STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

REGENTS OF THE UNIVERSITY OF CALIFORNIA, Employer, and UNIVERSITY OF CALIFORNIA ASSOCIATION OF INTERNS AND RESIDENTS (UCAIR), Petitioner.	)	Case No. SF-PC-1052-H PERB Decision No. 1359-H October 28, 1999

Appearances: University of California Office of General Counsel by James E. Hoist, James Nellis Odell and Leslie Van Houten, Attorneys, and Cochran-Bond & Connon LLP by Walter Cochran-Bond, Attorney, for the Regents of the University of California; Robert J. Bezemek, Attorney, and Kenneth T. Phillippi for University of California Association of Interns and Residents (UCAIR).

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Regents of the University of California (University) to a proposed decision (attached) by a PERB administrative law judge (ALJ). In the proposed decision the ALJ determined that medical housestaff[1] employed by the University at its medical centers at the University of California at Los Angeles (UCLA), University of California at San Francisco (UCSF) and University of California at Davis (UCD), and on rotation within a facility owned and

[1]The term "housestaff" is used throughout this Decision to describe medical residents and clinical fellows in residency programs at University hospitals.

operated by the University, are employees under the Higher Education Employer-Employee Relations Act (HEERA or Act).[2] Based on the petition for certification filed by the University of California Association of Interns and Residents (UCAIR) the ALJ determined that campus-wide bargaining units consisting of housestaff at UCLA, UCSF and UCD are appropriate bargaining units under HEERA.[3]

The Board has reviewed the entire record in this case, including the transcript and exhibits, the ALJ's proposed decision, the University's statement of exceptions and UCAIR's response thereto. Finding them to be free of prejudicial error, the Board hereby adopts the ALJ's findings of fact as the findings of the Board itself. The Board also adopts the ALJ's conclusions of law, consistent with the following discussion, and finds that housestaff, as described in the attached order, are employees under the HEERA.

INTRODUCTION

The Statutory Test

Under HEERA, an employee organization may petition the Board to certify it as the exclusive representative of the employees of an appropriate bargaining unit for the purpose of meeting and

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

Petitions for housestaff bargaining units at the University's Irvine and San Diego campuses were dismissed due to lack of support.

conferring with the University over terms and conditions of employment. (HEERA sec. 3575(c).) The Board will conduct the necessary inquiries and investigations in order to decide questions raised by the petition, including the employer's assertion that it reasonably doubts the appropriateness of the unit. (HEERA sec. 3577(a).)

The University asserts that the units proposed by UCAIR and determined to be appropriate by the ALJ are inappropriate because they include student employees who are not covered by HEERA. HEERA section 3562(f) (hereafter subsection (f)) defines an employee under HEERA:

> 'Employee' or 'higher education employee' means any employee of the Regents of the University of California, . . . However, managerial, and confidential employees shall be excluded from coverage under this chapter. The board may find student employees whose employment is contingent on their status as students are employees only if the services they provide are unrelated to their educational objectives, or. that those educational objectives are subordinate to the services they perform and that coverage under this chapter would further the purposes of this chapter. [Emphasis added.]

The Board must apply this definition to determine in this case whether housestaff employed by the University at UCLA, UCSF and UCD are employees under HEERA and, therefore, are entitled to negotiate with the University over the terms and conditions of their employment.

Subsection (f) sets out a three-part test to determine whether collective bargaining rights should be extended to student employees.

Under the first part of the test, the Board must determine whether employment of student employees is contingent on their status as students. If so, the Board must proceed to apply the subsection (f) test. If not, the student employees are employees under HEERA and the remainder of the subsection (f) test need not be applied.

Under the second part of the test, the Board must determine whether the services provided by student employees are related to their educational objectives. If so, the Board must proceed to apply the third part of the subsection (f) test. If the services provided by the student employees are unrelated to their educational objectives, they are employees under HEERA and the third part of the subsection (f) test need not be applied.

The third part of the test has two prongs. Under the first prong, the Board must determine whether the educational objectives of student employees are subordinate to the services they perform. Under the second prong, the Board must determine whether coverage of the student employees under HEERA would further the purposes of the Act. In order for the Board to conclude that student employees are employees under HEERA, affirmative determinations must be made under both prongs.

Prior Cases Involving the Application of the Statutory Test

The issue of the application of the subsection (f) test to student employees at the University has come before PERB in four prior cases. One of these cases, Regents of the University of California v. Public Employment Relations Bd. (1986) 41 Cal.3d

601 [224 Cal.Rptr. 631] (Regents). also presented the issue of the employee status of housestaff under HEERA.

In Regents, the Supreme Court upheld the Board's decision that housestaff were employees under HEERA. In doing so, the court considered the legislative history behind the enactment of HEERA. Initially the court noted that prior to final passage of the Act, the Legislature amended it to remove a specific work hour standard under which a student employee would be determined to be an employee for purposes of HEERA. Thus, the Legislature left the determination of student employee status to PERB. The court concluded that subsection (f) requires PERB to make a "case-by-case assessment of the degree to which a student's employment is related to his or her educational objectives." (Regents at p. 607.)

The court then considered whether the Legislature intended the language of subsection (f) to incorporate the precedent of the National Labor Relations Board (NLRB), which held that housestaff in the private sector were not employees under the National Labor Relations Act. In two NLRB decisions involving housestaff, a majority of the NLRB adopted a "primary purpose" test which focused primarily on the students' motivation for participating in housestaff programs. The NLRB majority concluded that the students' interests in their own educational development by participating in residency programs outweighed their interests in providing services. The dissent in these cases concluded that the student employees' motivations were

irrelevant, believing that the focus should be confined to the services actually performed by the student employees.

Based upon its review of these NLRB decisions, the court in Regents found that subsection (f) represents a compromise by the Legislature between the NLRB's majority and dissenting opinions, requiring that both factors, a student's purpose for participating in the position and the services provided, be considered. The court stated:

> The Legislature has instructed PERB to look not only at the students' goals, but also at the services they actually perform, to see if the students' educational objectives, however personally important, are nonetheless subordinate to the services they are required to perform. Thus, even if PERB finds that the students' motivation for accepting employment was primarily educational, the inquiry does not end here. PERB must look further --to the services actually performed -- to determine whether the students' educational objectives take a back seat to their service obligations. [Regents at p. 614, fn. omitted.]

The court instructs, therefore, that even if all the student employees agreed that their purpose in seeking employment was to further their educational objectives, the Board could determine that those educational objectives were subordinate to the value of the services they provided to the University.

Applying this standard, the court in Regents found that there was substantial evidence to support the Board's finding under prong one of the third part of the statutory test, that the educational objectives of housestaff were subordinate to the services they provided. The court noted that while housestaff

sought to participate in residency programs in order to obtain extensive medical training, these educational objectives were subordinate to the valuable patient care services housestaff provided. As stated by the court in referring to PERB's decision:

> . . . although housestaff did receive educational benefits in the course of their programs, this aspect was subordinate to the services they performed. The Board made this determination based on (1) the substantial quantity of time housestaff spend on clinical activities and direct patient care, (2) the nature of the procedures housestaff perform with little or no supervision, (3) the professional guidance they provide for interns, medical students and other hospital employees such as nurses and technicians, (4) the extensive indicia of employment that characterize housestaff as employees rather than students, and (5) the extent of the educational benefit and training received by housestaff. [Regents at p. 618.]

The court also found support for the Board's determination under prong two, that the purposes of HEERA would be furthered by extending collective bargaining rights to housestaff. The Board found that there were substantial employment concerns affecting housestaff and that issues such as salaries, vacation time, fringe benefits and hours, were "manifestly amenable to collective negotiations." (Regents at p. 622.) The Board also concluded that by providing housestaff with a mechanism for resolving disputes, harmonious and cooperative labor relations between the University and housestaff would be furthered. Accordingly, the court affirmed the Board's determination that housestaff were employees for purposes of HEERA.

PERB addressed the student employee issue a second time in Regents of the University of California (1989) PERB Decision No. 730-H (Regents (AGSE)). In this case, the Board considered whether graduate students appointed to graduate student instructor (GSI) and graduate student researcher (GSR) positions at the University's Berkeley campus were employees covered by HEERA. After reviewing the Regents decision, the Board concluded that there were significant factual differences between the housestaff in Regents and the graduate student employees in this case. The Board noted the difficulty in balancing a seemingly subjective element (educational objectives) against an objective one (services performed). Based on these considerations, the Board in Regents (AGSE) found it necessary to "recalibrate" the scale in the first prong of the statutory test set forth in Regents. Under this new approach, the Board focused on the apparent conflicts between the student employees' academic and employment interests. The Board concluded that the educational objectives of GSIs and GSRs were not subordinate to the services they provided because where conflict existed between academic and economic considerations, academic considerations prevailed.

Applying the second prong of the test, PERB also found that the purposes of HEERA would not be furthered by extending collective bargaining rights to GSIs and GSRs for several reasons, including: (1) impact on the student/faculty mentor relationship; (2) the economic nature of collective bargaining would override academic goals; (3) impact on the academic nature

of the selection process; (4) instability resulting from the continuous movement of graduate students in and out of the unit; and (5) the impossibility of separating academic and economic matters. Accordingly, the Board concluded that graduate students appointed to GSI and GSR positions at the Berkeley campus were not employees for purposes of HEERA.

On appeal, the court in Association of Graduate Student Employees v. Public Employment Relations Bd. (1992) 6 Cal.App.4th 1133 [8 Cal.Rptr.2d 275] rev. den. August 13, 1992 (AGSE) found that the Board erred by establishing a new test which conflicted with the standard set forth in Regents. The court held that the Board's "recalibration of the scales" had so distorted the first prong of the test that the Board's conclusion was suspect unless saved by its ruling under the second prong. The court stated the proper test under the first prong:

> 'Case-by-case analysis' would call upon PERB to consider all the ways in which GSI and GSR employment meet educational objectives of the students and all the ways in which the employment provides services and to compare the value and effectiveness of the employment in meeting the students' educational objectives with the value and effectiveness of the employment in providing services. PERB, with its expertise, would then make a judgment about whether the employment was more valuable and effective in meeting educational objectives or in providing service to the University: whether the 'educational objectives are subordinate to the services' the students perform. [AGSE at p. 1143, emphasis in original.]

Although the court rejected the Board's first prong test, it upheld the Board's conclusion that GSIs and GSRs were not

employees under HEERA, finding that there was substantial evidence to support the Board's determination that the purposes of HEERA would not be furthered by extending collective bargaining rights to GSIs and GSRs.

The Board applied the guidance contained in these prior cases in determining whether HEERA coverage should be extended to certain student academic employees at the University's San Diego (UCSD) campus. In Regents of the University of California (1998) PERB Decision No. 1261-H (UC San Diego), the Board determined that students employed as readers, tutors and associates at UCSD are employees under HEERA. The Board rejected the University's assertion under prong one of the third part of the subsection (f) test that the educational objectives of the student academic employees at issue were not subordinate to the services they performed. Referring to the prior court decisions, the Board stated:

> The AGSE court instructs that 'the statute and Regents decision call for a value judgment about which is subordinate, not a scientific weighing process.' In making this value judgment, the Board must consider how vital employment as a reader, tutor or associate is to the achievement of students' educational objectives, and how vital the services provided by readers, tutors and associates are to the accomplishment of the educational mission of the University. In Regents, the court applied this part of the subsection (f) test by considering whether 'services must be performed without regard to whether they will provide any educational benefit' to the students performing them. (UC San Diego at p. 20.)

