STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNIVERSITY COUNCIL AMERICAN FEDERATION OF TEACHERS, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. SF-CE-611-H PERB Decision No. 1689-H September 17, 2004

Appearances: Leonard Carder by Arthur Krantz, Attorney, for University Council American Federation of Teachers; Hanson, Bridgett, Marcus, Vlahos & Rudy, by Allison Woodall, Attorney, for Regents of the University of California.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (Board) on exceptions filed by the Regents of the University of California (University) to a proposed decision (attached) of an administrative law judge (ALJ). The ALJ held that the University violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by unilaterally adjusting health benefits without giving the University Council American Federation of Teachers (UC-AFT) notice and opportunity to bargain.

The Board has reviewed the entire record in this matter, including the proposed decision, the University's exceptions and UC-AFT's response.[2] The Board finds the ALJ's

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

[2] The request for oral argument was denied September 2, 2004.

proposed decision to be free of prejudicial error and adopts it as the decision of the Board itself.

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, it has been found that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a), (b) and (c), by unilaterally changing health benefits for calendar years 2002 and 2003 without affording the University Council American Federation of Teachers (UC-AFT) notice and an opportunity to bargain. By this conduct, the University has breached its duty to bargain in violation of HEERA section 3571(c), interfered with the right of Unit 18 employees to be represented by UC-AFT in violation of section 3571(a), and denied UC-AFT the right to represent its members in violation of section 3571(b).

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to negotiate with the UC-AFT about the decision to change health benefits;

2. Denying UC-AFT the right to represent Unit 18 employees in their employment relations with the University; and

3. Interfering with the right of Unit 18 members to be represented by their chosen representative.

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

1. Unless otherwise agreed to by the parties, make employees whole for losses suffered as a result of the unilateral change in health benefits for calendar years 2002 and 2003. The make whole remedy shall include, but shall not be limited to: (a) reimbursement for the difference between premiums they have paid since January 2003 and the premiums they would have paid had the University followed its benchmark methodology of setting its contribution based upon the lowest cost health maintenance organization after risk adjustment, and (b) reimbursement for the difference between copayments they have paid since January 2002, when the University made the discretionary decision to negotiate higher copayments not in conformance with any past practice, and the copayments they would have paid had the University not made the decision. The period covering the make whole remedy shall begin with the date the changes were implemented and end with the effective date of a successor agreement covering health benefits. All monetary losses will include interest at the rate of 7 percent per annum.

2. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the University, indicating that the University will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notice of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in

accord with the director's instructions. Continue to report to the regional director as directed. All reports to the regional director shall be concurrently served on UC-AFT.

Members Whitehead and Neima joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-611-H, University Council American Federation of Teachers v. Regents of the University of California, in which all parties had the right to participate, it has been found that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a), (b) and (c). The University violated HEERA when it implemented significant changes in health benefits for calendar years 2002 and 2003 without affording the University Council American Federation of Teachers (UC-AFT), the exclusive representative of an appropriate unit of lecturers (Unit 18), notice and an opportunity to negotiate.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to negotiate with UC-AFT about the decision to change health benefits;

2. Denying UC-AFT the right to represent Unit 18 employees in their employment relations with the University; and

3. Interfering with the right of Unit 18 members to be represented by their chosen representative.

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

Unless otherwise agreed to by the University and UC-AFT, make employees whole for losses suffered as a result of the unilateral change in health benefits for calendar years 2002 and 2003. The make whole remedy shall include, but shall not be limited to: (a) reimbursement for the difference between premiums they have paid since January 2003 and the premiums they would have paid had the University followed its benchmark methodology of setting its contribution based upon the lowest cost health maintenance organization after risk adjustment; and (b) reimbursement for the difference between copayments they have paid since January 2002, when the University made the discretionary decision to negotiate higher copayments not in conformance with any past practice, and the copayments they would have paid had the University not made the decision. The period covering the make whole remedy shall begin with the date the changes were implemented and end with the effective date of a successor agreement covering health benefits. All monetary losses will include interest at the rate of 7 percent per annum.

