Field Station.

were to continue working, would require a permanent preclusion from rabbit exposure.

Gustafson testified that Sandoval's inability to work with rabbits was the basis for his decision to medically separate Sandoval. He believed that liability issues required this decision and that OAR could no longer accommodate Sandoval's medical condition. Gustafson repeated his contention that Sandoval refused to wear the respirator which OAR had provided him.

Asked whether it would have been possible to place Sandoval in an assignment not requiring exposure to rabbits, Gustafson stated:

> Well, yes and no. We have facilities that do not have rabbits but those people work in other facilities and are responsible for weekend coverage which involves working with rabbits, so we don't have any place where we could assign him where he would not be in contact with rabbits.

Barry Niman testified that he understood OAR's rationale to be based on medical opinions, primarily Dr. Falkoff's, that Sandoval's condition would worsen over time. He believed that this type of animal allergic reaction was one that naturally progressed in severity over time. However, Niman appeared to have no medical training to validate such a conclusion.

Gustafson testified that three other employees had asthmatic reactions to rabbits and left employment. Two of them had attacks that required emergency medical care. Both left employment on their own volition. A third employee, a

veterinarian, was medically separated "after a long period of treatment and accommodations."

Following his medical separation, Sandoval found employment at other veterinary facilities and encountered no health problems during that time.

2. PAR'S Ability to Accommodate

Madison Lowe, a supervisor in OAR, testified that the Clinical Science Building, which he supervises, has never housed rabbits and that Sandoval could have performed the duties of animal technician there. In addition, he testified that rabbits had not been housed at the Center for Molecular Medicine - West, Center for Molecular Medicine - East and the Engineering Building for the one-year period preceding the date he testified in February 1997.

Rudolph Richardson, whom Lowe supervises, testified that he had worked at the Clinical Science Building since August 1996. He corroborated Lowe's testimony that there were no rabbits there. Testifying also in February 1997, he stated that he had no weekend duties involving rabbits at the Clinical Science Building, Engineering Building, or Psychology Building.[25] He stated that there were no rabbits at the Engineering Building, nor had he seen any there since 1987. He also had not seen rabbits at the Psychology Building since 1986.

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^Richardson is the only person assigned to the Engineering Building. It is not a full-time position, however. Most of the duties are completed on a Wednesday, with one two hours on the remaining days.

Emily Peale is an animal technician who has worked at the same facilities as Richardson in the year preceding her February 1997 testimony. She had no contact with rabbits on days or weekends during that period.[26]

Principal Animal Technician Jody Rodriques at the Center for Molecular Medicine - West did not work with rabbits, even on weekends, nor did her two subordinates. She believed that Sandoval could perform the duties of her two subordinates and all of her work, except that of supervision.

The work assignments of the four animal technicians at the Center for Molecular Medicine - East were the same with respect to the absence of rabbit duty at the time of the hearing in February 1997. According to Senior Animal Technician Tom Blaze only mice have been housed at this facility for the last three years.[27] Blaze believed Sandoval could perform his duties. This opinion was shared by Lowe. Two of his Blaze's coworkers had not had contact with rabbits in the year preceding the February 1997 hearing.

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[26]Pete Willhite acknowledged the absence of rabbit duties, but claimed that Sandoval could not perform Peale's duties because Peale did come into contact with other employees who cared for rabbits and Sandoval could be exposed to hair and dander on their clothing. He could not remember such indirect contact ever causing an allergic reaction in Sandoval, however. Sandoval admitted that he could suffer an attack even outside the presence of rabbits, but only in the context of a fairly strong exposure like washing rabbit cages.

[27]Willhite corroborated this in part, stating that the facility had not had rabbits during its two years of operation.

Milton Rodriguez, an OAR supervisor, testified that the only facilities with rabbits in February 1997 were the Basic Science Building, Clinical Teaching Facility, and Elliott Field Station.[28]

Gustafson disputed the testimony that Sandoval could be assigned to any of the positions noted above that did not entail care of rabbits. When asked if Sandoval could be assigned to Center for Molecular Medicine - East, Gustafson's response was as follows:

> A: It would be -- okay. It would be -- I would have to discuss that with my boss because it would be a more dangerous situation for him than some other things.
>
> Q: Why?
>
> A: They wear face masks in that facility because of the requirements in there and from what I understand, the face mask could be, the type he likes to wear could be a problem.
>
> Q: What type is that?
>
> A: Well, he's tried various different types and he doesn't wear them, so I don't know if he would wear one in the facility or not.
>
> Q: No -- no. You said there was a problem about the type of face mask he likes to wear. What type is that?
>
> A: He has gone out and bought his own with a purchase order from the university. I'd have to look at it to see exactly what he has.
>
> Q: Would that particular face mask be a problem? Is that what you're saying?

[28]Rodriguez guessed that there were rabbits at Center for Molecular Medicine - West. However, since his knowledge was not first-hand and is contradicted by other witnesses, that assertion is rejected.

> A: I don't know. I know that his asthma is aggravated by certain types of environments.

At no point in this line of questioning did Gustafson directly assert that exposure to rabbits was a problem for Sandoval at Center for Molecular Medicine - East, or that Sandoval was not qualified to perform the duties of an animal technician there.

When asked generally whether Sandoval's allergic condition could be accommodated by assigning him to facilities without rabbits and by reassigning rabbit coverage among the 25 to 30 animal technicians, Gustafson stated:

> That would be a nightmare. No, its not possible. . . Again, people get ill. People go on vacation. Things happen. He would be exposed to rabbits.

Construed most generously, Gustafson's justification was that he could not "guarantee" that Sandovai would have absolutely no contact with rabbits or rabbit dander.[29]

Gustafson also questioned Sandoval's versatility as compared to other employees, raising reservations about his ability to handle primates. However, an August 1994 letter of commendation from a PI, Jaime A. Pineda, Assistant Professor of Cognitive Sciences, states that in caring for squirrels and monkeys, Sandoval has been one of the "best caretakers in recent memory"

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[29]As noted previously, Sandoval was referred to Barry Niman, the University's manager of rehabilitation programs. Niman concurred in the need for a medical separation. However, he did not independently assess OAR's ability to accommodate Sandoval so as to avoid exposure to rabbits and was never informed about facilities where rabbits had not been housed for a long time or some buildings that had never housed rabbits. Niman saw no problem with Sandoval continuing to work with other animals.

and that Sandoval is recommended for care of "rodents, primates, or other species." In a letter of recommendation addressed to Gustafson, another PI vouched for Sandoval's work with primates as well as his conscientiousness and dedication. Gustafson did acknowledge that Sandoval was qualified to work at any of the facilities "in some capacity."

Layoff of James Adamson

James Adamson was employed as a development technician by the University for 23 years, most of those in OAR. His principal duties in OAR involved the repair of cage equipment, such as automatic watering systems and cage washers. He also advised OAR with respect to the design of equipment, prepared blueprints, consulted on cost estimates, and did some minor electrical wiring work.