The Board then concluded that, because the services provided by readers, tutors and associates were vital to the academic mission of the University, and were not vital to the accomplishment of educational objectives, the educational objectives of student employees in those positions were subordinate to the services they performed.

The Board in UC San Diego also determined that coverage under HEERA of the student academic employees at issue would further the purposes of the Act. In response to the University's arguments to the contrary, the Board noted the expressed purpose of HEERA, at section 3560(e), to provide for relations between the higher education employer and its employees which permit the fullest participation of employees in determining the conditions of their employment. The Board stated:

> It is axiomatic, therefore, that the extension of collective bargaining rights to University employees is consistent with, and in furtherance of, the expressed purpose of HEERA. To the extent that the University's position is based on the assertion that extending collective bargaining rights to student academic employees would fundamentally conflict with the University's educational mission, that position ignores and is inconsistent with HEERA's expressed purpose. rue San Diego at p. 28.]

The Board noted HEERA provisions which preserve and encourage academic freedom, shared governance and joint decisionmaking between the University and its faculty, and peer review and tenure systems for academic employees. The Board also cited HEERA provisions which exclude from the scope of representation

subjects which could intrude in these academic areas. The Board stated:

> HEERA encourages the "pursuit of excellence" at the University. Harmonious and cooperative labor relations result from a system of collective bargaining between the University and its employees which respects the concept of academic freedom. Under HEERA, these concepts - collective bargaining and academic freedom - coexist and complement one another. They are not mutually exclusive, as much of the University's argument seems to suggest. (UC San Diego at p. 30.)

The Board reached the same conclusion in The Regents of the University of California (1998) PERB Decision No. 1301-H (UC Los Angeles). determining that student academic employees in various positions at the UCLA campus were employees under HEERA. The Board again concluded that "employment in the disputed positions is more valuable and effective in providing service to the University than in meeting the educational objectives of students." The Board stated:

> [I]t is reasonable to conclude that affected students would find other means to accomplish those objectives, as do the many students who currently do not serve in the positions in dispute in this case. Conversely, the services performed by the student academic employees in dispute are vital to the University and must be performed without regard to whether they provide any educational benefit to student employees. (UC Los Angeles at p. 26.)

Responding to the University's assertion that HEERA coverage of student academic employees would interfere with the pursuit of academic excellence, which is the purpose of the University, the Board stated:

> The policy expressed within HEERA section 3561(c) 'to encourage the pursuit of excellence in teaching, research and learning' is achieved 'through the free exchange of ideas among the faculty, students and staff of the University of California' and through a system which seeks 'to preserve academic freedom in the University of California.' This is the very system established by HEERA. Contrary to the University's contention, HEERA presents a framework under which the pursuit of academic excellence, the free exchange of ideas, the preservation of academic freedom, and collective bargaining all co-exist and complement one another. [UC Los Angeles at p. 31.]

For the first time in UC Los Angeles, the Board dealt with the University's argument that the application of HEERA to student academic employees would interfere with certain central functions of the University and thereby violate the constitutional restriction that the "full powers of organization and government" vested in the Regents of the University of California in Article IX, section 9 of the California Constitution, may be subject only to limited legislative control.[4] In rejecting the University's argument the Board noted

[4]The University raised this issue in its request that the Board join in a request for judicial review of its decision in UC San Diego. HEERA section 3564(a) provides that no employer shall have the right to judicial review of a unit determination by the Board, unless the Board agrees that the case is of special importance and joins in the request for such review. In denying the University's request, the Board noted that the constitutional issue was not presented in UC San Diego prior to the request for judicial review. The Board stated:

> The Board declines to reach the determination that a case is of special importance based on consideration of an issue not addressed in that case. [Regents of the University of California (1998) PERB Order No. JR-18-H at

that PERB, as an administrative agency, is bound by Article III, section 3.5 of the California Constitution, which states:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statue on the basis that federal law or federal regulations prohibit the enforcement of such a statue unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations. [New sec. adopted June 6, 1978.]

The Board noted that there had been no appellate court determination on the constitutional issue raised by the University, even though the court had considered two prior cases involving the application of subsection (f) to student academic employees. In Regents, the Board noted, the court looked to the legislative history of HEERA to determine whether housestaff were precluded from HEERA coverage as employees. The court stated:

> Although the statute is silent on the subject of housestaff, it clearly leaves open the possibility that such persons may come within it. As the words of the statute make clear, the Legislature intended that PERB determine whether a particular student qualifies as an employee under the Act. [Regents at p. 607.]

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p. 8.]

The Board is guided by these prior cases in the application of the subsection (f) test here.

DISCUSSION

UCAIR offers no exceptions to the ALJ's finding that housestaff on rotation at non-University owned and operated facilities are not employees under subsection (f) and, therefore, are excluded from HEERA coverage. The Board adopts this finding as the finding of the Board itself.

The Constitutional Issue

In its exceptions to the ALJ's decision, the University, as it did in UC Los Angeles, asserts that HEERA coverage of housestaff would interfere with central functions of the University in violation of Article IX, section 9 of the California Constitution, which states, in pertinent part:

> The University of California shall constitute a public trust, to be administered by the existing corporation known as 'The Regents of the University of California,' with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services.

According to the University:

> This constitutional provision establishes the University as, in essence, a fourth branch of state government with full powers of organization and government over its central and core functions, such as its relationships with its students and the exercise of discretion in setting academic policy and

> making academic judgments. [University's exceptions brief at p. 6.]

In essence, the University seeks a ruling by PERB that the subsection (f) test is constitutionally unenforceable with regard to housestaff. As the Board explained in UC Los Angeles, prior to an appellate court determination to that effect, PERB has no power to make such a ruling pursuant to Article III, section 3.5. The University's constitutional argument is rejected.[5]

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[5]While the ALJ's decision contains an extensive discussion which concludes that "nothing on the face of HEERA intrudes into the constitutional authority of the University" (proposed decision at p. 56), Article III, section 3.5 makes it clear that a question regarding the constitutionality of HEERA must be pursued in the appellate courts rather than at PERB. Nonetheless, as the Board noted in UC Los Angeles, HEERA specifically references the University's constitutional status and responsibilities. Section 3560(c) states, in pertinent part:

> The people of the State of California have established a system of higher education under the Constitution of the State of California with the intention of providing an academic community with full freedom of inquiry and insulation from political influence in the administration thereof.

And Section 3560(e) states, in pertinent part:

> It is the purpose of this chapter to provide the means by which relations between each higher education employer and its employees may assure that the responsibilities and authorities granted to the separate institutions under the Constitution and by statute are carried out in an atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them.

It appears that the Legislature was well aware of the University's constitutional status, and intended that the system of collective bargaining which it established in enacting the HEERA would not interfere with the University's authority over its central functions. Consequently, HEERA specifically excludes

Application of the Statutory Test

In order to determine whether the housestaff at issue in this case are entitled to HEERA coverage, the Board must apply the three-part subsection (f) test described above.

Part One: Is Employment Contingent on Student Status?

The parties offer no exceptions to the ALJ's finding that employment as housestaff is contingent on student status, which the Board adopts as its own conclusion.

Part Two: Are the Services Provided by Housestaff Related to Their Educational Objectives?

The parties offer no exceptions to the ALJ's finding that the services provided by housestaff are related to their educational objectives, which the Board adopts as its own conclusion.

Part Three - Prong One: Are the Educational Objectives of Housestaff Subordinate to the Services They Perform?

Application of this part of the subsection (f) test requires the Board to determine whether employment as housestaff is more valuable and effective in meeting educational objectives or in

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from the scope of representation many of these central functions, including "any service, activity or program established by law or resolution of the regents or the directors," and "the content and supervision of courses, curricula and research programs." (HEERA sec. 3562(q).) Further, HEERA seeks to preserve and encourage the relationship between the University and its academic employees which is "the long-accepted manner of governing institutions of higher learning." (HEERA sec. 3561(b).)

As noted above, the Regents court considered the legislative history of the HEERA and concluded that housestaff clearly are not eliminated from HEERA coverage by the language of subsection (f). Instead, the court stated, "the Legislature intended that PERB determine whether a particular student qualifies as an employee under the Act." [Regents at p. 607.]

providing service to the University. (AGSE at p. 1143.) In finding that the educational objectives of housestaff are subordinate to the services they perform, the ALJ relies on the five factors cited in Regents to conclude that housestaff were entitled to HEERA coverage. The University excepts to this finding, arguing that the ALJ relied too heavily in his analysis on the Regents decision. The University also asserts that by limiting the analysis to those five, other important factors are not considered.

While the application of this portion of the subsection (f) test may involve numerous considerations, the Regents factors utilized by the ALJ remain valid as a basis for analysis. Based on its review of those factors, the University argues that their application in this case does not support a finding that the educational objectives of housestaff are subordinate to the services they provide to the University.

The Board disagrees. Housestaff continue to spend long hours, often extraordinarily long, providing clinical services and direct patient care. They perform a wide variety of medical and patient care functions and procedures, from routine patient examinations and the development of patient treatment plans, to providing medical treatment in life threatening situations. The vast majority of these patient care services are performed independently with little or no supervision from other medical staff. As housestaff progress through their residency programs, they are increasingly called upon to provide guidance and

supervision to less senior housestaff, nurses and technical staff.

While performing these services, housestaff exhibit indicia of employment which are extensive and compelling. Their compensation level is substantial, up to $45,000 per year; they work on a 12-month, non-academic schedule and receive a 4-week paid vacation per year; they receive an extensive benefit package, including medical and dental coverage, disability and life insurance and fully paid medical malpractice insurance; and they receive performance appraisals on which promotions and salary increases may be based. Conversely, housestaff do not exhibit several fundamental indicia of student status. They pay no University tuition; they take no University examinations; and they receive no grades.

It is virtually undisputed that housestaff meet a variety of educational objectives through their employment. Among them are the development of competence in the provision of medical services to patients, which prepares housestaff to practice independently in a medical specialty; and the completion of an accredited residency program, which provides housestaff with the skills and experience necessary to qualify for professional certification. But, as the Regents court stated:

> The fact that housestaff obtain an educational benefit from providing direct patient-care services does not mean services are subordinate to educational objectives. Such services are undertaken for a patient's welfare. Obviously, patient demands are such that services must be performed without

> regard to whether they will provide any educational benefit. [Regents at p. 621.]

It remains clear in the instant case that the patient care functions performed by housestaff must be provided regardless of whether they further any educational objective. Therefore, the value of the services being provided by housestaff is relatively greater than the educational benefits which they may derive as a result of their employment.

The Board concludes that employment in housestaff positions is more valuable and effective in providing service to the University than in meeting the educational objectives of housestaff. Therefore, the Board adopts the ALJ's finding under this prong of the subsection (f) test that the educational objectives of housestaff are subordinate to the services they perform.

Part Three - Prong Two; Would Coverage of Housestaff Under HEERA Further the Purposes of the Act?

The University excepts to the ALJ's finding that extending HEERA coverage to housestaff would further the purposes of the Act. The University's argument is based largely on its assertion that coverage would interfere with the University's central functions in violation of Article IX, section 9 of the California Constitution. The Board's rejection of that argument is discussed above.

In UC San Diego and UC Los Angeles, the Board explained its application of this prong of the subsection (f) test. The

purposes of HEERA are stated in sections 3560 and 3561. HEERA section 3560 states, in pertinent part:

> (a) The people of the State of California have a fundamental interest in the development of harmonious and cooperative labor relations between the public institutions of higher education and their employees.
>
> (d) The people and the aforementioned higher education employers each have a fundamental interest in the preservation and promotion of the responsibilities granted by the people of the State of California. Harmonious relations between each higher education employer and its employees are necessary to that endeavor.
>
> (e) It is the purpose of this chapter to provide the means by which relations between each higher education employer and its employees may assure that the responsibilities and authorities granted to the separate institutions under the Constitution and by statute are carried out in an atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them. It is the intent of this chapter to accomplish this purpose by providing a uniform basis for recognizing the right of the employees of these systems to full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of representation in their employment relationships with their employers and to select one of these organizations as their exclusive representative for the purpose of meeting and conferring.