Dated: ____________________

REGENTS OF THE UNIVERSITY OF CALIFORNIA

By: ______________________________
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

UNIVERSITY COUNCIL AMERICAN FEDERATION OF TEACHERS, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-611-H PROPOSED DECISION (3/17/04)

Appearances: Leonard Carder, by Arthur Krantz, Attorney, for University Council American Federation of Teachers; Hanson, Bridgett, Marcus, Vlahos and Rudy, by Douglas Barton and Allison Woodall, Attorneys, for Regents of the University of California.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

The University Council American Federation of Teachers (UC-AFT) initiated this action on March 5, 2002, by filing an unfair practice charge against the Regents of the University of California (University). The Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on August 22, 2002. The complaint, as amended, alleges that the University changed health benefits for calendar years 2002 and 2003 without affording UC-AFT notice and an opportunity to negotiate about the decision or the effects thereof. It is alleged that the University, by this action, violated the Higher Education Employer-Employee Relations Act (HEERA) section 3571(a), (b) and (c).[1]

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

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

The University answered the complaint on September 16, 2002, generally denying the allegations and setting forth a number of affirmative defenses. Denials and defenses will be addressed below, as necessary.

A settlement conference was conducted by a PERB agent, but the matter was not resolved. The undersigned conducted six days of formal hearing in Oakland between January 15 and February 28, 2003. With the receipt of the final brief on June 17, 2003, the matter was submitted for decision.

FINDINGS OF FACT

Jurisdiction

UC-AFT is an employee organization within the meaning of section 3562(f)(1) and the exclusive representative of an appropriate unit of the University's non-senate instructional employees (Unit 18) within the meaning of section 3562(i). The University is a higher education employer within the meaning of section 3562(g). At all relevant times the collective bargaining agreement between the parties had expired and the parties were negotiating for a successor agreement.

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

Background

The University encompasses ten campuses, as well as several medical centers and three national laboratories. It offers a comprehensive health benefits package to eligible employees and retirees, regardless of their location within the system or their representation by an exclusive representative. Employees in all bargaining units participate in the health benefits system and have the same benefit options and costs as all other participants. The University's Human Resource and Benefits Policy Division, headed by Executive Director Michele French, manages policy and administration for all non-pension benefits.

The health benefits system covers approximately 145,000 active employees and retirees. With covered dependents, the system provides benefits for over 300,000 individuals. The number of benefit-eligible UC-AFT members is less than one percent of the total number of employees in the University system. By virtue of their participation in the system, members may choose coverage from a number of different health plans, including several health maintenance organizations (HMO), a preferred provider organization (PPO), a point of service plan, and two fee for service plans.[2] The University's ability to offer a variety of plan choices arises from the large number of participants in the system.

All participants in the system have the opportunity to change their health care coverage once per year during an open enrollment process. Open enrollment occurs every November, with changes becoming effective January 1 for the following calendar year. During the open enrollment, participants may switch to a new plan, change the dependents enrolled in a plan, or

[2] An HMO offers a closed access program with a defined network of physicians and a primary physician who acts as a gatekeeper or manager of the patient's health care. A PPO provides greater flexibility than an HMO by providing a defined network of physicians without the primary physician gatekeeper. A point of service plan provides different levels of benefits by melding an HMO component with a PPO component or a fee for service component. A fee for service plan has no gatekeeper component and no defined network.

make no change to prior selections. The ability of employees to make annual changes through open enrollment is important because the benefits and costs of the plans change every year for a variety of reasons, including cyclical swings both in the health care market and in the University's budgetary resources.

The Process for Setting Health Benefits

The process leading to the open enrollment period in November is a lengthy one involving University committees in areas such as planning, administration, communications and systems. It generally begins soon after the open enrollment period in November with a goal of completion the following August. According to French, preliminary steps in dealing with health plans are taken in the calendar year prior to an enrollment period. She said "you'd probably begin thinking about it the year before, but you'd begin to actually sit down and hammer them out in the first quarter of the year at least an initial take on where you think . . . you want to go or what you need to know in order to determine where you go."

The University sends a request for renewal to each health plan in approximately mid-April. The request concerning benefits for the 2002 calendar year, for example, was issued on April 13, 2001, and required a written response by May 1, 2001. Among other things, response typically includes proposals for premium rates, plan designs and related matters. At about this time, negotiations between numerous University teams and the various health plan vendors commence on a number of issues. The University typically schedules a meeting for July with representatives from the various plans who have final decision-making authority.

French testified that all non-financial decisions (anything that is not limited to the final rate negotiations with the vendor) must be made by about August 31. Other decisions are made shortly thereafter. For example, she said the final date for setting the 2002 benefits, including the vendor's rate and the University's rate, was September 25, 2001. A total premium ordinarily is established at about that time, and rates are sent to the payroll department so they can be programmed for deductions. That function typically is completed by October 15, and the process moves to the open enrollment stage. Notification of changes in health benefits typically is forwarded to employee organizations in late October or early November. Changes in health benefits become effective January 1.