Adamson participated in the submission of the "potential sick leave" notices. After submitting the first, he was told by Timms that the sick leave policy did not apply to him. Adamson exhibited his support of UPTE's campaign for recognition by allowing his name, picture, and a quote to be published in an organizational flyer. Stephen Gardella, the compliance officer and a former OAR supervisor, took issue verbally with Adamson's belief that a union was necessary. Based on the entire record, a reasonable inference may be drawn that Gustafson was aware of the flyer.

The School of Medicine has budgetary oversight for OAR. Annual budget meetings take place under the supervision of the

Dean for Scientific Affairs in the School of Medicine. Deborah McGraw-Block, Assistant Dean for Fiscal Affairs in the School of Medicine, coordinates the annual budget deliberations for the School of Medicine. These meetings include the deans of the various divisions, including Dr. George Palade, Dean of Scientific Affairs, and Roger Meyer, Associate Dean for Administration. The OAR animal program falls under their purview. When the School of Medicine directs that reductions be made it is usually the result of a joint decision by Palade, Meyer, McGraw-Block, and her staff.

During the budget meetings held to discuss the 1995-96 budget, sometime in early 1995, the School of Medicine budget committee directed the OAR animal program to reduce the rates charged to PIs and their sponsoring institutions for housing laboratory mice. The School of Medicine had determined that OAR's rates were too high to remain competitive with 16 other institutions housing mice. These rates, referred to as "per diem" rates, constitute a primary source of operating revenue for OAR. OAR was instructed to reduce the rates by approximately 20 percent, based on research completed by Smith showing that such a reduction would bring UCSD's rates within the middle of the range of rates of the other competing institutions.

Based on the assumption that the mouse per diem rates would be reduced, the 1995-96 proposed budget generated by Smith indicated a projected year-end deficit of $118,000 for OAR. This deficit reflected a total operating income increase of 12 percent

and total expense increase of 15 percent. The largest expenditure line item increase was for staff salaries in the amount of approximately $184,000. Smith's projections also indicated that implementing a 20 percent cut in the "mice barrier micro" rate and 18.4 percent cut in the "mice micro" rate would result in a projected revenue loss of $102,271. Both projections incorporated assumptions that the reduced rates would increase the volume of contracts, by 173 percent for "mice barrier micro," and 6 percent for "mice micro." Smith projected that the anticipated overall revenue loss could be made up through increased contracts, but that the additional contracts would concomitantly increase OAR's expenses in maintaining the additional populations.[30]

During the budget meetings, Smith recalls that the discussion about reducing the per diem rates included the need to offset the loss through other reductions. She recalls noting that the OAR Machine Shop, to which Adamson was assigned, appeared to be an expensive operation and that its elimination was suggested as a possible action.[31] She recalled that several options were initially proposed including cuts in the Machine

[30]The record does not permit a quantification of the additional expense associated with the projected increase in mice contracts. However, it is clear that economies of scale do operate, resulting in less than a directly proportional relationship between increased volume and expenses.

[31]McGraw-Block recalls noting what she thought was the high expense of maintaining the Machine Shop. But she did not suggest eliminating it and does not recall the proposal for its elimination being brought up in the budget meetings at the dean's level.

Shop, delays in hirings, and attrition of employees in the OAR Diagnostic Laboratory. Adamson's name was never mentioned specifically in the discussions.

Dr. Robinson has ultimate responsibility for the budget of the UCSD animal program. He concluded that cuts would be required to eliminate the $118,000 deficit, in part because OAR is not permitted to end the year with a deficit. If it does, it is required to expend its own funds to eliminate it. Robinson instructed Gustafson and Dr. Phillip Richter, Senior Veterinarian in the Office of Campus Veterinary Services, who also reports to him, to propose areas for reduction.

The Office of Campus Veterinary Services includes the Diagnostic Laboratory. The Diagnostic Laboratory investigates disease outbreaks in the animal program and performs assays for PIs. In September 1995, Robinson directed Richter to prepare an analysis showing the cost savings of closing the Diagnostic Laboratory, including estimates of the cost of out-sourcing the services. Richter responded and ultimately proposed the layoff of Holly Henkelmann, an Animal Health Technician III. Her layoff was to be effective November 1, 1995. She, too, was an UPTE member.[32] Richter testified credibly and without contradiction that the layoff of Henkelmann resulted in net savings to the animal program, despite the need to contract out and shift the ongoing diagnostic work.

[32]Henkelmann had a terminal medical condition and took a disability leave to avoid being laid off.

Gustafson discussed the options with Robinson and together they came up with the decision to eliminate the Machine Shop. Gustafson estimated that savings would amount to a total of $50,000 to $70,000. This factored in the cost of out-sourcing the services previously provided by Adamson. Adamson testified that he was not approached prior to his layoff with concerns about excessive costs in the Machine Shop.

The 1995-96 proposed budget estimated that the total outlays for the Machine Shop would be $114,319, of which labor costs amounted to $81,639.[33] Supplies and expenses were estimated to be $27,080, and the remaining expenses amounted to $5,600.

In the layoff justification documents submitted for approval to UCSD Employee and Labor Relations, Gustafson noted that the total cost of operating the Machine Shop was approximately $114,000 and the cost of replacement labor would yield an estimated savings of $50,000, as he had earlier predicted. He attached a contract proposal with Sterilizer Technical Specialists (STS) at approximately $18,800 per year, labor only.

Following submission of the formal layoff request, Gustafson negotiated contracts with STS and another outside vendor, Edstrom Scientific Company.[34] In Gustafson's estimation, the Edstrom

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[33]This included the cost of hiring an additional part-time employee to assist Adamson. The part-time position was added in response to Adamson's health condition, which precluded overtime work on his part.

[34]STS Corporation handled maintenance of the cage washers and autoclaves. Edstrom maintained the watering machinery. The UCSD campus machine shop was also enlisted to handle small repairs.

contract covered three-fourths of Adamson's work. The original Edstrom contract was negotiated as a "labor only" contract, for $9,000, with parts billed as needed. The contract was later substituted with a comprehensive parts and labor contract for $16,400. The first STS contract for the 1996-97 year was negotiated for $18,800 per year, per the original proposal.[35]

The UCSD animal program ended the 1995-96 year with a budget surplus of approximately $12,000. This was due to two unanticipated events: a merit increase to employees in the bargaining unit represented by UPTE being withheld resulting in a $30,000 windfall, and a special project financed by the Dean's office generating a $60,000 to $70,000 windfall.[36]

Some of Adamson's work was shifted to other employees in OAR. OAR supervisors were assigned to check the sterilizers, though not as frequently as Adamson had. Supervisors and non-supervisory employees checked the automatic watering systems and cage washers on a daily basis.