HEERA section 3561 states, in pertinent part:

> (a) It is the further purpose of this chapter to provide orderly and clearly defined procedures for meeting and conferring and the resolution of impasses, and to define and prohibit certain practices which are inimical to the public interest.

Thus, HEERA's expressed purpose is to foster harmonious and cooperative labor relations by providing for a system of collective bargaining between the University and its employees. As the Board held in both UC San Diego and UC Los Angeles, it is axiomatic that this purpose is furthered by the extension of collective bargaining rights to those employees determined by PERB to meet the subsection (f) test.

The policy expressed within HEERA section 3561 (c) "to encourage the pursuit of excellence in teaching, research and learning" is achieved "through the free exchange of ideas among the faculty, students, and staff of the University of California" and through a system which seeks "to preserve academic freedom in the University of California." This is the very system established by HEERA. HEERA presents a framework under which the pursuit of academic excellence, the free exchange of ideas, the preservation of academic freedom, and collective bargaining all co-exist and complement one another. These purposes and policies do not conflict with one another, and are not mutually exclusive.

Furthermore, HEERA contains extensive guidance and specific restrictions on the scope of representation to ensure that providing collective bargaining coverage for employees will not interfere with the pursuit of academic excellence and the academic policies and procedures which both the University and HEERA seek to preserve. For example, HEERA section 3562(q)(1) states that the scope of representation at the University shall not include:

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

And HEERA section 3561(b) states, in pertinent part:

> The Legislature recognizes that joint decisionmaking and consultation between administration and faculty or academic employees is the long-accepted manner of governing institutions of higher learning and is essential to the performance of the educational missions of these institutions, and declares that it is the purpose of this chapter to both preserve and encourage that process.

To the extent, despite this guidance, that disputes arise over whether a subject is within the scope of representation, HEERA section 3563(b) provides that PERB shall have the right, power, duty and responsibility:

> To determine in disputed cases whether a particular item is within or without the scope of representation.

These specific exclusions and safeguards ensure that HEERA coverage of housestaff will not interfere with the University's power of organization and governance over its central functions.

Based on this discussion, and the findings of the ALJ, the Board concludes that HEERA coverage of housestaff would further the purposes of the Act.

ORDER

The following unit is found to be appropriate for meeting and negotiating at each of the following locations: University

of California at Los Angeles, University of California at San Francisco and University of California at Davis.

The Unit Shall Include:

> All medical housestaff who are employed by the University of California and are on rotation within a facility owned and operated by the University, including Chief Residents who are in their final year of a residency program.

The Unit Shall Exclude:

> All managerial, supervisorial, and confidential employees.
>
> All medical housestaff on rotations at facilities not owned and operated by the University of California.
>
> All veterinary, pharmacy and dental residents.
>
> All fellows (housestaff who have completed their first board program).
>
> Chief residents who have completed their first board residency program.
>
> All other employees.

An election will be conducted by the PERB San Francisco Regional Director in accordance with PERB Regulation 51300 et seq. unless the University grants a voluntary recognition pursuant to PERB Regulation 51330.

The Board hereby ORDERS that this case be REMANDED to the San Francisco Regional Director consistent with the attached Notice of Decision and Notice of Intent to Conduct Election.

Members Dyer and Amador joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD
NOTICE OF DECISION AND
NOTICE OF INTENT TO CONDUCT ELECTION

CASE: PERB Decision No. 1359-H
(Case No. SF-PC-1052-H)
Date Issued: October 28, 1999

EMPLOYER: Regents of the University of California

DESCRIPTION OF UNIT:

The Unit Shall Include:

All medical housestaff who are employed by the University of California and are on rotation within a facility owned and operated by the University, including Chief Residents who are in their final year of a residency program.

The Unit Shall Exclude:

All managerial, supervisorial, and confidential employees.

All medical housestaff on rotations at facilities not owned and operated by the University of California.

All veterinary, pharmacy and dental residents.

All fellows (housestaff who have completed their first board program).

Chief residents who have completed their first board residency program.

All other employees.

ELECTION: A representation election will be conducted in the unit described above provided one or more employee organizations qualifies to appear on the ballot. However, pursuant to PERB Regulation 51330, if only one organization qualifies to appear on the ballot and the organization has demonstrated proof of majority support in the unit found appropriate, the Regents of the University of California may grant voluntary recognition and notify the Board to cancel the election.

INTERVENTION TO APPEAR ON BALLOT:

Pursuant to PERB Regulation 51310, any employee organization wishing to appear on the ballot in the representation election conducted in the unit listed on this Notice must file an intervention to appear on the ballot with the PERB San Francisco Regional Office within 15 workdays from the date of this Notice. The intervention must be on a form provided by PERB and must be accompanied by proof of support of at least 10 percent of the employees in the unit. Proof of support is defined in PERB Regulation 32700.

The last day to file an intervention to appear on the ballot in the unit described above is:

November 18, 1999

This Notice of Decision and Intent to Conduct Election is provided pursuant to PERB Regulations 51235 and 51300.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

REGENTS OF THE UNIVERSITY OF CALIFORNIA, Employer, and UNIVERSITY OF CALIFORNIA ASSOCIATION OF INTERNS AND RESIDENTS (UCAIR), Petitioner.	)	Representation Case No. SF-PC-1052-H PROPOSED DECISION (1/21/98)

Appearances: Cochran-Bond & Connon LLP by Walter Cochran-Bond and Nicholas P. Connon, Proskauer Rose LLP by Jeffrey A. Berman, Maria Grecky and Elizabeth Kruger, University of California Office of the General Counsel by James E. Hoist, James Nellis Odell and Leslie Van Houten, Attorneys, for Regents of the University of California; Van Bourg, Weinberg, Roger and Rosenfeld by William Sokol, California Association of Interns and Residents, SEIU, Local 250 by Kenneth T. Phillippi, Law Offices of Robert J. Bezemek by Robert J. Bezemek, Adam H. Birnhak and Debra Dubroff, Attorneys, for University of California Association of Interns and Residents (UCAIR).[1]

BEFORE: JAMES W. TAMM, Administrative Law Judge.

INTRODUCTION

This representation case presents three significant issues: (1) whether housestaff are statutory employees that may comprise an appropriate bargaining unit;[2] (2) whether housestaff on rotation in facilities not owned and operated by the Regents of the University of California (University or UC) are statutory

[1]An internal union dispute exists regarding who represents the petitioner. This decision does not attempt to resolve that dispute. Any interested parties were allowed to file briefs. All briefs were duly considered.

[2]Within this decision the term "housestaff" is used synonymously with the term "resident".

employees; and (3) whether establishment of a housestaff bargaining unit would impermissibly intrude upon University independence under Article IX, section 9, of the California Constitution.

Resolution of the first issue is relatively straightforward. The precise issue of housestaff employee status is one of a very small number of Public Employment Relations Board (PERB or Board) issues which have been addressed by the California Supreme Court, resulting in a decision directly on point. Consistent with the California Supreme Court's holding in Regents of the University of California v. Public Employment Relations Board (1986) 41 Cal.3d 601 [224 Cal.Rptr. 631] (Regents). this decision holds that housestaff at University owned and operated facilities are employees within section 3562 (f) of the Higher Education Employer-Employee Relations Act (HEERA or Act),[3] and therefore a housestaff unit is appropriate.

The status of housestaff on rotation at non-University owned and operated facilities is a matter of first impression. Housestaff at those facilities are found to be excluded from coverage because they provide little, if any, service to the University during those rotations.

Regarding the third issue, this decision finds that employee status for housestaff under HEERA can be harmonized with limitations arguably imposed by Article IX, section 9 of the California Constitution.

[3]HEERA is codified at Government Code section 3560 et seq.

PROCEDURAL HISTORY

The issue of housestaff employee status was first litigated in 1979 when the Physicians National Housestaff Association (PNHA) filed an unfair practice charge alleging that the University unlawfully ceased making payroll dues deductions on behalf of PNHA.[4] The University's defense was that housestaff were students excluded from coverage under HEERA.

The PERB determined that housestaff were statutory employees entitled to coverage under HEERA and that the University had violated the Act. Because the matter was litigated as an unfair practice charge, rather than a representation case, the Board's decision was appealed, culminating in the California Supreme Court's ruling in Regents. During the lengthy appeal process PNHA became defunct.

On February 13, 1996, PNHA's successor in interest, the University of California Association of Interns and Residents (CAIR), filed this Petition for Certification seeking a systemwide unit of all housestaff at the University's five campuses having medical centers. On April 3, 1996, PERB determined that the showing of support submitted with the petition was sufficient to meet the requirements of PERB Regulation 51100(b).[5] The University opposed the petition on several grounds.

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[4]The PNHA was an employee organization under HEERA representing housestaff at the University of California.

[5]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

At pre-hearing conferences the parties selected representative departments from each campus to provide testimony at the hearing. After two weeks of hearing, the parties entered into a stipulation agreeing that if housestaff are found to be employees under section 3562(f) of HEERA, the appropriate units for meeting and negotiating would be campuswide rather than a single systemwide unit. The stipulation was based upon a series of factual stipulations leading to a conclusion that local autonomy has increased at University medical facilities since the time of the Regents litigation.

At that time CAIR also modified the petition to delete dental, pharmacy, and veterinary housestaff as well as all "fellows" in second board subspeciality programs. The parties also resolved all supervisory issues.

The stipulation of the parties was accepted and, based upon an amended petition for campus units, the proof of support was reevaluated. As a result, the petitions for units at the University's Irvine and San Diego campuses were dismissed due to lack of support.[6]

The hearing regarding the remaining campuses concluded on July 21, 1997, after 31 days of hearing. Transcripts were prepared, briefs were filed and the case was submitted for decision on November 18, 1997.

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[6]The parties also stipulated to be bound at any campus dismissed from this hearing for lack of a showing of support by a final court decision of the issues litigated in this hearing.

FINDINGS OF FACT

The University operates medical schools at five of its campuses: San Francisco (UCSF), Los Angeles (UCLA), San Diego (UCSD), Davis (UCD) and Irvine (UCI). As part of the graduate medical education program the University offers residency training in approximately 25 specialty programs (e.g., internal medicine, surgery, emergency medicine, pediatrics, psychiatry, etc.)

Each specialty program has a sponsoring institution that assumes final responsibility for the program. All of the programs at issue in this case are sponsored by one of the University medical centers.[7]

Students in medical school typically spend their last year or two of medical school rotating through various assignments within a hospital setting. Upon graduation from medical school, students receive their M.D. degree, then begin a residency program.

Residency programs typically last from two to six years after graduation.[8] After the first year of their residency

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[7]Housestaff from programs sponsored by Kaiser Permanente or Cedars-Sinai Medical Center, for example, may rotate through one of the University owned and operated facilities, but are not considered UC residents and would not typically be on the University payroll. Residents in those programs are not included within the petitioned units.

[8]Years ago the first year after medical school was commonly referred to as an internship, however, the term intern is now outdated and seldom used.

program, residents typically take licensing exams and become fully licensed to practice medicine in California.