In the negotiations leading to adoption of a final benefit package, the University and the various health plans have several options in dealing with rising health care costs. One option is to increase copayments, which is what the University did in the 2001 negotiations leading up to the 2002 changes. The plans had proposed a double digit increase in premiums, and the University was able to keep the increase lower by proposing plan design changes that included copayment increases. The proposal was accepted by the plans. Other options include increasing the University's contribution if funding is available and adopting salary-related contributions, otherwise known as transitional allowances.[3] Establishing a multiple tier system is yet another option. Under this approach, contributions are made in increasing amounts in accordance with the following order: single employee, employee with one or more children, employee with one adult, and an employee with an adult and one or more children. Under this option, the University's aggregate cost does not change, it merely is allocated differently across the tiers.

Still another option available to the University is to take money from other areas, such as salaries and cost of living increases, and use it to fund health care increases. In fact, the University uses a "total compensation approach." According to French, this term means that

[3] The transitional allowance concept permits the University to vary its contribution for different groups of employees based on salary. As more fully discussed below, the contribution for calendar year 2003 was higher for employees whose annualized salaries were less than $40,000, while the contributions were lower for employees whose annualized salaries were higher than $40,000.

the University looks at "the entire compensation to an individual, that includes salary, health and welfare benefits, pension, can include fringe benefits, depending on how broad a definition you want to wrap that up, it's anything that can be looked at as compensation, things like [that]."

According to French, the University decides which options it plans to use in an "interactive process" that takes into account the marketplace, resources and the overall competitive position of the benefit program. French said she meets with several groups in the process and seeks input. These include the faculty welfare committee (an arm of the faculty senate that has a constitutional right to shared governance), various administrative groups, and employee organizations to the extent that University's labor relations representatives want to involve the unions in informational meetings.[4]

The process for setting the University's contribution rate for health benefits has changed over the years. Prior to 1982, the University did not set its own rate. It established an annual contribution based on the rate paid by the Public Employee Retirement System or PERS for State of California (State) employees. From 1982 to 1993, the University continued to follow the State's formula, which was to develop a contribution based on the weighted average of the four largest plans; that is, the average was weighted based on how many members those plans had.

In 1993, the University adopted a benchmark methodology, which is designed to provide a contribution equal to the cost of lowest priced HMO at all nine University campuses. As the University stated in its open enrollment announcement for 1994, it "adopted the

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[4] In 2002, for example, French said she met with the faculty welfare committee sometime during the first six months of 2002 to consult about the transitional allowance. The committee has medical experts who offered input regarding "risk rating" and point of service plans.

principle of setting the employer contribution close to the level of the most cost-efficient plan." Under this methodology, the University offered at least one fully paid HMO, assuming the resources were available to fund it. This methodology continued until 2002. Even when the University commenced using the so-called "risk adjustment" concept in 2000, the benchmark methodology was followed, with the University setting its contribution equal to the price of the lowest risk-adjusted HMO.[5]

The State Budget Process

At about the time the health benefit process between the University and the various health plans is unfolding, the University proceeds on a separate track to adopt an overall budget. In November, the University submits its budget for the following fiscal year to the Regents. After the Regents approve the budget, the University submits its proposed budget to the Legislature and the Governor. The Governor proposes a State budget in January and announces revisions in May. Ideally, the State budget is to be completed by July 1, but in reality the budget frequently is finalized later. After the Governor signs it, the University's budget is sent to the Regents for approval of any changes from its original proposal.

Budgeting for health benefit costs is difficult because the budget process involving the University and the State operates on a fiscal year basis, while the benefit-setting process between the University and health plans operates on a calendar year. The calendar year premium increases for health benefits must by matched up with the University's budget year. Consequently, the premium increases fall into two separate budget cycles.

[5] French described risk adjustment as an attempt to prevent any given plan and any employee that chooses that plan from being either advantaged or disadvantaged based on health risk. She said the University's means of accomplishing that goal is to increase its contribution for those employees who are part of a plan that has more unhealthy people in it. The University ends up making higher contributions for groups of employees that have more health problems as compared to groups of employees who have fewer health problems.