Further attempting to show that Adamson's layoff was pretextual, UPTE submitted evidence showing that in January 1997,

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[35]Contrary to UPTE's claim, OAR did not appear to suffer in terms of slower response times due to use of the outside contractors. UPTE also asserted that OAR's failure to have negotiated contracts in place with Edstrom and STS prior to the layoff is suspicious. However, I reject any such implication since it appears the parties had informal "pay-as-you-go" arrangements for the balance of the 1995-96 fiscal year, before negotiating one-year formal agreements.

[36]UPTE asserts that the surplus would have been closer to $81,000 had the School of Medicine not unexpectedly recouped revenue of $79,000 in the form of a special user surcharge.

OAR posted a vacancy for a new position entitled Quality Assurance Specialist with a salary range of $33,000 to $41,600. The job description indicates similarities to Adamson's position, such as responsibility for renovation and construction projects. However, an overall representation of the job reflects an emphasis on administrative duties, especially the role of liaison between OAR and the School of Medicine in the planning and implementation of new projects and work sites. Adamson admitted that he did not have experience in several of the areas required by the job, though he claimed he could perform "at least one-half" of the job. Gustafson estimated it as less than one-quarter. From this, UPTE conservatively estimates that $7,800 in labor costs had merely been shifted and not recouped.

ISSUES

1. Did the University interfere with employee rights under the HEERA by threatening employees with loss of their jobs, and thereby violate section 3571(a) and (b), as a result of Melman's statement during the October 26, 1994 meeting?

2. Did the University impose reprisals on Sandoval and Dawn because of their protected activities involving protest of the sick leave policy, and thereby violate section 3571(a) and (b), by issuing them the November 1994 disciplinary letters?

3. Did the University impose reprisals on Sandoval because of his protected activities, and thereby violate section 3571(a) and (b), by:

(a) transferring him to Elliott Field Station on December 1, 1994;

(b) issuing him the December 5, 1994, disciplinary letter;

(c) imposing the December 20, 1994, suspension; and

(d) medically separating him from employment on April 3, 1996?

4. Did the University impose reprisals on Adamson because of his protected activities involving protest of the sick leave policy and support for the recognition drive of UPTE by laying him off, and thereby violate section 3571(a) and (b)?

DISCUSSION

Alleged Threat By Melman in October 26, 1994, Meeting

HEERA section 3571 makes it unlawful for a higher education employer to "threaten to impose reprisals on employees" because of their exercise of representational or organizational activities. Threats are deemed to be interference with protected rights because they tend to or do result in harm to employee rights. (Clovis Unified School District (1984) PERB Decision No. 389.) Proof of unlawful intent to deprive employees of their protected rights is not required. (Carlsbad Unified School District (1979) PERB Decision No. 89.) In interference cases, the employer is permitted to demonstrate competing interests which are then balanced against the degree of harm to employee rights in determining whether an unfair practice has occurred. (Ibid.)

Consistent with the notion that the exercise of protected rights must be balanced against the employer's right to maintain its operations under Carlsbad, section 3571.3 of the HEERA specifically acknowledges the higher education employer's right of free speech.[37] Cases construing the employer's right of free speech establish that a statement containing a threat of reprisal loses its protection, and will be found unlawful if the employer shows no overriding operational necessity justifying it. (University of California (1983) PERB Decision No. 366-H.)

The first issue with regard to Melman's statement that employees "could lose their jobs" if they took their protest to PIs is whether the statement reasonably conveyed the notion, as UPTE contends, that employees would be terminated as a result, or, as the University contends, that the action would precipitate a chain of events that would cause them to lose their jobs for reasons beyond the University's control, such as the loss of funding.[38]

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[37]Section 3571.3 states:

> The expression of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute, or be evidence of, an unfair labor practice under any provision of this chapter, unless such expression contains a threat of reprisal, force, or promise of benefit; provided, however, that the employer shall not express preference for one employee organization over another employee organization.

[38]Even the latter meaning would not necessarily be lawful, however. An employer's prediction of possible adverse consequences is unlawful where its statement is not supported by

A statement with alternative meanings will be analyzed by an objective test, considering the impact the statement was likely to have on the employer and recognizing that employees may be more susceptible to intimidation. (Chula Vista City School District (1990) PERB Decision No. 834.) The outcome does not depend on whether the employee actually felt threatened. (Ibid.) In general, whether particular comments constitute an unlawful threat depends on the circumstances in which they occurred. (See Los Angeles Unified School District (1987) PERB Decision No. 611.) A statement may be considered an implied threat of adverse action, depending the manner in which it was delivered and other surrounding circumstances. (Los Angeles Unified School District (1988) PERB Decision No. 659.)

I conclude that the employees could reasonably have inferred that Melman's statement carried the threat of dismissal. I base this on the fact that Melman, as the director of UCSD Employee and Labor Relations, spoke for OAR. He would be reasonably perceived by the employees to be speaking in his role as a labor/management authority[39] rather than as the operational manager of OAR responsible for grant funding and compliance

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demonstrably predictable consequences beyond the employer's control. (Rio Hondo Community College District (1980) PERB Decision No. 128, citing NLRB v. Gissel Packing Co. (1969) 395 U.S. 575 [71 LRRM 2481] [employer predicted that recognition of the union "could" result in the loss of jobs]; Modesto City Schools (1983) PERB Decision No. 291.)

[39]UPTE offered evidence that Melman had the authority to initiate disciplinary investigations against employees. Melman testified that he did not generally initiate disciplinary actions, but also did not rule out the possibility.

issues. Furthermore, in stating that going to the PIs would be "360 degrees against what the policy stood for," he conveyed his view that the job action would be a breach of loyalty, and presumably therefore, grounds for termination. He said nothing to disabuse the employees of the notion that dismissal was one possible consequence. He never elaborated on his statement or attempted to qualify it.

Despite having found that Melman's statement had a tendency to coerce employees, I find that Melman's statement was not unlawful because it was excusable under the circumstances. PERB has held that an "employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect." (Rio Hondo Community College District (1982) PERB Decision No. 260.) An activity loses is protected character, when the activity is "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice." (Mt. San Antonio Community College District (1982) PERB Decision No. 224.)

Melman's statement came in direct response to Kalmijn's threat that employees would inform PIs that the animals were in danger of contracting diseases borne by the employees.[40] Kalmijn's statement lost its protected character because it was reckless and inflammatory. There was no credible evidence that

[40]The plan for employees to attempt to solicit the support of PIs must be considered protected activity. (See McPherson v. Public Employment Relations Bd. (1987) 189 Cal.App.3d 293, 309 [234 Cal.Rptr. 428].)

the policy was forcing employees to work while sick. Few human diseases are transmitted to laboratory animals and there was no indication that care was actually compromised because employees were ill while working. An employer may expect that employee activity be carried out in a lawful manner through the pursuit of law means. (Konocti Unified School District (1982) PERB Decision No. 217 [discipline of bus driver lawful where he stopped bus at an unauthorized point to solicit student support for a strike].) In this case, Kalmijn's statement crossed the line of reasonableness.