Although fully licensed to practice medicine, most residents continue in a specialty program to become "board certified" by one of the various medical specialty boards approved by a joint committee of the American Medical Association and the American Board of Medical Specialties. Board certifications are a basic professional qualification for a doctor to be granted hospital privileges and placed on approved provider panels of insurance companies.

The specialty programs are accredited by the Accreditation Council for Graduate Medical Education (ACGME). The ACGME sets standards and conducts accreditation reviews for all specialty programs. The standards are set forth in a book referred to as the "essentials". If a program does not meet the minimum standards set forth in the essentials the program may receive accreditation reviews more frequently than normal, receive warning notices, be placed on probation, or, in extremely egregious situations, even lose its accreditation entirely.

The essentials are revised on a ongoing basis. The trend has been for the essentials to become more specific with each revision. Although programs vary greatly, the essentials often spell out the length of the program, general curriculum requirements, type of didactic training, types and sometimes specific numbers of clinical procedures required, and resident evaluation policies, among other requirements.

The essentials states:

> The training of [housestaff] relies primarily on learning acquired through the process of their providing patient care under supervision. The quality of the training experience depends on the quality of patient care. Educational quality and patient care quality are interdependent and must be pursued in such a way that they enhance rather than interfere with each other. A proper balance must be maintained so that a program of graduate medical education does not rely on [housestaff] to meet patient care needs at the expense of educational objectives.
>
> . . . . . .
>
> The educational goals of the program and learning objectives of residents must not be compromised by excessive reliance on residents to fulfill the institutional service obligations.

Housestaff learn through both clinical and didactic training. The vast majority of their time is typically spent in a clinical setting working directly with patients. Residents typically rotate through various departments or assignments in two to four week blocks of time. Most rotations assign residents to patient care teams which include an attending physician, residents in varying years within their program, and medical students.

The theory behind graduate medical education is one of progressive responsibility. The amount of independence residents receive depends upon their experience and confidence level. New residents are given greater supervision by either an attending physician or a more senior resident. Senior residents are

expected to work more independently and to assist and teach junior residents. All residents are also expected to supervise medical students on their team. As residents become more experienced, they are also expected to put on conferences and conduct pre-rounds with less senior residents and medical students.

First year residents tend to do a great deal of "grunt" work such as writing patient care orders and prescriptions. When they have questions or concerns, they typically turn to more senior residents for help. Although there are exceptions, the protocol most followed is that residents work up the chain of command as help is needed, especially when residents are working on call[9] while most attending physicians are not actually in the hospital. For example, a junior resident would typically first contact a senior resident. If additional help is needed the senior resident might then call a chief resident or fellow. If additional help is needed the attending physician might be contacted at home.[10]

Right from the start of their residency programs, residents are assigned to the front lines of patient care efforts and are immersed in all aspects of direct patient care. They regularly

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'Although it varies by program and facility, "on call" generally denotes a work shift which continues from one day through the evening and into the next morning.

[10]Typical exceptions include departments such as emergency medicine or intensive care nurseries where an attending physician is present in the hospital 24 hours per day, or where there are standing orders to contact the attending physician at home whenever a hospital admission occurs.

perform physical examinations, obtain patients' medical histories, develop and implement treatment plans, prescribe and administer drugs, and perform a lengthy list of dangerous medical procedures.

Most patients admitted to the hospital are first seen by a resident and often are not seen by an attending physician until the next day. A significant number of residents testified that they continually make critical decisions in life or death situations without the presence of an attending physician.

Recently some programs have taken steps to insure that all patients are either personally seen by an attending physician, or the case is personally reviewed after the fact by an attending physician the next day. There is abundant evidence, however, that this policy was not implemented as either a patient care issue or for the educational benefit of housestaff. The University, like many other teaching hospitals, is currently under investigation for its billing practices under Medicare. Under Medicare guidelines, the University is not allowed to bill for services provided by residents. Therefore, the only way the University can bill directly for physician services is if the attending physician is actually present in the room with the patient or, in certain fields such as radiology, personally reviews the charts the next morning. In some departments, prior to the Medicare regulations, senior housestaff were allowed to sign off on patients upon their discharge. The attending physician would then bill for the services as though the

attending physician had personally performed the service. That practice has since been determined by Medicare to be improper.

According to testimony of both attending physicians and housestaff, the requirement that attending physicians personally see all patients has been to the detriment of the educational process. For example, in the past attending physicians in the UCLA emergency room selected cases for review based upon which cases required their assistance or provided a learning opportunity for housestaff. Now that each patient must be seen by the attending physician, that physician's time can easily be dominated by routine cases with little or no learning value to housestaff.

Housestaff also learn through a number of other methods not involving direct patient care. "Conferences" are didactic programs offered on a weekly basis at regular times. At conferences, faculty or other housestaff offer lectures or interactive learning experiences on matters of interest to housestaff. In most programs, housestaff are required to conduct a certain number of conferences to remain in good standing within the program.

Attendance at conferences seems to vary depending upon the facility, the program, the year, and the University's interest in taking attendance. Often housestaff are unable to attend or are called out of conferences due to patient care needs, which take precedence. Guidelines require that housestaff attend at least 70 percent of all conferences. In some programs when attendance

drops below 70 percent, the program sends housestaff a letter reminding them that they are expected to attend the conferences. In other programs there appeared to be no consequences for dropping down to 50 percent attendance.

"Grand rounds" are occasional lecture programs for all the housestaff in a specialty program. They are given by UC faculty, outside visiting faculty, or on occasion, practitioners with special expertise.

"Attending rounds" are sessions with all housestaff, medical staff and medical students on a particular rotation who are on duty. They typically occur daily. During attending rounds, the attending physician and the housestaff team on duty often tour the hospital to view and discuss patients with interesting medical issues. These discussions are typically socratic in method, with the attending physician asking questions of housestaff in order to elicit any learning from the case.

"Journal clubs" are groups of residents and faculty who meet to discuss recent or pertinent articles published in medical journals. Typically each meeting, one or two individuals review articles for the group as a whole. All the participants then discuss the article. These meetings are usually held during off duty hours at a club member's house.

Many of the didactic programs are also attended by other physicians to satisfy continuing medical education requirements. Every witness who was asked indicated that they believed their education continued beyond their residency program. All

witnesses believed that medical education is a lifelong learning effort.

There was conflicting testimony about the impact that ancillary staffing has upon the educational efforts of housestaff. It appears that there are variations between departments, programs and facilities. In some departments staffing has been reduced or remained the same for some time, thus putting a greater load on housestaff to perform more mundane procedures such as patient transports or hanging X-rays. One radiology resident estimated that in some departments he spends up to two hours a day going through patient records locating and then hanging X-rays. In other departments ancillary staff locates and hangs the radiographs for the housestaff.

Overall, it appears that ancillary staffing has increased over the years in an effort to reduce some of the non-educational mundane duties that residents have been assigned in the past. Probably the best examples are phlebotomy teams assigned to draw blood from patients, and special transport nurses who accompany patients when they are transferred between departments.

The working hours of residents vary a great deal depending upon their specialty, with extremes at both ends of the scale. A very small number of rotations may be 8 a.m. to 5 p.m., six days a week, while others consistently exceed 100 hours per week as a minimum. Most rotations average somewhere between 70 and 80 hours per week. On many, if not most rotations, it is common for

housestaff to be required to work 30- to 36-hour shifts every fourth day.

The ACGME essentials states:

> Resident duty hours must not be excessive. The structuring of duty hours and on-call schedules must focus on the needs of the patient, continuity of care, and the educational needs of the resident.

While programs vary on the matter of hours within the essentials, the most common requirements provide that the program must, on average, permit residents to spend at least 1 day out of 7 duty free from the hospital, and be assigned on-call duty (overnight) no more frequently than every third night. In a few programs, the essentials sets limits on the number of duty hours. For example, internal medicine requires that residents spend no more than 80 hours per week in patient care duties, when averaged over a four week period.

Housestaff are paid with monthly University payroll checks, from which state and federal taxes are withheld. Their pay varies depending upon their year in the program, and to a slight degree where they work. The University Office of the President sets guidelines for residents' annual salaries ranging from $30,900 to $44,600. Individual campuses are able to increase those amounts in order to stay competitive, however. For example, at UCD the University has added a stipend to help offset the cost of a disability insurance program.

In addition to a salary, housestaff receive a significant benefits package. While the benefit packages vary somewhat among

University locations, most include four weeks of paid vacation, a choice between two full coverage health insurance plans, dental, vision and prescription coverage for residents and their families, long term disability insurance (or an offsetting stipend to purchase individual disability insurance), life insurance, uniforms, meals while on duty, and long range pagers. The University also provides housestaff with fully paid medical malpractice insurance. Residents are also covered by social security and workers compensation programs. Housestaff are not allowed to join the University retirement plan.

Although the University carries housestaff on University books as enrolled and registered students, residents do not complete student registration forms. Nor do they pay any tuition or other student fees. Residents are not referred to as students but rather as residents, colleagues or doctors, unlike medical students on hospital rotations who are referred to as students.

Residents do not take academic tests like those taken by medical students, and they receive no grades. Instead, residents receive evaluations at the conclusion of each rotation. Residents occasionally take national examinations, for which no grades are given, in preparation for their board certification. These exams are typically not used for evaluation purposes and are designed to provide feedback to residents about their individual strengths and weaknesses, as well as feedback to the University about program strengths and weaknesses.

Residents receive no degree from the University upon completion of the residency program. They do, however, receive a certificate indicating that they have completed the program and are eligible to take specialty board exams.

The testimony from residents about their educational objectives was fairly consistent. Residents choose a residency program in order to develop competency in a specialized field of medicine. Gaining mastery in their chosen field enables them to become board certified. It also gives them experience practicing medicine. Some residents also indicated a desire to continue in an academic setting, and their residency program helps them establish credentials for future employment. Many residents also testified that they hoped to establish professional relationships with faculty to assist them with future career opportunities.

It is a fair generalization to say that almost all residents chose their University residency program because it offered them extremely high quality training, leading to successful board certification in their chosen specialty field. A significant number of housestaff testified that they also made their initial selection of programs based upon geographic location. When asked whether the amount of the salary offered was a factor in their decision, most indicated that it was not because there wasn't a significant difference between the various programs.

A significant portion of housestaff seek outside employment as physicians during their residency. Most programs do not discourage this, although most require that the resident first

get permission from the program director. This insures that residents do not jeopardize success in their own program due to the demands of outside employment. Some programs also prohibit housestaff from moonlighting at facilities where they would also serve as residents. This policy seeks to avoid the situation where two residents from the same program may be working side by side, doing the same work, with one of the residents being paid an additional $600 per shift. Residents in some programs can supplement their salary by approximately 30 percent through moonlighting.

One incident regarding moonlighting provides a dramatic example of the service aspects of the residency program. Residents in a UCLA program had a history of moonlighting at the Veterans Hospital, providing necessary patient care coverage. The VA then ran into budget difficulties and could no longer afford to pay for the moonlighting residents. At the request of the VA, the UCLA residency program simply assigned the residents to the VA hospital for extra on call shifts without moonlighting pay as part of their program responsibilities. When residents objected to having to work the extra shifts as part of their residency responsibilities rather than for the moonlighting pay that they used to receive, they were told that if they failed to cover the rotations they would be terminated from the program.

Other examples of service obligations occurred when the number of residents in a program decreased, resulting in less patient care coverage. The program added extra call schedules to

the resident assignments to insure that patient care coverage continued.