For several years the University and the State have operated under a Partnership Agreement where the State provides the University with a 4 percent annual increase in funds for salaries, benefits and other expenditures. In brief, the Partnership Agreement money is envisioned as a 4 percent increase each year on a base budget from the Legislature; it is appropriated in a lump sum, but it is justified in certain categories. Funds from the Partnership Agreement are pooled and must be allocated by the University to cover various costs. However, the University identifies in its budget how it expects to spend the money.

Under the established budget process, the University has the discretion to determine its contribution to health benefits because it determines how much it will pay for the benefits as compared with payments for other items, such as salaries. University Vice President for Budget Larry Hershman, testified that the amount projected for health benefit increases is based on two factors: "One is staying within this total pot of 4 percent and what the priorities are for salaries, what we estimate costs for other inflation, and an estimate of the cost increase for health benefits, yes. So we look at all those and figure out an allocation of that 4 percent and that would be included in the plan, absolutely."

Within the framework of the Partnership Agreement, the University tells the Legislature and the Governor how much it plans to spend for health benefits. Hershman testified "since the partnership hasn't been fully funded, we're behind on salaries. So we're behind on a lot of things, given what's happened recently. And so we have to make a judgment within the amount of money that we would hope to get how to distribute that." Hershman said, for example, the University may decide to include in its budget request a line item of 10 percent for health benefits, but anticipated health benefit increases are 20 percent. In view of the University's other priorities employees would have to pay for the increase or benefits would have to be changed.

Although the University attempts to spend the money in its budget request in accord with the terms of the request, this does not mean that the University lacks discretion in the manner that it eventually allocates the money. In addition to the discretion the University has in presenting its request in the first place, once the University receives its money from the Legislature, it is legally free to spend the money as it wishes. However, the University ordinarily chooses not to deviate from the original request, in order to maintain credibility with the Governor and the Legislature. Hershman summarized the process as follows: "[I]n terms of how we get money from the Governor and the partnership, we got a lump sum, if you would, a percentage increase. But we always presented a plan for how we were going to spend that money."

An example of the University's discretion in the budget process lies in its action during fiscal year 2002-2003. The University's original budget request indicated that it planned to allocate part of the 4 percent Partnership Agreement funding to a 10 percent increase in its health benefits contribution. When the State provided the University with only 1.5 percent funding under the Partnership Agreement, rather than 4 percent, the University decided to reduce its increase in health benefits contributions to 6.7 percent. The University's discretion is further evident in that the decrease was not in proportion to the State's reduction; that is, the State's 1.5 percent funding represented almost a two-thirds cut from the full 4 percent funding, but the University responded by planning to cut its increase in health benefits contributions by only one-third.

When the University decided that a 6.7 percent increase in its health benefits would not be enough to fund salary increases for faculty and staff, it implemented another plan to raise additional revenue by increasing non-resident tuition and using the increased revenues to supplement health benefit programs. Thus, in 2003, the University chose to increase its non-resident tuition by 16 percent and to put 6 percent of that money toward health benefit contributions.

The Negotiations for a Successor Agreement

UC-AFT and the University have been parties to a series of collective bargaining agreements beginning in 1986. Each contract contained a waiver clause providing that, during the term of the agreement, the University had the right to make changes to health benefits for Unit 18 employees, provided that the changes were identical to those made for senate faculty. (The relevant contract provision is set out in its entirety below.) Prior to 2000, there was only one hiatus between contracts, in 1993, and the University made no health benefit changes during that time. The most recent contract expired in June 2000. As of the conclusion of the hearing in this matter, the parties had not reached agreement on a successor agreement.

The parties began negotiations for a successor agreement early in 2000 against a background of what the University describes as a "growing volatility in the health care marker." Proposals were exchanged, but it does not appear that detailed discussions about health benefits occurred in the early negotiations. In October 2000, the University announced changes to health benefits, effective January 1, 2001. The changes were implemented without affording UC-AFT notice and an opportunity to bargain. However, UC-AFT declined to file an unfair practice charge because the changes were minimal, consistent with the University's benchmark methodology and generally acceptable to employees. The 2001 changes are not at issue here.

In December 2000, as the negotiations continued, the University proposed a benefits article that was similar to the prior agreements. UC-AFT followed with proposals in January and April 2001 which abandoned an initial proposal in favor of language that is similar to the prior agreements. Thus, proposals covering health benefits were on the table at this time.

Nonetheless, it appears there was little detailed discussion about the benefits article and the initial proposals during negotiations in early 2001 with one exception, a proposal by UC-AFT to expand benefits eligibility for part-time lecturers.