Furthermore, Melman's statement was a one-time occurrence, not repeated, and made in the heat of a confrontational meeting. (See Culver City Unified School District (1990) PERB Decision No. 822 [angry response of administrator implying a threat of harm was a reasonable response to a perceived attack on the administrator's integrity].) Melman was not an expert in animal care and was likely to have accepted at face value Kalmijn's statement that animals were susceptible to human diseases. Melman's spontaneous response, to the extent it was designed to impede the threatened harm, was therefore excusable.

Accordingly, this allegation is dismissed.

Retaliation Against Sandoval, Dawn, and Adamson

A. Legal Framework

In order to prevail on a claim of retaliation, the charging party must establish that he engaged in protected activity, that the activity was known to the employer, and that the employer

took adverse action because of such activity. (Novato Unified School District (1982) PERB Decision No. 210.) The adverse action must involve actual, rather than merely speculative, harm; it must satisfy an objective, "reasonable man" standard considering the impact on the employee's conditions of employment. (Palo Verde Unified School District, supra, PERB Decision No. 689; Newark Unified School District (1991) PERB Decision No. 864.) Unlawful motivation is essential to the charging party's case. Motivation may be proven by both direct and circumstantial evidence. In the absence of direct evidence, the unlawful purpose or intent may be established by inference from the entire record. (Carlsbad Unified School District, supra, PERB Decision No. 89.)

Types of circumstantial evidence probative of unlawful intent include (1) timing of the adverse action (North Sacramento School District (1982) PERB Decision No. 264), (2) inadequate, inconsistent, shifting justification for the adverse action (Novato Unified School District, supra, PERB Decision No. 210), (3) disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S), (4) departure from standard procedures (Santa Clara Unified School District (1979) PERB Decision No. 104), (5) cursory investigation (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S), and pattern of antagonism toward the union (Cupertino Union Elementary School District (1986) PERB Decision No. 572).

Once the charging party establishes unlawful motivation for the adverse action, the burden of proof shifts to the employer to establish that the action "would have occurred in any event," regardless of the protected activity. Stated conversely, the action will be deemed an unfair practice only if the employee establishes that he would not have been disciplined "but for" his protected activities. (Novato Unified School District, supra, PERB Decision No. 210; Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 730 [175 Cal.Rptr. 626].)

B. Sandoval and Dawn Disciplinary Letters

UPTE contends that Sandoval and Dawn engaged in protected activity by participating in the October 26, 1994, meeting and by later submitting the "potential sick leave" notices.

Relying on Konocti Unified School District, supra, PERB Decision No. 217, the University contends that the submission of the sick leave notices was not protected, because the protest was pursued through improper means. In Konocti, PERB cited the following language in the National Labor Relations Board decision of Elk Lumber Co. (1950) 91 NLRB 336 [26 LRRM 1493][41]:

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[41]In Elk Lumber Co., carloaders reduced the number of cars loaded per day in response to changes made by the employer. The employer's termination of the employees was found to be justified. In a similar case, NLRB v. Local Union 122, International Brotherhood of Electrical Workers (1953) 346 U.S. 464 [33 LRRM 2183], television technicians handed out flyers that attacked the quality of the programming on the station they were striking. There, the termination of the employees was upheld because it constituted disloyalty.

> [N]ot every form of activity that falls within the letter of this provision is protected. The test . . . is whether the particular activity is so indefensible as to warrant [disciplinary action]. Either an unlawful objective or the adoption of improper means of achieving it may deprive employees engaged in concerted activities of the protection of the Act. . . .

As noted previously, PERB has held that an "employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect." (Rio Hondo Community College District, supra. PERB Decision No. 260.)

I find that the submission of the notices was protected. Gustafson and Timms participated in the October 26 meeting and so the protest did not come as a complete surprise to them. They were aware of the employees' objections to the sick leave policy and their intention to take some further collective action in protest of the policy. Though not explicitly so informed by UPTE, they could reasonably infer that the strategy chosen was an alternative to contacting the PIs, since the PIs were not in fact contacted. Beginning on the first day and continuing for each successive day (for a total of approximately three to five days), until the submission of the notices ceased in response to the disciplinary letters, each of the employees who submitted the notices did report to work. The total number of participants was no more than six.[42]

[42]The University contends that the employees resorted to unlawful "self help" and should have pursued proper "administrative channels," suggesting that grievances could have

While Gustafson claimed that the notices created administrative "havoc," it is belied by the facts. Only one employee was actually reassigned as a result of the protest. A few employees were essentially placed on alert for a potential need for coverage.

Dawn and Sandoval received disciplinary letters because they persisted in submitting the notices after being verbally warned. In this case, there is no need to resort to circumstantial evidence to connect the disciplinary action with the protected activity. That is, there is no need to demonstrate that the disciplinary action was merely a pretext for punishing some other protected activity. The University contends UPTE must establish that the University imposed discipline for the submission of the notices, as a pretext for punishment for participation in the October 26 meeting. This is unnecessary. The University admits that the letters were issued <u>because</u> the employees disobeyed the directives of their supervisors to cease submitting the notices -- an act they characterize as insubordination. The only real issue in this case is whether the submission of the notices was protected activity, or exceeded the bounds of proper protest. For the reasons stated, I find the activity to be within the bounds of protection. Accordingly, I find that by this conduct, the University violated section 3571(a) of the HEERA.

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been filed under the Staff Personnel Policy, employer-promulgated grievance policy. Employee protests do not lose their protected status merely because the employer views them as disruptive or because other alternatives are available.

C. Sandoval Adverse Actions

1. Transfer to Elliott Field Station

Sandoval engaged in protected activity by participating in the October 26, 1994, meeting and by submitting the "potential sick leave" notices thereafter. Gustafson and Timms both attended the October 26, 1994, meeting. Gustafson issued Sandoval the November 4, 1994, warning letter regarding submission of the notices. Timms was also aware that employees were submitting the notices. Therefore, both Gustafson and Timms had knowledge of Sandoval's protected activity.

Sandoval suffered an adverse action when he was reassigned from the Basic Science Building to Elliott Field Station. He was not working with rabbits while at the Basic Science Building. The Elliott Field Station position was one he specifically requested that he not be assigned. Gustafson admitted that employees do not like "change." Involuntary transfers or reassignments have been found to be adverse actions even though they are not accompanied by loss of pay or benefits. (Pleasant Valley School District (1988) PERB Decision No. 708; Santa Paula School District (1985) PERB Decision No. 505; Santa Clara Unified School District (1985) PERB Decision No. 500.) The lack of any loss of pay or benefits is not an impediment to finding that Sandoval suffered an adverse action.