There were, however, numerous examples where complaints from housestaff resulted in changes to the program. Most programs sponsor an annual three-day retreat for housestaff, in which they discuss program structure and administration. Several times a year housestaff have the opportunity to meet as a group with program managers. Many programs also host regular luncheons with residents to discuss housestaff needs or complaints. Residents use all of these forums to voice complaints about their programs to the administration. It also appears that housestaff are quite willing to voice complaints and suggestions for improvement directly to program faculty and administration. There are many examples in the record where program administrators took action to improve situations brought to them by housestaff.

CAIR has negotiated collective bargaining agreements with numerous other hospitals outside the University of California system. Those collective bargaining agreements may, however, cover University residents during the time they may be rotating through a non-University owned and operated facility. An example of this is the collective bargaining agreement between CAIR and San Francisco General Hospital, which was negotiated under the Meyers-Milias-Brown Act (MMBA) (Gov. Code, sec. 3500 et seq.).

Housestaff are also covered by the collective bargaining agreement between the State of California (State) and the Union

of American Physicians and Dentists.[11] In establishing State Bargaining Unit 16 (physician, dentist, and podiatrist), the PERB included housestaff as professional employees within the bargaining unit under the State Employer-Employee Relations Act (SEERA) (Gov. Code, sec. 3512 et seq.). (In the Matter of: Unit Determination for the State of California (1979) PERB Decision No. 110-S.)

Both parties offered examples of contractual grievance procedures used to resolve housestaff complaints within various bargaining units under other statutes (e.g., MMBA) or other states. The University offered several examples where academic and employment issues were intermingled within a grievance, thus risking that an arbitrator would be allowed to make rulings on academic issues. University witnesses also testified that they felt any grievance process involving a union advocate made the problem solving process more adversarial.

The vast majority of grievances are, however, settled at informal stages. Arbitrations are very rare. For example, in its 15-year history statewide, CAIR has not taken a single grievance to arbitration.

Most programs benefit from a wider variety of patient mix and learning experiences than a single University facility can provide. The University therefore enters into arrangements with

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[11]It is appropriate for an administrative agency to take official notice of its own records. (El Monte Union High School District (1980) PERB Decision No. 142.)

other facilities not owned and operated by the University.[12] For example, UCLA housestaff rotate through the Veterans Hospital to gain more experience dealing with an elderly male patient population with a high incidence of chronic lung disease. Housestaff at UCSF rotate through San Francisco General Hospital in order to work with a more indigent patient population, which generally suffers more acute disease, or Childrens Hospital to gain more exposure to sick children.

In most instances University housestaff rotating through non-University owned and operated facilities remain on the University payroll, receiving University paychecks at the same pay level they receive within a University rotation. The University typically, although not always, is reimbursed by the non-owned and operated host facility for the salary the University pays the housestaff while on rotation at that facility. Examples where the University might not receive reimbursement occur when residents rotate through rural clinics or private physician offices to obtain specialized experience regarding rural settings or small private practices. In those cases, the University would continue paying the residents' salary and not receive any reimbursement.

[12]Within the non-University owned and operated facilities there are both "participating" and "UC-affiliated" programs and institutions. Given the holding that all housestaff at non-University owned and operated facilities are excluded from coverage, it is unnecessary to discuss the complexities distinguishing the two.

Even when the University does get reimbursed for resident salaries, the reimbursement usually does not cover the full cost of assigning housestaff to non-owned and operated facilities. There are usually additional expenses associated with program administration and didactic training that are not covered by the reimbursement. Thus, in the best of arrangements the University breaks even, and in most situations it loses money when rotating residents to non-owned and operated facilities.

The parties offered conflicting studies regarding the financial advantages to a medical center for sponsoring residency programs. The studies offered by the University were more credible than the study offered by CAIR. While the results were not clear cut, the more credible studies concluded that residency training programs were a financial disadvantage for the sponsoring institution.[13]

The University has ultimate control over the curriculum, but not the day to day activities or supervision at non-owned and operated facilities. Attending physicians at these facilities are given University faculty appointments so that they may supervise University housestaff. These are often non-paying appointments, however, sometimes the University pays a small portion of the attending physician's salary. Attending physicians at these facilities often take on teaching duties

[13]Although the data was not sufficient to draw clear conclusions, one credible study suggested that a proper mix of experienced and inexperienced residents might generate a slight revenue in ambulatory settings while other settings would not be cost effective at all.

because it is considered prestigious to be a member of the University clinical faculty or simply because they enjoy teaching, in spite of not receiving additional salary.

The amount of control the University exercises over work issues at non-owned and operated facilities varies a great deal. In a few cases the University's control is clear and direct, such as at San Francisco General Hospital where the contract between the University and San Francisco General specifically states: "There shall be no disciplinary action against any individual initiated by San Francisco General Hospital. Any concerns or complaints by the Hospital will be registered with the University of California who will then act in accordance with University procedures."

University influence regarding work issues in most cases, however, is limited to persuasion because the University does not have discretion to unilaterally set working conditions. The University does, however, exercise some authority when negotiating with the non-owned facilities. If the University is not satisfied with the conditions it can pull the program from the non-owned and operated facility. Since this may work to the detriment of both housestaff and the program itself, this approach would not be exercised lightly.

The University receives no patient care services from residents rotating through non-owned and operated facilities. The purpose for such rotations is to benefit the educational program of the residents. To some extent the University's

reputation does benefit from such affiliations. Several residents testified that they were drawn to their program initially because it had opportunities for a wide range of experiences. That breadth of experiences would not be available from only University owned and operated facilities. Thus, University programs have a better reputation and can attract more highly rated students because they are not limited to experiences at University owned and operated facilities.[14] .

DISCUSSION

Issue # 1: The Employee Status of Residents

This unit dispute is governed primarily by HEERA section 3562 (f) (subsection f), which states:

> (f) "Employee" or "higher education employee" means any employee of the Regents of the University of California, the Directors of Hastings College of the Law, or

[14]In determining these findings of fact, two witnesses were noteworthy for their lack of credibility. The first was petitioner witness Dr. Theodore Grandin Rose, who testified about the economic feasibility of residency programs. His testimony offered a study which appeared to be more of an advocacy piece to support the retention of a particular program, in which he had a vested interest, rather than a true assessment of facts. The second was University witness Dr. Ralph C. Jung, who described a particular resident as "both a lazy resident and an inaccurate resident [who] would falsify information". Dr. Jung was using this as an example of where his mentoring a resident had suffered as a result of the existence of a formal grievance procedure. It was pointed out to Dr. Jung that no grievance was ever filed regarding this individual, and that their dispute never involved the grievance process. Dr. Jung's response was "But if it would have I'd have been madder than hell at this guy for putting me through the hassle of [having] to testify on a formal Residency Review Committee that this guy was a jerk." (Reporter's Transcript, Vol. 18, pp. 143-144.) Dr. Jung's use of this example to buttress his personal views that grievance processes harm the mentoring process reduces the credibility of his entire testimony.

> the Board of Trustees of the California State University, whose employment is principally within the State of California. However, managerial, and confidential employees shall be excluded from coverage under this chapter. The board may find student employees whose employment is contingent on their status as students are employees only if the services they provide are unrelated to their educational objectives, or, that those educational objectives are subordinate to the services they perform and that coverage under this chapter would further the purposes of this chapter.

This section calls for the application of three tests to determine coverage of student employees. The first test is whether employment is contingent upon the candidate's status as a student. If employment in a disputed position is not contingent on student status, then the additional requirements of subsection (f) do not apply and student employees are guaranteed rights under the Act.

The second test provides that even if employment in a disputed position is contingent upon status as a student, coverage under HEERA will be extended if services provided to the University by the student employees are unrelated to their educational objectives.

The third test has two prongs. Under this test, student employees whose employment is contingent upon their status as students and whose educational objectives are related to the services they perform for the University may be extended coverage under HEERA if their educational objectives are subordinate to the services provided (Prong One) and coverage under HEERA would further the purposes of the Act (Prong Two).

First Test: Is Employment Contingent Upon Student Status?

A strong argument can be made that housestaff are professional employees rather than students, and therefore, their employment is not contingent on student status. This issue is addressed later in this decision. However, in spite of that strong argument, the facts as they exist now are almost identical to those in the Regents case. Because both the Board and the court previously analyzed housestaff as students on similar facts, I feel bound by that holding. Therefore, because housestaff are admitted into an educational program rather than hired into a job, and because no individuals outside the educational program are hired to perform as residents, I conclude that employment as a resident is contingent upon student status.

Second Test: Are Services Related to Educational Objectives?

The services provided by residents are related to their educational objectives. The overriding educational objective of all residents who testified was to become competent, board certified physicians. The only effective way to accomplish that objective is to gain experience as a practicing physician in an approved residency program. Thus, when residents are working with patients under the supervision of more senior residents and/or attending physicians, that work is directly related to their educational objectives.

Third Test: Are Educational Objectives Subordinate to Services (Prong One) and Would Coverage Under the Act Further the Purposes of the Act (Prong Two)?

In Regents, the Supreme Court reviewed HEERA legislative history, noting that the Legislature had created a new standard for determining the status of residents, rather than following National Labor Relations Board precedent. The court believed that subsection (f) was the Legislature's attempt to craft a more comprehensive alternative to either a "primary purpose" test or a test focused instead on the value of the services performed.

The court believed that in crafting HEERA, the Legislature did not focus solely on the primary purpose of the employment or on the value of services performed. Instead, subsection (f) requires that in cases where employment is contingent upon student status and the student employee's educational objectives are related to the services performed, PERB must balance those educational objectives against the value of the services performed.

In determining the educational objectives of student employees, the court made it clear that PERB was to focus on the personally held subjective perceptions of the students themselves. Once the subjective educational goals of the student employees are determined, they are then weighed against the objective value of the services performed:

> . . . to see if the students' educational objectives, however personally important, are nonetheless subordinate to the services they are required to perform. Thus, even if PERB finds that the students' motivation for accepting employment was primarily

> educational, the inquiry does not end here. PERB must look further - to the services actually performed - to determine whether the students' educational objectives take a back seat to their service obligations. [Regents at p. 614; fn. omitted.]

Thus, even if all student employees concurred that their purpose in taking the job was to further their educational objectives, the Board could determine that those educational objectives were subordinate to the value of the services provided. For example, in Regents there was evidence that the residents chose their positions in order to best fulfill their personal educational objectives.[15] Yet the Board still found that the educational objectives were subordinate to the valuable patient care services provided.

Prong One

While the record in this hearing is longer, it is fundamentally similar to the facts outlined in the earlier Regents case. Although there may be minor changes of emphasis, all of the following factors which the court relied upon in Regents to uphold the Board's housestaff decision are still applicable:

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[15]The administrative law judge in that case noted:

> [A]11 housestaff witnesses testified [that] their educational objectives in choosing and participating in a residency program are to receive the best medical training and qualify for specialty or subspecialty certification. . . . [Regents at p. 640, fn. 14.]

1. The substantial quantity of time residents spend on clinical activities and direct patient care;

2. The nature of the procedures residents perform with little or no supervision;

3. The professional guidance residents provide for newer residents, medical students and other hospital employees;

4. The extensive indicia of employment status of residents; and

5. The extent of educational benefit and training received by the residents.

The vast majority of a resident's time is spent in direct patient care. They perform physical examinations, take patient histories, develop treatment plans, prescribe and administer dangerous drugs, and perform all sorts of extensive medical procedures in life threatening situations from intubations to delivering babies. Almost all hospital admissions are first seen by residents and are often not seen by an attending physician until the next day.

Housestaff continue to work extremely long hours in spite of efforts to reduce their workload. An 80-hour work week is very common, with some programs or rotations exceeding 100 hours per week. Even following the guidelines on hours suggested by the essentials, a resident can be assigned shifts of 24 to 36 hours every third or fourth day, and regularly work 80-hour weeks, receiving only one day off out of every seven "when averaged over four weeks".