During the summer, the University published articles in its HR/Benefits Review newsletter that described a managed care crises facing the health care industry and the University. It advised employees that they could expect changes which included premium and copayment increases.

> Notably, plan design changes that revise the copayment structure of UC's medical plans are being examined in an effort to keep the net monthly costs closer to what employees and retirees are used to paying. Ideally, the result for 2002 will be a modest increase in net monthly costs and slightly higher copayments for medical services.

The fall 2001 HR/Benefits Review similarly advised employees that the University had maintained a balance between holding down premium costs and modestly increasing copayments. UC-AFT president and negotiator Jeremy Elkins testified that he did not recall reading these articles.

In October 2001, University Labor Relations Manager Peter Chester took over as chief negotiator. The negotiations had been stalled for some time and Chester wanted to get them moving. In an informal meeting, the parties discussed several outstanding substantive issues, as well as the idea of resuming full team negotiations. During one of those meetings, Chester suggested extending the contract through at least June 2002. He testified that he proposed the extension because, among other things, the no-strike clause, management rights clause and various contractual waivers were no longer in effect, and the University wished to reinstate them. "In terms of doing business," Chester testified, "we needed to make changes in the terms and conditions of employment." One of the clauses that the University wanted to reinstate was the waiver permitting changes to health benefits.

Elkins responded that UC-AFT was not interested in a full contract extension, but the union would be willing to discuss extending certain articles. Chester responded that a contract extension would benefit the union, because it would permit the University to pass through an across-the-board cost of living salary increase that had been provided to other employees in 2000. The parties then discussed extending the contract in return for the salary increases.

In an October 25, 2001, letter to Elkins, the University announced the health benefits for calendar year 2002, including a number of specific changes in the benefits provided the previous year. The letter stated that materials were being sent to employees regarding the open enrollment, and employees who want detailed information can access the information through the University's open enrollment website. The letter was the first notice to UC-AFT of the specific changes in benefits offered by the University for calendar year 2002. (The details of the changes are more fully addressed below.)

Elkins responded in a letter dated November 7, 2001, requesting to meet and confer over the changes. He also requested five categories of information to prepare for the bargaining. "We thought that we should be part of the process of bargaining over these kinds of changes," Elkins testified. No written proposals were offered by the union at this time.

On November 26, 2001, Chester responded to Elkins' November 7 letter regarding health benefits.

> As a matter of law, the University has no obligation to bargain these annual modifications to health care coverage through the open enrollment process, as these adjustments do not constitute a unilateral change in the terms and conditions of employment. On the contrary, the University's open enrollment process is an established past practice under the dynamic status quo principle. Indeed, the University has implemented health benefit plan

> modifications (including adjustments in health benefits and employee monthly contributions to reflect the health plan changes and costs assessed by the health carriers), through the open enrollment process for over thirteen years. By allowing AFT represented employees to participate in the November, 2001 open enrollment process, which is open to all UC employees, the University is simply maintaining the status quo.

Chester testified that UC-AFT's request to negotiate was untimely. He said that the University was not going to negotiate over the changes because they were "essentially finalized." He said further that "if we got a demand to bargain and that demand to bargain was a timely one, we would bargain over the benefits. That is my understanding of what our position is."

At the next bargaining session, November 30, 2001, Chester responded with a written proposal agreeing to pass through the cost of living increase if UC-AFT agreed to extend the contract to June 30, 2002, and withdraw its earlier salary proposal for 2000-2001. Elkins was reluctant to accept the proposal, but the UC-AFT caucused and prepared a counterproposal. The counterproposal was presented orally at the bargaining session and later in e-mail and hard copy. Among other things, UC-AFT agreed to accept the University's 2002 health benefit changes and not strike until at least March 2002 in return for the same salary increase provided other non-senate employees and an agreement that the University participate in at least eight bargaining sessions and eight informal sessions prior to March 1, 2002.

Elkins and Chester continued to discuss a possible interim agreement. Proposals were exchanged, but no agreement was reached. UC-AFT had presented no specific proposals regarding health benefits, other than expanding benefit eligibility to include part-time lecturers.

Meanwhile, as the discussions continued, the changes in health benefits were implemented on January 1, 2002, without agreement by UC-AFT. In brief, the changes included the following: (1) 100 percent increases in copayments for office visits, home visits, eye examinations, hearing examinations, allergy testing and treatment, abortion, podiatry, outpatient mental health and substance abuse visits, inoculations, and other outpatient services; (2) 43 percent increase in emergency room copayments; (3) establishment of a new $250.00 per occurrence hospitalization copayment for all inpatient services, maternity services and mental health/substance abuse inpatient care; and (4) approximately 100 percent increase in prescription drug copayments.