The decision to transfer Sandoval was announced approximately five weeks after the October 26, 1994, meeting and approximately four weeks after the submission of the "potential

sick leave" notices. The timing of the involuntary transfer constitutes circumstantial evidence of intent to retaliate against Sandoval for his protected activities. (Santa Clara Unified School District, supra, PERB Decision No. 500 [reassignment three weeks after protected activity].)

Evidence of an inadequate justification also supports a showing of retaliatory motive. (See San Leandro Unified School District (1983) PERB Decision No. 288 [insubstantial justification for transfer].) The University's justification for the transfer was suspect for a number of reasons. The additional animal technician at Elliott Field Station was needed because of increased animal populations, including a new project involving rabbits from the Salk Institute. Gustafson testified that Sandoval was familiar with the PIs and the facilities at Elliott Field Station as a result of his assignment there in the 1980s. He felt it would be necessary to retrain another individual. Yet the record as a whole does not indicate any high degree of specialization of skills among animal technicians nor that retraining was a substantial issue for OAR. Many animal technicians are cross-trained to handle a variety of species. Gustafson admitted that Sandoval could work in any of the UCSD facilities "in some capacity." It would not have been difficult to fill the position with one of the other 25 or more animal technicians. This ground was at best expedient -- certainly not compelling.

Gustafson contradicted his own claim that Sandoval was a good fit with the PIs when he asserted that the reason Sandoval was moved from Elliott Field Station following his first stint there was because some PIs had expressed reservations about him.

Gustafson also claimed that he believed the assignment would be welcomed by Sandoval because Sandoval had requested the Elliott Field Station position in the late 1980s for health reasons, and was accommodated at that time. But Sandoval credibly testified that he informed Gustafson of his desire not to be transferred to Elliott Field Station. Then, immediately upon his transfer, Timms assigned Sandoval to work directly with rabbits on a daily basis.[43]

Several factors also suggest that Gustafson had ample motive to make Sandoval's job more unpleasant. The October 26 meeting in which Sandoval participated became a high profile matter involving the UCSD's director of Employee and Labor Relations and its legal staff. The "potential sick leave" campaign was vexing to OAR. And Gustafson's electronic-mail response to the inquiry from the Massachusetts management employee seeking advice on how to discipline a unionized workforce, in which Gustafson boasted that the OAR sick leave policy had resulted in six terminations, belies his claim of strict neutrality.

Finally, the fact that Sandoval was subject to a series of at least four subsequent adverse actions over the next 12 months,

[43]In its post-hearing brief, the University argues that the Elliott Field Station offered the least amount of exposure to rabbits. The weight of evidence establishes otherwise.

discussed in detail below, adds further weight to the prima facie showing with respect to this transfer.

The timing, inadequate and inconsistent justification, and anti-union animus on Gustafson's part supports a finding that Sandoval's transfer to Elliott Field Station was made for retaliatory reasons.

The University's business justification for the transfer has been noted, but is rejected. The decision to select Sandoval for the position based on his familiarity with the Pis and OAR's desire to avoid retraining another individual is comparatively weak. Even if Gustafson's reasons for the transfer were mixed, the preponderance of the evidence supports the conclusion that Gustafson would not have transferred Sandoval but for Sandoval's high level of participation in the sick leave policy protest. Thus, I find that by this conduct, the University violated section 3571(a) of the HEERA.

2. December 5, 1994, Disciplinary Letter

Evidence supporting the claim that the December 5 disciplinary letter was issued for retaliatory reasons include the timing of the letter, disparate treatment of Sandoval, and OAR's exaggerated justification for the disciplinary action.

The letter citing Sandoval for falsifying completion of weekend work was issued approximately six weeks after the October 26, 1994, meeting. It was also issued four days after the decision to reassign Sandoval to Elliott Field Station. The December 5 letter was the third of four adverse actions occurring

within eight weeks of Sandoval's protected activity. OAR could point to no instance of formal disciplinary action against Sandoval prior to his protected activity.[44] Sandoval's evaluations prior to his protected activity indicate that he was an above-average employee who was valued by OAR for his conscientiousness. Some PIs had written glowing recommendations on his behalf.

The record supports a finding that Sandoval was treated in a disparate manner because he was singled out for discipline for a recordkeeping error and was not afforded progressive discipline. Sandoval was cited for "falsifying" records, when the only other employee shown to have been disciplined for a similar error was only cited for entering "incorrect data." Significantly, Rudolph Richardson testified without contradiction that Timms instructed him to "sign off" the sheet for Timms' shift, which he had not actually completed, showing that similar errors had been condoned in the past.

The animal room checklists offered by UPTE reflect numerous discrepancies. There was evidence that other animal technicians failed to annotate changes on the checklist in the comments section at the bottom of the form without consequences, which, if done by Sandoval in this case, would have avoided any discipline. In one case of apparent falsification, it appears that another individual other than Gustafson entered his initials.

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[44]Although Willhite testified that Sandoval had been verbally counseled in the past, it did not involve recordkeeping responsibilities.

There were numerous instances where no initials were entered. Either an animal technician failed to report for duty or completed the work but failed to fill in the form. Whatever the case, OAR provided no evidence that these omissions either prompted an investigation or resulted in corrective action. Even when Sandoval alerted management to Tom Blaze's entering his signature in advance of his duty day and his repeated failure to document his work by entering notations, no investigation occurred.[45] The policy regarding disciplinary consequences for recordkeeping errors was ill-defined and inconsistently applied. (State of California (Department of Parks and Recreation), supra, PERB Decision No. 328-S.)

Instead of merely counseling Sandoval verbally in keeping with OAR's policy of progressive discipline, Timms showed Sandoval no leniency when he issued the formal letter of discipline. No credit was given for Sandoval's lengthy and unblemished service record and the fact that Sandoval had voluntarily admitted his failure to report for the weekend duty.

The investigation of Sandoval's alleged falsification of records also exhibits a tellingly adversarial, cursory, and technical character. (Ibid. [insubstantial or technical allegations may raise inference of unlawful motivation].)

[45]The fact that some checklists, including the one which contains Sandoval's error, contain no initials on weekends and holidays suggests that OAR was also lax in policing lapses in coverage at those times. That, in turn, suggests that Sandoval's failure to come in on the December 5 weekend did not seriously compromise the experiments with the animals affected.

Initially, when Sandoval volunteered his own failure to report, Willhite's response was casual. He did not criticize Sandoval for potential harm befalling the animals who went without weekend care. Though Willhite did not remind Sandoval to annotate his entry in the comments section at the bottom of the form after telling him, in his words, to "document the weekend," OAR later assumed that Sandoval deliberately ignored his training in an effort to cover up the fact that he had not reported.