Senior housestaff also have substantial teaching and supervisory duties. First year residents on call or working on weekends almost always take questions to their senior residents before they contact an attending physician. Senior residents also put on conferences and give regular instruction to less senior residents and medical students assigned to their team. Residents also regularly issue medical orders which must be carried out by nurses and other technicians.

The indicia of employment are also extensive. Residents are paid approximately from $31,000 to $45,000 annually. Housestaff do not work according to typical academic schedules (i.e., on a semester or quarter system with a set period when everyone is off) but rather they work year round and receive four weeks of paid vacation scheduled to ensure adequate staffing of residents exists at all times.

Housestaff also receive a better benefit package than most other University employees. They typically receive a choice between two full coverage health insurance plans, dental, vision and prescription coverage for the resident and their entire family, long term disability insurance (or an offsetting stipend for the resident to purchase their own disability insurance), life insurance, uniforms, meals when on duty, and long range pagers. The University also provides housestaff with a major benefit for any doctor: fully paid medical malpractice insurance.

Housestaff are paid through regular payroll checks issued by the University, from which state and federal taxes are deducted. They are covered by social security and workers compensation programs. They receive performance evaluations, not grades. If they are promoted to their next level based upon those evaluations, they receive annual salary increases.

Residents pay no University tuition or student fees. They take no University examinations, but rather a very limited number of national medical examinations for which no grades are given. They receive no degree from the University at the completion of the program. They are not identified as or called "students," but rather referred to as housestaff, residents, doctors, or colleagues. This distinguishes housestaff from medical students also doing rotations within the hospital who are referred to as students.

Finally, although there has been an increasing emphasis upon the importance of the didactic training over the past years, both the nature and amount of didactic training received is substantially similar to that outlined by the Supreme Court in Regents. Also, since patient care is the primary responsibility for residents, conflicts between patient care and didactics tend to be resolved in favor of patient care.

One significant change has been implemented since the time of the Regents decision. In the past, a patient could have been admitted, treated, and discharged without ever seeing an attending physician. Now, almost all patients are either

personally seen or their cases are reviewed by an attending physician. This change was not instituted to benefit the educational program, but rather to avoid Medicare fraud. It is not a persuasive factor in determining the employee status of housestaff.

Evidence that educational aspects play a more significant role now than in the past are offset by new examples that service still plays a predominant role. When UCLA required its residents to cover call schedules at the VA hospital because the VA ran out of money to pay for moonlighting doctors, that decision was implemented for service reasons, not for the education of the residents. The same holds true when the number of residents in a program is reduced and increased call schedules are assigned to residents to maintain patient coverage. Thus, the findings of fact and conclusions of both the Board and the Supreme Court regarding the predominance of service over educational objectives are still supported by this record.

This is not meant to imply that educational objectives are not being met or that they are not important. Virtually all residents who testified believed that their educational objectives were being met. That, however, was also the case in Regents, and yet the Board and the Supreme Court still concluded that service to the University, through the residents' clinical duties, predominated over their educational objectives.

That conclusion is strongly corroborated by the fact that housestaff fit so precisely within the definition of professional

employees. Section 3562(o)(2) states:

> (o) "Professional employee" means:
>
> (2) Any employee who: (i) has completed the courses of specialized intellectual instruction and study described . . . and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (1).

This statutory language contemplates situations where individuals have received their degrees, but must perform related work under the supervision of those already qualified as professional employees before they are considered qualified professional employees. By obtaining their medical degree, residents have "completed the courses of specialized intellectual instruction and study". Residents also perform related work under the supervision of a professional person in order to qualify themselves to become a professional employee, i.e., a board certified physician.

In Regents, the court found that section 3562(0) corroborated their conclusion that housestaff were not excluded per se from the benefits of collective bargaining, stating:

> . . . Housestaff fit precisely within this definition. The fact that housestaff so clearly fall within the definition of professional employee reinforces the view that the Legislature did not intend housestaff to be excluded under the Act. [Fn. omitted.]

This finding is also consistent with the Board's holding in In the Matter of: Unit Determination for the State of California, supra, PERB Decision No. 110-S, where it placed medical residents

into the same professional employee bargaining unit with physicians, dentists, and podiatrists.

Prong two

Having concluded that service to the University and its patients predominates over educational objectives, it is necessary to determine if it would further the purposes of the Act to extend coverage to housestaff. In Regents the Board reviewed the purposes of the Act and concluded that the extension of collective bargaining rights to housestaff would give them a viable mechanism for resolving their differences and would, therefore, foster harmonious and cooperative labor relations between the University and housestaff.

In upholding the Board decision, the court specifically rejected the University's claim that its mission would be undermined by bargaining on subjects tied to the educational aspects of the residency programs.

> . . . This "doomsday cry" seems somewhat exaggerated in light of the fact that the University engaged in meet-and-confer sessions with employee organizations representing housestaff prior to the effective date of HEERA.
>
> Moreover, the University's argument is premature. The argument basically concerns the appropriate scope of representation under the Act. (See section 3562, subd. (q).) Such issues will undoubtedly arise in specific factual contexts in which one side wishes to bargain over a certain subject and the other side does not. These scope-of-representation issues may be resolved by the Board when they arise, since it alone has the responsibility "[t]o determine in disputed cases whether a particular item is within or without the scope of representation."

(Section 3563, subd. (b).) [Regents at p. 623; emphasis in original; fn. omitted.]

The court also rejected the University's claim that extending coverage could lead to strikes and was inappropriate due to the brief tenure of housestaff.

> The University also argues that permitting collective bargaining for housestaff may lead to strikes. However, it is widely recognized that collective bargaining is an alternative dispute resolution mechanism which diminishes the probability that vital services will be interrupted. (See San Diego Teachers Assn. v. Superior Court, supra, 24 Cal.3d at pp. 8-9, 13.)
>
> Finally, the University argues that the brief tenure of housestaff's relationship with the University undermines the conclusion that coverage would further the purposes of the Act. The University acknowledges that many other individuals whose relationship with the University is of short duration have been accorded employee status with full bargaining rights. Housestaff should not be treated differently. . . . [Regents at pp. 623-624.]

In summary, with the exception of a few new arguments regarding the University's constitutional issue, which will be discussed later, the University's arguments in this case are little more than a rehash of old arguments rejected previously by both the Board and the court. If the outcome of this issue is to be changed, it will need to be done so as a change in policy at the Board level, because the factual findings are not substantially different from the Regents case. To come to any other conclusion would also result in the absurd inconsistency of granting residents collective bargaining rights under the two other California bargaining statutes applicable to residents, the

MMBA (while on rotation at San Francisco General, for example) and SEERA (while on rotation at a State hospital, for example), but yet be excluded from coverage within their own program at the University under HEERA.

I therefore find, consistent with the Regents decision, that housestaff are employees under section 3562 (f) of HEERA, and that campuswide units are appropriate for meeting and negotiating.

Issue # 2: Housestaff at Non-University Owned or Operated Facilities

The second issue to be resolved is whether housestaff working at facilities that are not owned and operated by the University are employees under HEERA. The reason residents are rotated through such facilities is for their educational benefit. Residents gain experience dealing with a different patient population and different disease progressions than those at University facilities. The service benefit accrues to the non-University facility and its patients. Neither the University nor any of its patients receive any service from residents at other facilities. Even in the best of circumstances it is only a monetary break-even proposition for the University. In most situations the University does not fully recover its costs in sending residents to another facility.

One benefit the University does reap is that the reputation of its program is typically enhanced. Because residents have greater exposure to differing patient populations, the program is considered more attractive. While it is to the benefit of the

University to have its residency programs respected, that benefit cannot be considered a service under subsection (f).

The petitioner's claim that the University and its non-owned and operated facilities are joint employers is rejected. Four factors have traditionally been relevant in determining if two employers should be considered a single employer for collective bargaining purposes; (1) the interrelationship of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. (Radio & Television Broadcast Technicians Local 1264 v. Broadcast Serv., Mobil. Inc. (1965) 380 U.S. 255, 256 [58 LRRM 2545]; South Prairie Const. Co. v. Operating Engr's Local 627 (1976) 425 U.S. 800, 802 (fn. 3) [92 LRRM 2507].) The record does not support a finding that the University is a joint employer with any of the non-owned and operated facilities.

The closest example is probably San Francisco General Hospital, where the contract between it and the University specifically prohibits San Francisco General from taking any disciplinary action against residents. That clearly gives the University control over some labor relations issues at San Francisco General. However, San Francisco General retains sufficient autonomy to negotiate a collective bargaining agreement with the petitioner under the MMBA, separate and apart from the University. That collective bargaining agreement contains clauses such as Recognition, No Work Stoppages, Use of Facilities (by the union), Bulletin Boards, Job Stewards, Access,

Dues Check Off, Agency Shop, Health and Safety, Maintenance of Employment Status, Job Descriptions, Housestaff Lounge, Security, Phlebotomy Services, Housestaff Responsibilities, Telephone Calls, Meals, and over twenty other clauses reflecting that the University does not exercise labor relations control over San Francisco General.

Any commonality of management stops, for the most part, at the supervisory level, where attending physicians are given non-paying University faculty appointments. Nor is there evidence of common ownership, University financial control over San Francisco General or significant interrelationship of operations.

I therefore conclude that, as to non-University owned or operated facilities, the educational objectives of housestaff predominate over the service received by the University. Because educational objectives of housestaff predominate over services received by the University, all housestaff working in rotations at non-University owned or operated facilities are excluded from coverage under HEERA.[16]

Issue # 3: The Constitutional Issue

The third and final issue is whether granting residents employee status undermines the University's constitutional status. Granting employee status can be harmonized with the University's constitutional status because HEERA deals with

[16]Because housestaff at non-owned and operated facilities are excluded based upon a lack of services received by the University, it is unnecessary to deal with the University's federal preemption and community of interest arguments.

matters of statewide concern that foster stable employer-employee relationships, and does not improperly intrude into internal University affairs.

Article IX, section 9 of the California Constitution states in relevant part:

> The University of California shall constitute a public trust, to be administered by the existing corporation known as "The Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure the security of its funds and compliance with the terms of the endowments of the university and such competitive bidding procedures as may be made applicable to the university by statute for the letting of construction contracts, sales of real property, and purchasing of materials, goods, and services.

The University argues that Article IX, section 9 prohibits the Legislature from enacting legislation that would interfere with the University's power of organization and governance over central or core functions such as its relationship with students engaged in academic activities, or its discretion in making academic judgments and academic policies.[17] According to the University, by excluding housestaff from coverage under subsection (f) of HEERA, the Board can "save the Act from such a constitutional confrontation."

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[17]The University is not precluded from raising constitutional issues now for the first time. It is noteworthy, however, that from 1979 to 1986 the University spent seven years litigating this exact same case all the way to the California Supreme Court and never once raised this issue which it now raises as such a fundamental intrusion into the University's constitutional authority.

Administrative agencies are not typically involved in constitutional issues. The California Constitution, Article III, section 3.5, specifically provides in relevant part:

> An administrative agency, including an administrative agency created by the Constitution or an initiative or statute has no power to:
>
> (a) declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) to declare a statute unconstitutional

The University notes that it is not seeking to have PERB resolve a constitutional challenge to HEERA. Rather, the University urges that PERB should interpret subsection (f) in a manner which excludes housestaff from coverage, in order "to insulate HEERA from violating article IX, section 9".