It is not disputed that the University made changes in copayments during several years prior to the 2002 changes. Prior to the 2002 changes, however, the University had never implemented changes in health benefits during a contract hiatus, except for the changes in 2001. As noted above, UC-AFT did not challenge the 2001 changes because the union concluded they were beneficial to its members.

In early 2002, Labor Relations Director Gayle Cieszkiewicz joined the negotiations. At about this time, she proposed to pass through the 2000-2001 and 2001-2002 across-the-board salary increases if UC-AFT would agree to the already-implemented 2002 health benefit changes and the 2003 health benefit changes that would become effective January 1, 2003. The proposal also sought UC-AFT agreement that it would not litigate the 2002 benefit changes, and would also agree to the benefit proposal whether or not the parties agreed on a complete contract.

In an e-mail to Cieszkiewicz, Elkins conveyed his concern about waiving future bargaining rights without a comprehensive contract. However, he wrote that he "could sell the team on agreeing to the health care changes for 2001-2002 in return to [sic] the pass through on the outstanding COLAs." In another e-mail to Cieszkiewicz, Elkins wrote on February 20, 2002, that

> As I indicated in the email I sent you last week, UC-AFT is uncomfortable agreeing to waive any rights to meet and confer in the future, unless that waiver is part of a comprehensive contract.

> However, we continue to be willing to discuss a side letter that would provide our consent to the 2001-2002 health care cost increases in exchange for "pass through" of past COLAs. I think that we would also be very willing to consider a side letter on health care increases for the future as part of an agreement on implementation of an overall salary scale.

By letter of February 24, 2002, Elkins reiterated the union's proposal to withdraw its earlier salary proposal and to accept the health benefits changes for the 2002 calendar year in return for a pass-through of the 2000-2001 cost of living increase of 3-4 percent. UC-AFT received no response, and it appears that the negotiations slowed down for several months.

On June 26, 2002, the parties participated in an informational meeting with French to discuss some of the possibilities under consideration by the University with respect to health benefit changes for the next calendar year, 2003. At the time of the meeting, the University's negotiations with health plan vendors were underway and French was not certain of the outcome, although she had a general notion that health care costs were rising and the University might not be able to deliver a free HMO plan. French explained that the Governor had cut the University's request for health benefits money from 10 percent to 6.7 percent. Elkins responded that the cut should not determine the cost to employees. He argued that the University's maximum contribution was the equivalent to what it had been ten years earlier, the University had saved the money in the interim and it should now restore it.

French did not agree with the way Elkin's characterized the history of contributions. She believed Elkins' statement regarding University contributions in past years represented a narrow view and was made out of context. Elkins testified: "And so there was a bit of a heated argument about that. But we were certainly very concerned that they not try to paint this as if their hands were tied and they had to pass along these increases to employees."

No specific proposals were presented at the meeting, but French mentioned the possibility that the free health plan would be eliminated. Chester testified that French said elimination of the free plan was "very likely." Elkins testified that the parties discussed elimination of a free plan, but he said the discussion of this topic was marked by phrases such as "it wasn't definite" and "there was no precise plan." Elkins testified "there was no indication of the details." Even French testified that she was not sure what the cost of benefits would be as of the date of the meeting; while she had a "directional sense" or a "pretty good sense" that the University would not be able to offer a free plan, she "wasn't sure yet." Asked specifically by UC-AFT counsel if she was sure the University would not be able to offer a free plan, she testified "no."

Chester's notes of the meeting indicate that French was asked about actual monthly payments by employees and responded "we are still looking at what the costs are per plan. Then we break out for the individual contributions. So, the answer is we don't know yet." When French was asked whether there would be a free plan, the notes indicate, she responded "We have asked each HMO to provide a no frill plan that would involve no cost to the employee. The plans refused. We asked again what their no frills looked like. We have also asked a PPO provided for a higher front end." Asked about the coverage of a no frills plan, French responded "we don't want to whittle away at benefits. There won't be a total UC paid plan. We are still wrestling with the numbers but I can't throw any out. The managed care market is unraveling."