The disciplinary letter did not issue until one month after Sandoval reported his absence. When Timms first investigated, he and Gustafson met with Sandoval and asked him only one question: whether he had come in or not. Then, rather than promptly asking Sandoval for an explanation for why he entered his initials when Sandoval admitted not coming in as would likely have been done in a normal counseling situation, they concluded the meeting. Sometime later a second formal meeting occurred and only then was Sandoval asked for an explanation. Gustafson ultimately credited Willhite's version in the dispute about what he instructed Sandoval to do by claiming that Sandoval's explanation had changed. Yet, in fact, it had not -- Gustafson assumed that because Sandoval had not volunteered an explanation at the first meeting, his explanation at the second meeting was a belated fabrication of an excuse. Furthermore, Gustafson apparently never questioned Willhite closely because he never professed knowledge that Willhite had told Sandoval to "document the weekend" -- a statement that would have at least raised a

question about Sandoval's intent to deliberately falsify information.

The University failed to present sufficient evidence to rebut the claim of disparate treatment though it attempted to do so by showing comparable levels of discipline for similar misconduct by employees who had not engaged in protected activities. OAR provided only one comparable instance of disciplinary action for a recordkeeping error,[46] involving an unidentified employee. And that employee was charged with a lesser offense and received a lesser form of punishment.

The preponderance of the evidence establishes that Sandoval would not have been issued the December 5, 1994, disciplinary letter but for his participation in protected activities. Thus, I find that by this conduct, the University violated section 3571(a) of the HEERA.

3. December 20, 1994, Suspension

Evidence supporting the claim that OAR's December 20, 1994, suspension for Sandoval's alleged insubordination for crossing out temperatures, include the timing of the discipline, inadequate justification, and disparate treatment of Sandoval.

[46]The other two instances of disciplinary action taken subsequent to the October 26 meeting involving employees not engaged in protected activity were not comparable. The termination of the employee for assaulting a supervisor involves highly serious misconduct, which according to University Staff Personnel Policy may be grounds for immediate termination. Progressive discipline principles do not apply according to the written policy. The employee charged with failure to accurately read thermometers was a supervisor, who was expected to conform to a higher standard of competence than those in Sandoval's classification.

The suspension for crossing out the Celsius temperature readings when only the fahrenheit temperatures should have been recorded was imposed approximately eight weeks after the October 26, 1994, protest meeting. The December 20 suspension was the fourth of four adverse actions occurring within eight weeks of Sandoval's protected activity. Again, as noted above, there was no record of any formal discipline imposed on Sandoval prior to his protected activity. Suspicious timing of the discipline has been shown.

Gustafson's justification for the disciplinary action was suspect for several reasons. (See San Joaquin Delta Community College District (1982) PERB Decision No. 261 [unsubstantiated claims of insubordination].) He appeared to greatly exaggerate the significance of Sandoval's relatively inconsequential error of recording both the fahrenheit and Celsius temperatures. If the temperatures were that critical to the welfare of the animals, the traditional high-low thermometer would have been procured and put in place without delay. The temperatures which Sandoval actually recorded were consistent with the other temperatures recorded during that week while the fahrenheit/celsius thermometer was in use. The only temperature readings of significance that fit this pattern were the fahrenheit readings recorded by Sandoval. By crossing out the celsius figures, Sandoval only rendered the consistency of the readings more apparent to the reader.

It is reasonable to infer from the escalating level of adverse actions against Sandoval that he was especially fearful of the consequences of another error being identified by management. It is therefore entirely plausible that Sandoval would have asked Timms if he could "white out" the redundant temperature readings. Why Timms would have told Sandoval that he could "take care of that tomorrow" is curious. He could have made the statement either absentmindedly or with the conscious design of entrapping Sandoval into a more serious infraction of insubordination. Whatever Timms's motivation, OAR's subsequent justification was completely undermined after Timms granted Sandoval permission to cross out the readings.

As noted previously, there was scant evidence produced by the University to establish that the kind of recordkeeping errors committed by Sandoval had warranted similar discipline of other employees who had not engaged in protected activity. The University's attempt to characterize this error as well as the error resulting in the December 5 disciplinary letter as deliberate acts of sabotage only serves to accentuate the exaggerated, pretextual nature of the discipline.

The preponderance of the evidence establishes that Sandoval would not have been suspended on December 20, 1994, but for his participation in protected activities. Thus, I find that by this conduct, the University violated section 3571(a) of the HEERA.

4. Medical Separation

Evidence supporting the claim that OAR's decision to medically separate Sandoval was made for retaliatory reasons include the timing of the decision, departure from standard procedures, and the exaggerated nature of OAR's justification.

While the decision to medically separate Sandoval did not occur until April 3, 1996, or approximately one year and five months after Sandoval's protected activity, it relates back to Gustafson's assertion in his February 7, 1995, letter to Dr. Falkoff that it was no longer possible for OAR to continue accommodating Sandoval's allergy to rabbits. Gustafson adopted this position within weeks of Sandoval's severe allergic reaction to the rabbits at Elliott Field Station.[47]

In addition, the decision must be considered in context with the pattern of the repeated adverse actions against Sandoval.[48] The element of timing has therefore been established.

Departure from standard procedures in retaliation typically involves the failure to abide by formal written procedures for

[47]What followed was simply further communication between Gustafson and Falkoff, review of Sandoval's condition by the University's physician, Dr. Greenberger, and finally a period ostensibly of assessment.

[48]The placement of Sandoval on involuntary leave is not included in either of the complaints as an adverse action. It was not included in the unfair practice charge (or complaint in LA-CE-456-H) presumably because it would have been untimely. Although its circumstances were litigated, this adverse action will not be amended into the complaint to conform to proof because UPTE had ample opportunity to include it in the unfair practice charge filed in LA-CE-456-H prior to the expiration of the six-month statute of limitations.

disciplining employees or implementing some other administrative action deemed to be adverse. (See Woodland Joint Unified School District (1987) PERB Decision No. 628 [standard personnel procedures].) However that term is also appropriate for describing a deviation from an informal practice applied to a single individual. In this case, OAR had a history of accommodating Sandoval with his allergic reaction to rabbits. In the 1980s, following his first severe allergic reaction to rabbits, Sandoval appealed to Jack Vanderlip for permission to transfer to Elliott Field Station, a site Sandoval had concluded at that time would be better suited to his condition. That request was granted. In December 1994, Gustafson transferred Sandoval to Elliott Field Station, against his expressed wishes, and assigned him to work with rabbits on a daily basis. This assignment directly precipitated the asthmatic attack, on which Gustafson relied in justifying his decision to medically separate Sandoval.

Gustafson's justification for OAR's inability to continue accommodating Sandoval was exaggerated. As Sandoval's physician, Dr. Falkoff noted, Sandoval's work history demonstrated that he was able to avoid asthmatic attacks by avoiding prolonged or severe exposures to rabbits. The claimed necessity to remove Sandoval both because of his potential for an asthmatic reaction to rabbits and his allergies to other animals -- none of which evidenced any potential for medical problems -- rang hollow throughout Gustafson's testimony. After Sandoval's rabbit duties

at Elliott Field Station were transferred to Albert LeClair, he suffered no further allergic reactions.