If possible, constitutional challenges should be avoided through statutory interpretations. (Leek v. Washington Unified School District (1981) 124 Cal.App.3d 43 [177 Cal.Rptr. 196]; Local 21, International Federation of Professional and Technical Engineers, AFL-CIO et. al. v. Rojas (1995) 40 Cal.App.4th 670 [46 Cal.Rptr.2d 813]; Link v. Antioch Unified School District (1983) 142 Cal.App.3d 765 [191 Cal.Rptr. 264].) Because this decision does not do that, it is appropriate to explain why.

In Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168 [172 Cal.Rptr. 487] (Pacific Legal Foundation), the court reviewed a similar challenge to the constitutionality of SEERA. Petitioners claimed that SEERA conflicted with the merit system

provisions of California Constitution, Article VII. The court noted that the Legislature had carefully crafted the provisions of SEERA with the constitutional mandates of Article VII "firmly in mind, explicitly reaffirming the continued application of the merit principle in the preamble of the act and fashioning the major elements of the act in a manner calculated to minimize potential conflict with the merit principle".

As a general principle of statutory construction, the court stated that doubts regarding the Legislature's plenary authority should be resolved in favor of the Legislature's action.

> (2) Moreover, our past cases establish that the presumption of constitutionality accorded to legislative acts is particularly appropriate when the Legislature has enacted a statute with the relevant constitutional prescriptions clearly in mind. [Citation.] In such a case, the statute represents a considered legislative judgment as to the appropriate reach of the constitutional provision. Although the ultimate constitutional interpretation must rest, of course, with the judiciary [citation], a focused legislative judgment on the question enjoys significant weight and deference by the courts. [Pacific Legal Foundation at p. 180.]

The constitutionality of the MMBA has also been tested. In Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296 [152 Cal.Rptr. 903], the court upheld the sanctity of the collective bargaining agreements under the MMBA. Thus the Legislature's original action in establishing a framework for resolving employer-employee disputes through collective bargaining was necessarily proper even though the

Constitution grants charter cities, for example, plenary authority to set compensation.

In People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach (1984) 36 Cal.3d 591 [205 Cal.Rptr. 794] (Seal Beach Police Officers Assn.), the court explicitly found the MMBA constitutionally proper. In that case the city placed charter amendments before the voters on matters involving terms and conditions of employment without first satisfying the bargaining requirements of the MMBA. The city argued that it had "the absolute, unabridged constitutional authority to propose charter amendments to its electorate, which authority could not be impaired or limited by the requirements of the MMBA (Cal. Const., art. XI, § 3, subd. (b))." The court stated:

> While the Legislature established a procedure for resolving disputes regarding wages, hours and other conditions of employment, it did not attempt to establish standards for the wages, hours and other terms and conditions themselves. Rather, it "set forth reasonable, proper and necessary principles which public agencies must follow in their rules and regulations for administering their employer-employee relations, . . ." [Citation.]

In a footnote, the court in Seal Beach Police Officers Assn. went on stating:

> We emphasize that there is a clear distinction between the substance of a public employee labor issue and the procedure by which it is resolved. Thus, there is no question that "salaries of local employees of a charter city constitute municipal affairs and are not subject to general laws." (Sonoma County Organization of Public Employees v. County of Sonoma, supra, 23 Cal.3d at p. 317.) Nevertheless, the process

> by which salaries are fixed is obviously a matter of statewide concern and none could, at this late stage, argue that a charter city need not meet and confer concerning its salary structure. [Seal Beach Police Officers Assn. at pp. 600-601, fn. 11.]

The Appropriate Test for an Article IX Section 9 Challenge

Article IX, section 9 of the California Constitution has been interpreted by the courts as giving the Regents broad power to organize and govern the University. In San Francisco Labor Council v. Regents of the University of California (1980) 26 Cal.3d 758 [163 Cal.Rptr. 460] (San Francisco Labor Council), the court noted the University's "general immunity from Legislative regulations" and that "the power of the Regents to operate, control and administer the University is virtually exclusive." In Goldberg v. Regents of the University of California (1967) 248 Cal.App.2d 867, 874 [57 Cal.Rptr. 463] and Regents of the University of California v. Superior Court (1970) 3 Cal.3d 529, 540 [91 Cal.Rptr. 57], the court stated: "The Regents have the general rule-making or policy making power in regard to the University . . . and are . . . fully empowered with respect to the organization and government of the University. . . ."

That power is not total however. In San Francisco Labor Council, the court set out areas where the University is subject to regulation.

> (2) It is true the university is not completely free from legislative regulation. In addition to the specific provisions set forth in article IX, section 9, there are three areas of legislative regulation. First, the Legislature is vested with the power of appropriation, preventing the

> regents from compelling appropriations for salaries.[18] [Citations.]
>
> Second, it is well settled that general police power regulations governing private persons and corporations may be applied to the University. [Citations.] For example, workers' compensation laws applicable to the private sector may be made applicable to the university.
>
> Third, legislation regulating public agency activity not generally applicable to the public may be made applicable to the university when the legislation regulates matters of statewide concern not involving internal university affairs. [Citation.]

It is this third area, legislation regulating public agencies, that is at issue in this case. The test flows, in significant part, from the court's holding in Tolman v. Underhill (1952) 39 Cal.2d 708 [249 P.2d 280] (Tolman). In that case the court reviewed a University requirement that employees take an oath that they were not members of the communist party. The court held that laws passed by the Legislature will prevail over matters which are not exclusively university affairs.

> . . . It is well settled, however, that laws passed by the Legislature under its general police power will prevail over regulations made by the regents with regard to matters which are not exclusively university affairs. [Citations.] There can be no question that the loyalty of teachers at the university is not merely a matter involving the internal

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[18]For example, the Legislature appropriately regulated decisions of the University under this authority by reducing the number of specialty residency positions and increasing the number of primary care residencies. This was appropriate even though it intruded directly into decisions such as student admissions and retention, course content, internal allocation of resources and creation and termination of academic programs.

> affairs of that institution but is a subject of general statewide concern. . . . [Tolman at p. 712.]

Thus, the court interpreted what is exclusively University-affairs very narrowly, finding that the loyalty of teachers at the University was a matter of general statewide concern, and therefore subject to legislative regulation.

The court went on to say that the Legislature's intent is not measured only by the language used, but rather by the whole purpose and scope of the legislative scheme. The court also stated:

> . . . Constitutional limitations upon the Legislature's powers are to be strictly construed, and any doubt as to its paramount authority . . . will be resolved in favor of its action. . . . [Tolman at p. 712.]

In Coutin v. Lucas (1990) 220 Cal.App.3d 1016 [270 Cal.Rptr. 93], pet. hrg. den. August 15, 1990, the court of appeal interpreted what is exclusive internal University affairs very narrowly and interpreted general statewide concerns of the Legislature very broadly. The issue was whether the Legislature could statutorily prohibit the Chief Justice of the State of California from sitting on the University Board of Regents. The court broadly defined the general statewide concern as a legislative determination that judges should not be involved with nonjudicial duties in a nonjudicial public entity. The court found that the statutory removal of the chief justice from the Board of Regents "surely constitutes matters of transcending

statewide concern, and is patently not 'merely a matter involving the internal affairs of [the University]'." (Id., at p. 1026.)

Even cases invalidating legislative regulation of the University did so narrowly, and only with an actual dispute before the court. In San Francisco Labor Council, the court invalidated a prevailing wage statute because it interfered with Article IX, section 9. In that case the legislation required the University to set minimum salary rates at or above the prevailing wage rates in various locations. The court distinguished the prevailing wage statute from a minimum wage statute which would have been an appropriate regulation. The court pointed out that the prevailing wage legislation was not an appropriations bill, nor was there any showing that the requirements had been made "generally applicable to private persons and corporations". Furthermore, the court found that the regulation was not one of statewide concern even though it had been declared so by the Legislature. To the contrary, the court found that while the regulation claimed to establish minimum standards, it in effect determined University wages based upon extrinsic facts, i.e., prevailing wages in the local area.

In Scharf v. Regents of the University of California (1991) 234 Cal.App.3d 1393 [286 Cal.Rptr. 227] (Scharf), the Legislature amended the Education Code to require the University to provide employees access to their personnel files as part of the peer review tenure/promotion process. Following the guidance of San Francisco Labor Council and Tolman, the court held that the

legislation at issue in Scharf subjected the University to a different and more restrictive requirement regarding disclosure of personnel files than most other public or private employers. The court determined that there was no coherent statewide scheme pertaining to the disclosure of personnel files, but rather an array of diverse and conflicting regulations which were as disparate as those pertaining to the prevailing wage issue in San Francisco Labor Council. The court contrasted that to workers compensation laws, which it noted may be made applicable to the University.

A second reason the legislation in Scharf was rejected was that the issue constituted a very significant intrusion into the peer review process. The court believed that both the evaluation of scholarship and the granting of tenure or promotion "is a defining act of singular importance to an academic institution". The court found it to be of comparable academic importance to the establishment of the educational curriculum, which has long been held within the authority of the University. (Hamilton v. Regents of the University of California (1934) 219 Cal. 663 [28 P.2d 355], affd 293 U.S. 245 [79 L.Ed. 343, 55 S.Ct. 197].)

Therefore, in applying the court's test from San Francisco Labor Council to the case at hand, it is necessary to determine whether HEERA regulates matters of general statewide concern which are not merely internal or exclusively University affairs.

Matters of Statewide Concern

On several occasions the California Supreme Court has recognized that the State's various collective bargaining statutes are part of a general statewide comprehensive plan to assure the peaceful resolution of employer-employee disputes in the public sector. In Pacific Legal Foundation the court set out the history of the State's comprehensive plan:

> In 1972, following the first major state employee strike, the Legislature created the Assembly Advisory Council on Public Employee Relations, chaired by UCLA Professor Benjamin Aaron, to formulate recommendations "for establishing an appropriate framework within which disputes can be settled between public jurisdictions and their employees." [Citation.] In its 1973 report the Advisory Council recommended the enactment of a comprehensive state law, modeled on the National Labor Relations Act, which would afford formal collective bargaining rights to all public employees.
>
> The Legislature, however, was unable to agree on a comprehensive bill covering all public employees and decided instead to draft separate collective bargaining statutes directed to the specific needs and problems of different categories of public entities. In line with this approach, the Legislature in 1975 first enacted the Educational Employment Relations Act (EERA) [citation]; EERA repealed the Winton Act, established formal negotiating rights for public school employees, and created the Educational Employment Relations Board, an expert, quasi-judicial administrative agency modeled after the National Labor Relations Board, to enforce the act. In 1977, the Legislature adopted SEERA, the legislation challenged in the instant proceeding, to provide formal collective bargaining rights to state employees. Finally, the legislative sequence was completed in 1978 with the adoption of the Higher Education Employer-Employee Relations Act (HEERA) [citation], granting

> similar rights to employees in the state university and University of California systems. As this brief historical overview demonstrates, SEERA constitutes one significant component in a network of recent statutes affording collective bargaining rights to California public employees. [Id., at p. 177.]

In Regents, the court reiterated the comprehensive nature of the collective bargaining statutes:

> In 1978, the California Legislature enacted HEERA, which extended collective bargaining rights to employees of the University of California, Hastings College of the Law and the California State University.[1191] (Regents at pp. 604-605.)

The general statewide plan is clear and undeniable. Cities, counties and special districts are covered by the MMBA.[20] Public education up through community colleges is covered by the EERA. The State of California and its employees are covered by SEERA. The University of California and the California State University are covered by HEERA. Clearly HEERA is but one part of this

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[19]Employees of these institutions were among the last California public employees to be accorded collective bargaining rights. [Citation.]