I credit the testimony of French and Elkins over Chester's notes to the extent that French told UC-AFT on June 26 that she wasn't sure if the University would provide a no-cost HMO. Chester's notes are not the most reliable account of the meeting. They are incomplete, internally inconsistent and not a verbatim account of the discussion. In contrast, French forthrightly testified at hearing that, in fact, there was merely a possibility that the free HMO would not be offered, but she wasn't sure at the time. Elkins' testimony is in accord with that given by French. Hence, I conclude that French told UC-AFT representatives on June 26 that she had a directional sense that the no-cost HMO might be eliminated, but she wasn't sure about it.

Also on June 26, the University presented to UC-AFT a two-part proposal regarding benefits. The first part was the same as the language in the expired contract, stating that the University would have the right to make changes to health benefits, provided the changes were the same as the changes for senate faculty. The second part stated "This language is submitted as the language that UC proposes if we reach impasse." The second part of the proposal was essentially the same as the expired contract and included specific dollar maximums the University was willing to contribute toward benefit premiums beginning in 2003. Cieszkiewicz testified that the first offer was the University's proposal if the parties agreed on a contract, while the second offer contained the terms the University would implement at impasse. She testified that the University preferred the offer that did not include specific rates. There was no agreement on these proposals.

As discussed below, neither offer was ever implemented. No other University proposal contained specific contribution amounts or other specifics regarding coverage. The dollar amounts that were included in the University's two-part proposal are not the same as those eventually implemented on January 1, 2003.

In addition, during the discussions in June 2002, Elkins reiterated to Cieszkiewicz that any changes the University wanted to make must be negotiated. According to Elkins, she responded that the University's position was that it would not negotiate annual changes within its systemwide plan, but rather would engage in negotiations only if UC-AFT was willing to take its members out of the University's systemwide plan. However, she conceded in her testimony that taking a group of employees out of the University system was not the only way to negotiate about benefits.

After the University's June 26 two-part proposal brought no agreement, the parties resumed discussing a possible interim agreement by trading a pass-through of salary increases in return for UC-AFT's agreement to the 2002 and upcoming 2003 health benefit changes. Elkins reiterated that UC-AFT could not agree to any forthcoming changes sight unseen, and Cieszkiewicz promised the University would provide more specific information as soon as it had it. However, the University never complied with this promise. Elkins left the negotiations in August 2002.

The parties continued discussions through July and October, 2002, and proposals were discussed that relate to health benefits. However, no agreement was reached. By letter dated October 25, 2002, the University announced to UC-AFT the specific aspects of the changes that would become effective January 1, 2003. Prior to receiving the letter, the University had provided no specifics regarding the changes.

The health benefit changes for 2003 contained a different approach to establishing the University's contribution. For the first time, the University established its contribution based on budgetary constraints rather than premiums charged by a specific plan. Previously, the University had followed its benchmark methodology, under which its annual contribution toward employee health benefits was equal to or near the full cost of the lowest priced HMO available at every major University location. French testified that the University now determines its bench mark contribution based on what it feels it can pay, rather than on a specific plan's premium. As noted earlier, under this methodology, the University historically had provided at least one cost-free plan to employees. Under the 2003 changes, there was no cost-free plan. A chronology of major health and welfare program changes prepared by the University states for January 1, 2003: "Employer contributions targeted to budget requirements rather than to a specific plan's premium."

The 2003 changes also established a transitional allowance, under which the University's contribution toward health benefits was based on employee earnings. The contribution was higher for employees whose annualized salary is less than $40,000. The 2003 changes also included a new health care reimbursement account and a four-tier rate structure rather that three-tier rate structure. Under the health care reimbursement account, employees are permitted to pay out-of-pocket health care expenses, excluding premiums, with pre-tax dollars. Under the four-tier rate structure, medical coverage for an employee with children would be less expensive than coverage for two adults or a family.

In February 2003, as the bargaining continued, UC-AFT negotiator Rebecca Rhine requested to negotiate changes in health benefits for 2004. In a letter to Cieszkiewicz, Rhine wrote:

> In any event, in order to put to rest your supposed confusion on this point [UC-AFT's desire to negotiate about benefits], the Union hereby demands that it be afforded an opportunity to meet and confer over any and all material changes in health benefits that the University may contemplate making in the future. Since the University begins making its plans for the next year quite early, we wish to begin immediate meeting and conferring.

Cieszkiewicz responded by letter a few days later . Her letter states in relevant part:

> If you are now asking again to bargain about annual plan changes that will be negotiated with the carriers this year before they are implemented for the next open enrollment, we do continue to decline to do that. If, on the other hand, AFT is now asking to bargain about a separate set of arrangements for AFT members with respect to medical plan design, options offered, or the way in which the resulting costs are to be allocated, that is a surprising departure from the AFT's position on such issues up to now.