Gustafson's letter responding to Falkoff betrayed any sense of objectivity on his part, particularly the way he twisted Falkoff's advice to Sandoval to suggest that OAR was required to eliminate "all" contact with rabbits. His attempt to rebut the claim that Sandoval could have worked at the Center for Molecular Medicine - West, a facility not housing rabbits, was evasive and unpersuasive. Gustafson's assertion that attempting to accommodate Sandoval to avoid contact with rabbits would be a "nightmare" was simply not supported by any credible evidence.

OAR's attempt to invoke the potential liability of a life-threatening attack as an operational necessity defense is rejected. Despite the obvious appeal of the claim in theory, I find that the preponderance of the evidence establishes that the decision to cease accommodating Sandoval was not one that would have been made but for his participation in the sick leave protest. Gustafson pointed to three instances where other employees with the same allergic reaction to rabbits were separated from the University. In only one of those cases, the case of the veterinarian, did it appear that the employee was removed involuntarily. No facts were elicited from which a fair assessment could be made of the underlying medical profiles of that employee as compared to that of Sandoval.

While Dr. Greenberger rendered an opinion to the University supporting the need for separation of Sandoval, I find his

opinion to be subjective as compared to that of Falkoff. Falkoff examined Sandoval's work history around rabbits rather than forming a conclusion simply based on the literature and Sandoval's medical condition in the abstract.

As the medical examiner chosen by the University, it is also appropriate to scrutinize Greenberger's opinion more closely. Greenberger's opinion in May 1995, despite expressing amazement that Sandoval had been able to work as long with his condition, acknowledged that there had been no repeat of the December incident and that Sandoval could be progressing toward a more stable condition. He recommended follow-up examinations at a future time, which never occurred. Gustafson's purported reliance on Greenberger's opinion, without any follow-up investigation, and on Falkoff's opinion, which contradicts the notion that Sandoval required a complete preclusion from exposure, suggests a decision that was pretextual.

Finally, the fact that the December 1994 asthmatic attack forming the basis for Greenberger's opinion would not have occurred had Gustafson not participated in a decision that led directly to repeated and intense exposure to rabbits further belies any pretense that the decision to medically separate Sandoval was a dispassionate one based simply on medical science.

The preponderance of the evidence establishes that Sandoval would not have been medically separated but for his participation in protected activities. Thus, I find that by this conduct, the University violated section 3571(a) of the HEERA.

5. Cumulative Evidence of Unlawful Intent

Although not alleged as an adverse action, the September 22, 1995 ten-day suspension appears to have been unlawfully-motivated,[49] fitting the pattern of pretextual discipline against Sandoval for recordkeeping errors.[50] Given the strong showing of unlawful intent against Sandoval based on the previous incidents, it is reasonable to conclude, based on the totality of the evidence, that Sandoval was singled out for removal from the OAR staff because of his protected activity. The three instances of disciplinary action against Sandoval for recordkeeping errors cannot simply be viewed in isolation from each other but must be considered as a pattern. Though Gustafson testified that each escalating penalty was simply part of a pattern of progressive discipline, viewed in the larger context, the recordkeeping disciplinary actions appear to have been a concerted attempt to dismiss Sandoval for disciplinary reasons. The record permits the inference, again, based on the totality of the evidence, that when it became apparent to OAR that a termination for recordkeeping errors alone would not occur or be justifiable, OAR

[49]Sandoval had never previously been disciplined for failing to report for work. In the case of the November 5 and 6, 1994, absences, Willhite essentially overlooked the same omission. The room checklists shows absences on weekends and holidays, when coverage was apparently on a volunteer basis, yet there was no evidence of investigation or discipline.

[50]Again, although fully litigated, this adverse action will not be amended into the complaint to conform to proof because UPTE was provided the opportunity to allege this incident in the LA-CE-456-H unfair practice charge but failed to do so until the event became untimely.

pursued its other option of terminating Sandoval for medical reasons.

D. Adamson Layoff

Adamson engaged in protected activity by participating in the "potential" sick leave notice action. He also was a member of UPTE during its organizational campaign and was visibly supportive as evidenced by his picture and quote in a widely circulated UPTE organizing campaign flyer. Timms had knowledge of his participation in the "potential sick leave" notice action. The University did not deny that Gustafson was aware of this activity and the record reflects that the collective job action was of great concern to him, despite the fact that Timms told Adamson that the sick leave policy did not apply to him. Although the University denied the decisionmakers in Adamson's layoff had knowledge of the campaign flyer, Stephen Gardella was aware of it. Based on his association with OAR management it is reasonable to infer that Gustafson was aware of it. There is no evidence that Dr. Phillip Robinson, who ordered Gustafson to make cuts in the Machine Shop was aware of Adamson's protected activity.

UPTE contends that Adamson's layoff was a decision made solely by Gustafson and that Gustafson's motive was to retaliate against Adamson for his protected activity. Adamson's protected activity occurred in November 1994. The budget planning process for the 1995-96 year began in the early months of 1995. Some kind of preliminary decision to target savings from the Machine

Shop was made by Robinson prior to the commencement of the fiscal year, although the record is not clear precisely when that decision was made. Gustafson developed the proposal to layoff Adamson, which was submitted to the Office of Employee and Labor Relations approximately one year later, in November 1995.[51] Thus there is some evidence in this case that the timing of the decision supports a retaliatory motive, but it is weak. (See University of California (1984) PERB Decision No. 403-H [six-month lapse in time].) However, timing alone is insufficient to sustain a finding of unlawful intent. (Charter Oak Unified School District (1984) PERB Decision No. 404.)

UPTE's principal contention is that the decision to layoff Adamson was pretextual because the purported justification of the need to reduce expenses was without foundation. UPTE argues that the layoff was not necessary financially because OAR's revenues increased in 1995-96 and because OAR did not save money as a result of shifting Adamson's functions to other employees and outside contractors. Such a theory would provide evidence of an unlawful motive because inadequate or inconsistent justifications are considered probative. (Novato Unified School District, supra, PERB Decision No. 210.)

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[51]Since the budget deliberations resulted in a decision to eliminate the Machine Shop entirely, it is unlikely that Gustafson could have made, or did make, the decision to lay off Adamson unilaterally, as UPTE contends. Nevertheless, despite the fact that there is no evidence from which it may be reasonably inferred that Robinson knew of Gustafson's protected activity, the inquiry does not end here since Gustafson would be expected to analyze the proposal and reject it if it were imprudent.

However, the factual premise for UPTE's argument is lacking. Gustafson's estimate of the projected savings resulting from the elimination of the Machine Shop and Adamson's position was supported by the evidence. The budget deficit projected for 1995-96 was approximately $114,000. Gustafson estimated that the elimination of the Machine Shop would result in savings of $50,000 on an annual basis. This estimate was supported by savings calculated on the basis of substituting the Edstrom and STS contracts. The total budgeted annual labor costs for the in-house operation was $82,000. The labor-only figures for the outside contractors were $9,000 for the Edstrom contract and $18,800 for the STS contract, or a total of $27,800. The difference between labor costs of the in-house operation and the outside contractors was $54,200, showing Gustafson's estimate of $50,000 to, if anything, be slightly conservative.