PERB administers HEERA (§ 3560 et seq.), the State Employer-Employee Relations Act (SEERA) (§ 3512 et seq.) which accords collective bargaining rights to state civil service employees and the Educational Employment Relations Act (EERA) (§ 3540 et seq.) which accords collective bargaining rights to public school employees other than those covered under HEERA.

[20]California transit districts are also subject to labor relations provisions found in the Public Utilities Code enabling statutes, joint powers agreements, incorporation articles and bylaws and the MMBA. (California Public Sector Labor Relations, Matthew Bender & Co. Inc. (1989) section 2.13[1][a].)

master plan ensuring that processes are available to employers and employees to help them resolve employer-employee conflict.

That statewide plan was created to address a general concern over the manner in which public employees and employers resolved their differences. The State has a paramount interest in fostering stable, long term, employer-employee relationships. In relevant part, HEERA section 3560 states:

> (a) The people of the State of California have a fundamental interest in the development of harmonious and cooperative labor relations between the public institutions of higher education and their employees.
>
> (d) The people and the aforementioned higher education employers each have a fundamental interest in the preservation and promotion of the responsibilities granted by the people of the State of California. Harmonious relations between each higher education employer and its employees are necessary to that endeavor.
>
> (e) It is the purpose of this chapter to provide the means by which relations between each higher education employer and its employees may assure that the responsibilities and authorities granted to the separate institutions under the Constitution and by statute are carried out in an atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them. . . .

In addition, HEERA section 3561(a) provides:

> It is the further purpose of this chapter to provide orderly and clearly defined procedures for meeting and conferring and the resolution of impasse, and to define and prohibit certain practices which are inimical to the public interest.

Other State collective bargaining laws are in accord.[21] Thus, the State's public sector bargaining statues explicitly note the State's interest in long term, stable employer-employee relationships.

The courts have also noted the State's interest in stable employer-employee relationships. In Regents at page 622, the court explicitly recognized the State's fundamental interest in the development of harmonious and cooperative labor relations between public employers and their employees. (See also Seal Beach Police Officers Assn., promotes full communications between

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[21]MMBA section 3500 states:

> It is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes . . . . It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within various public agencies in the State . . . .

EERA section 3540 states:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State . . . .

SEERA section 3512 states:

> It is the purpose of this chapter to promote full communication between the state and its employees by providing a reasonable means of resolving disputes . . . . It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the State . . . . It is further the purpose of this chapter . . . to foster peaceful employer-employee relations, . . .

public employers and employees and improves personnel management and employer-employee relations within various public agencies; and San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893], strong public interest in minimizing interruptions of services.)

Thus, it is clear that in establishing HEERA the Legislature sought to regulate a matter of general statewide concern, i.e., creating stable, long term employer-employee relationships fostering labor peace. The next step is to determine whether HEERA intrudes on matters which are exclusively internal University affairs.

Internal University Affairs

In drafting HEERA the Legislature was mindful of the University's constitutional status and carefully crafted the legislation to avoid constitutional infirmities. The two most obvious examples of these legislative efforts are sections 3561(b) Purposes, and 3562(q) Definitions. The Purposes section, 3561(b) states:

> (b) The Legislature recognizes that joint decision making and consultation between administration and faculty or academic employees is the long-accepted manner of governing institutions of higher learning and is essential to the performance of the educational missions of these institutions, and declares that it is the purpose of this chapter to both preserve and encourage that process. Nothing contained in this chapter shall be construed to restrict, limit, or prohibit the full exercise of the functions of the faculty in any shared governance mechanisms or practices, including the Academic Senate of the University of California and the divisions thereof, the

> Academic Senates of the California State University, the University of California, or Hastings College of the Law. The principle of peer review of appointment, promotion, retention, and tenure for academic employees shall be preserved.

Under Definitions, section 3562(q), a completely separate "scope of representation" section was designed to avoid intrusion into University academic matters. It states:

> (q) For purposes of the University of California only, "scope of representation" means, and is limited to, wages, hours of employment, and other terms and conditions of employment. The scope of representation shall not include:
>
> (1) Consideration of the merits, necessity, or organization of any service, activity, or program established by law or resolution of the regents or the directors, except for the terms and conditions of employment of employees who may be affected thereby.
>
> (2) The amount of any fees which are not a term or condition of employment.
>
> (3) Admission requirements for students, conditions for the award of certificates and degrees to students, and the content and supervision of courses, curricula, and research programs, as those terms are intended by the standing orders of the regents or the directors.
>
> (4) Procedures and policies to be used for the appointment, promotion, and tenure of members of the academic senate, the procedures to be used for the evaluation of the members of the academic senate, and the procedures for processing grievances of members of the academic senate. The exclusive representative of members of the academic senate shall have the right to consult and be consulted on matters excluded from the scope of representation pursuant to this paragraph. If the academic senate determines that any matter in this paragraph should be within the scope of representation,

> or if any matter in this paragraph is withdrawn from the responsibility of the academic senate, the matter shall be within the scope of representation.
>
> All matters not within the scope of representation are reserved to the employer and may not be subject to meeting and conferring, provided that nothing herein may be construed to limit the right of the employer to consult with any employees or employee organization on any matter outside the scope of representation.

Thus, key University internal matters were excluded from coverage by HEERA. The University argues, however, that this is insufficient protection from intrusion into University affairs. According to the University, HEERA subjects the University to potential determinations by PERB that it refused to bargain in good faith, may delay the implementation of policies and procedures, requires the University to relinquish sole discretion over matters that are within the scope of representation, has the potential to interfere with the relationship between students and faculty members, would limit collaborative decision making on campus, creates the risk that non-University arbitrators will intrude into academic decisions, would interfere with patterns of governance, and last but not least, threatens the University's accreditation with the ACGME.[22]

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[22]The University's claim that its accreditation could be jeopardized is simply groundless. In spite of efforts to do so at the hearing, the University was unable to show any credible evidence that the accreditation of any residency program, at any university, medical center or hospital throughout the United States, has ever been jeopardized by any collective bargaining statute.

These fears are either premature, overstated, or lack proof and fall squarely within the "doomsday cry" rejected by the court in Regents. The court also noted that the arguments are premature.

> Moreover, the University's argument is premature. . . . Such issues will undoubtedly arise in specific factual contexts in which one side wishes to bargain over a certain subject and the other side does not. These scope-of-representation issues may be resolved by the Board when they arise, since it alone has the responsibility "[t]o determine in disputed cases whether a particular item is within or without the scope of representation." (Sec. 3563, subd.(b).) [Regents at p. 623.]

Eleven years after the decision in Regents, the University's argument is still premature. If and when an elected exclusive representative seeks to negotiate over an item potentially intruding on University internal affairs, the parties may be able to harmonize employee interests with the University's constitutional concerns. If the parties themselves are unable to reach a solution, then PERB will have the opportunity to decide the issue. As noted by the courts, PERB was created as the agency with the expertise to resolve such disputes. For example, when PERB has an actual bargaining dispute before it, PERB may be able to separate economic issues from academic issues. If so, the University may be required to negotiate those economic issues and may not be required to negotiate the academic issues. If in PERB's expert opinion it is not possible to separate the issues after looking at an actual dispute, PERB may indeed find that the matter is outside the scope of representation because it

impermissibly intrudes into the University's constitutional authority.

Thus, with an actual dispute before it, rather than a facial challenge, PERB may be able to harmonize the obligations of HEERA with the authority of Article IX, section 9. If the matter is not resolved, then the University may at that time appropriately resort to the courts.[23]

The court in Pacific Legal Foundation echoed the Regents court in rejecting a facial challenge to the Legislature's collective bargaining scheme:

> Because no actual jurisdictional conflict between PERB and the State Personnel Board confronts us in this proceeding, we have no occasion to speculate on how some hypothetical dispute that might be presented for decision in the future should properly be resolved. . . . [Pacific Legal Foundation at p. 200.]

The court also dismissed concerns about SEERA intruding upon the Governor's constitutional authority:

> . . . Although SEERA obligates the Governor and exclusive representatives to bargain in good faith, nothing in the act purports to compel the Governor to agree to conditions that he would feel obligated to "blue pencil" or veto. . . . [Id., at pp. 201-202.]

HEERA itself also specifically states under the definition of "meet and confer":

> . . . If agreement is reached between representatives of the higher education

[23]University arguments seem to be based upon a presupposition that neither the parties, nor PERB, nor the courts, but rather only the University, will be skillful enough to make these distinctions as they arise.

> employer and the exclusive representative, they shall jointly prepare a written memorandum of understanding which shall be presented to the higher education employer for concurrence. However, these obligations do not compel either party to agree to any proposal or require the making of a concession. [Sec. 3562(d).]

In rejecting a similar constitutional challenge of SEERA the court dismissed the argument that collective bargaining may lead to future agreements in contravention of the State's constitutional authority.

> We recognize, of course, that theoretically the product of the collective bargaining process may possibly in specific instances conflict with the merit principle of employment embodied in article VII. Such a conflict would be most evident, for example, if the Governor and an exclusive bargaining representative agreed to a memorandum of understanding purporting to authorize hiring or promotion on a politically partisan basis. The provisions of SEERA, however, neither explicitly nor implicitly authorize any such encroachment on the merit principle of article VII through the collective bargaining process. On the contrary, in drafting SEERA the Legislature explicitly reaffirmed the primacy of the merit principle of employment and crafted the statute carefully so as to minimize any potential conflict with such principle. [Pacific Legal Foundation at p. 185; emphasis in original.]

The California Supreme Court concluded with the following:

> In this ongoing and vital process of evolving employer-employee relations, so necessary to the promotion of harmonious understanding between the parties, the invalidation of this statute would be a sorrowful step backwards. (Id. at p. 202.)

HEERA is a process for resolving disputes and improving employer-employee relations. It is part of a statewide plan

created by the Legislature to address a general statewide concern regarding harmonious employer-employee relationships in the public sector. Nothing on the face of HEERA intrudes into the constitutional authority of the University. If an exclusive representative is elected to represent housestaff and the University believes that representation intrudes into its constitutional authority, PERB would then have the opportunity to harmonize any conflicting obligations and avoid a constitutional conflict. Denying housestaff the rights and protection afforded them by the Legislature under HEERA simply to avoid that process is unpersuasive at best.

CONCLUSION

Based upon the above findings of fact, discussion and the entire record in this case:

1. Consistent with the decision in the Regents case, medical housestaff on rotations in University owned and operated facilities are found to be employees within the meaning of section 3562 (f) of HEERA;

2. Campuswide units are appropriate for bargaining;

3. Housestaff on rotations at non-University owned and operated facilities are not employees within the meaning of section 3562(f) of HEERA;

4. Bargaining rights and obligations imposed by HEERA can be harmonized with the rights and obligations created by Article IX, section 9 of the California Constitution.

PROPOSED ORDER

The following housestaff unit is found to be appropriate for meeting and negotiating at each of the following locations: University of California at Los Angeles, University of California at San Francisco, University of California at Davis.

Shall Include:

> All medical housestaff who are employed by the University of California and are on rotation within a facility owned and operated by the University, including Chief Residents who are in their final year of a residency program.

Shall Exclude:

> All managerial, supervisorial, and confidential employees.
>
> All medical housestaff on rotations at facilities not owned and operated by the University of California.
>
> All veterinary, pharmacy and dental residents.
>
> All fellows (housestaff who have completed their first board program).
>
> Chief Residents who have completed their first board residency program.
>
> All other employees.

APPEAL PROCESS

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 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 Regs., tit. 8, sec. 32135; Code Civ. Proc., sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305 and 32140.)

James W. Tamm
Administrative Law Judge