UPTE sought to undermine these figures by pointing to work not covered by the two contracts that were shifted to other employees in OAR, primarily the animal technicians. There was evidence that animal technicians performed some of the routine maintenance duties previously performed by Adamson including checking instrument readings and refilling chemicals in machinery. There was no evidence that they performed any maintenance duties of a mechanical or skilled nature. This cost shift was subtle at best. Moreover, in anticipation of increased mouse populations, it was prudent from a budget standpoint to

retain animal technicians who would support increased revenue generation.[52]

UPTE also argues that the University attempted to ignore the budget totals at the end of the 1995-96 fiscal years that reflected a revenue increase of 2 percent and an expense decrease of 5 percent, resulting in a budget surplus of $11,977. Adding the new surcharge imposed by the School of Medicine to recoup excess revenue, the total revenue surplus for the year was $81,646. These figures have little if any probative value in proving unlawful motive because the decisions made to reduce expenditures in the proposed 1995-96 budget were based on projections of revenue likely to be lost in the coming year, which in turn, were due largely to the lowering of the mouse per diem fees. The fiscal decisions involving reductions in staff in OAR were made in an anticipatory posture. The budget management process requires that some cuts be made going into the new fiscal year based on anticipated shortfalls, as well as making cuts during the year due to unanticipated shortfalls. The actual budget surplus would only be probative if they were so extraordinary as to imply that the original projections were intentionally manipulated. There is no such evidence in the record.

[52]UPTE points to the addition of five animal technicians following Adamson's departure and claimed that portions of this additional labor costs belied the need to lay off Adamson. But the simple showing of additional expense ignores the fact that these additional expenses were contemplated as necessary to support the increased revenue production.

The University also successfully rebutted any claim of disparate treatment by showing that another UPTE member, Holly Henkelmann, was selected for lay off. Although Adamson's participation in protected activities was greater, the significant point is that Gustafson, who I have found did harbor unlawful motives, did not orchestrate Adamson's layoff by himself. He was directed by Dr. Robinson to propose reductions and the Machine Shop had been identified by several others as an appropriate target.

UPTE has failed to present sufficient evidence to demonstrate a prima facie violation of unlawful retaliation against Adamson. Accordingly, this allegation is dismissed.

REMEDY

Under the HEERA, the Board has the authority to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action as will effectuate the purposes of the Act. (Sec. 3563.3.)

It has been found that the University unlawfully retaliated against (1) Sandoval and Dawn by issuing them the disciplinary letters in November 1994 for submitting the "potential sick leave" notices, and (2) Sandoval alone by (a) involuntarily transferring him from the Basic Science Building to Elliott Field Station on December 1, 1994, (b) issuing him the disciplinary letter dated December 5, 1994, (c) ordering him suspended for five days by its notice dated December 20, 1994, and (d)

medically separating him from employment by its action effective April 3, 1996. These reprisals were imposed on Sandoval and Dawn because of their participation in protected conduct.

The appropriate remedy in a case involving unlawful retaliation under the HEERA is to order the University to rescind its punitive actions, remove and destroy the letters evidencing the disciplinary actions, and restore the employees to the positions they held before the unlawful action. (Compton Unified School District (1989) PERB Decision No. 784; Mt. San Antonio Community College District, supra, PERB Decision No. 224.) It is also appropriate that the University be required to post a notice incorporating the terms of the order. Posting of such notice, signed by an authorized agent of the University, will provide employees with notice that the University has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the HEERA that employees be informed of the resolution of this controversy and the University's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Regents of the University of California (University) has violated Government Code section 3571(a) of the Higher Education Employer-Employee Relations Act (Act). The University violated the Act by (1)

issuing Gilberto Sandoval and Ernie Dawn, employees at the University of California, San Diego (UCSD), the disciplinary letters in November 1994 for submitting the "potential sick leave" notices, and (2) involuntarily transferring Sandoval from the Basic Science Building to Elliott Field Station on December 1, 1994, (3) issuing Sandoval the disciplinary letter dated December 5, 1994, (4) ordering Sandoval suspended for five days by its notice dated December 20, 1994, and (5) medically separating Sandoval from employment by its notice dated April 3, 1996. These reprisals were imposed on Sandoval and Dawn because of their participation in the activities of the University Professional and Technical Employees - UPTE-CWA, Local 9119 (UPTE).

Because these actions had the additional effect of interfering with, and hence denying, the right of UPTE to represent its members, through the discipline of UPTE members and supporters, the disciplinary actions against Sandoval and Dawn, as well as the transfer and medical separation of Sandoval also violated section 3571(b).

The allegations that the University violated section 3571(a) by threatening employees with loss of jobs and by laying off James Adamson, and all other allegations are hereby DISMISSED.

Pursuant to section 3563.3 of the Government Code, it is hereby ORDERED that the University, UCSD, its Office of Animal Resources, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against UCSD employees Sandoval and Dawn, because they participated in activities of an employee organization of their own choosing for the purpose of representation on matters of employer-employee relations; and

2. Denying the right of UPTE to represent its members in their employment relations with the higher education employer by virtue of the acts of retaliation against its members.

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

1. Within ten (10) workdays of service of a final decision in this matter, rescind the November 1994 disciplinary letters issued to Sandoval and Dawn regarding their submission of "potential sick leave" notices.

2. Within ten (10) workdays of service of a final decision in this matter, reinstate Sandoval to his animal technician position at the Basic Science Building at UCSD, or similar facility with accommodations for his allergy to rabbits consistent with past practice.

3. Within ten (10) workdays of service of a final decision in this matter, rescind, remove and destroy the December 5, 1994, disciplinary letter ("Written Warning") issued to Sandoval for falsification of animal care records.

4. Within ten (10) workdays of service of a final decision in this matter, rescind, remove and destroy the December 20, 1994, Notice of Intent to Suspend (five-day

suspension) issued to Sandoval for failing to follow a supervisor's directives.

5. Within ten (10) workdays of service of a final decision in this matter, rescind the medical separation of Sandoval and reinstate him to his former position as an animal technician with the Office of Animal Resources.

6. Within thirty (30) workdays of service of a final decision in this matter, reimburse Sandoval for all lost wages and benefits he incurred due to the five-day suspension given to him as a result of the December 20, 1994, disciplinary action and due to the April 3, 1996, medical separation from employment. The amount of reimbursement is to be augmented by interest at the annual rate of seven (7) percent.

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

8. Within ten (10) workdays of service of a final decision in this matter, notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, of

the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the Charging Party.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code 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 of Regs., tit. 8, secs. 32300, 32305 and 32140.)

DONN GINOZA
Administrative Law Judge