At the hearing in this matter, UC-AFT counsel questioned Cieszkiewicz about her letter to Rhine.

> Q In this case, the request to bargain for changes that would become effective January 1, 2004, was in fact made with quite a bit of lead time, yes?
>
> . . . .
>
> A Yes.
>
> Q Okay. But nevertheless, you are refusing to bargain.
>
> A Well, no. If you read the next sentence, I clarify and say if, on the other hand, the AFT is asking to bargain about a separate set of arrangements for AFT members with respect to medical plan design, the options offered or the way the resulting costs are to be allocated, it would be a surprising departure, but it might be something I'm willing to do. The bargain about the annual plan changes that are negotiated with the carriers, that is a different process, I think. We negotiate with carriers over broad-based plans for University of California employees. I am offering an alternative to that, as I have to the unions before.
>
> Q Let me see if I understand. I don't want to put words in your mouth, so correct me if I'm wrong, please. You're saying that if AFT is interested in taking the lecturers out of the pool of other employees who are covered under UC benefits, then you would be able to start negotiating that?
>
> A We would look at that.
>
> Q But if UCAFT is proposing to keep its members that it represents in the pool with all the other University employees and to actually negotiate concerning the annual changes that will take effect next January, then you're not willing to bargain?
>
> A Yes. And the reason I say that is it was a surprising departure is because we've already received counterproposals from the AFT agreeing to the coverage that the University provides for the AFT, being the same that we provide for everybody else. The same plan, the same carrier, same terms and conditions.

As more fully discussed below, I find that Cieszkiewicz took the position with UC-AFT that the University would not negotiate about annual changes in health benefits if the union proposed to keep its members in the pool with other University employees.

The CUE/UPTE Negotiations

The Coalition of University Employees (CUE) is the exclusive representative of a unit of approximately 18,000 clerical employees in the University system. In 2002, CUE was engaged in negotiations with the University for a new collective bargaining agreement. CUE's expired contract, like the contract between the University and UC-AFT, contained a provision permitting the University to make health benefit changes during the life of the agreement. The waiver in the CUE contract, in fact, was almost identical to the waiver in the UC-AFT contract. Pursuant to the waiver, the University has traditionally made changes to health benefits for CUE members, just as it has done with respect to UC-AFT members.

On June 5, 2002, University chief negotiator Sharon Hayden proposed a side letter to CUE, under which the contract waiver giving the University the right to make changes to health benefits would continue until the effective date of a successor agreement. Hayden testified that she made the proposal because "we were looking at some changes coming down in the area of benefits. We'd already been through some changes for the winter and I was proposing to the Union that we have their agreement as to the benefits for the rest of the year since it was looking like it was going to take us a long time to finish this contract." Hayden testified further that in proposing the side letter she explained to CUE representatives that, in her view, the parties were operating under a dynamic status quo. Yet Hayden testified that she wanted to tell French, who was dealing with the various health plan vendors at the time, that CUE was "on board" with respect to health benefits. Hayden said she never told CUE that the

University believed it needed CUE's agreement to go forward with the open enrollment period, and CUE demanded no concessions to agree to the side letter.

CUE's chief negotiator, Margy Wilkinson, testified about her exchange with Hayden. She said Hayden told her that "the University was about to enter into negotiations with benefit plan providers, and that in order to, you know, I'm not quoting her, but the general gist of what she said was that in order to go into those negotiations in the strongest possible position, the University needed the buy-in of our bargaining unit." At 18,000 employees, the bargaining unit represented by CUE is the largest in the University system.

Wilkinson also testified that the University's proposal carried a sense of urgency. She testified that Hayden said the agreement was "extremely urgent" and she needed agreement by the end of the bargaining session (which was June 7) because negotiations with the health providers was imminent. Wilkinson testified further that CUE agreed to the proposal after gaining concessions in the hours of work article which the union had been seeking and the University had rejected.

The parties reached agreement on a side letter on June 7. The agreement permitted the University to make changes in health benefits and included an alternative work schedule provision CUE had "wanted for a long time," according to Hayden.

As noted, Hayden testified that CUE demanded no concessions in exchange for signing the side letter, but the record undercuts that claim for several reasons. Hayden's testimony was based in part on research performed by her assistant on bargaining history notes, but Hayden conceded that she never told the assistant to research whether concessions were made. Wilkinson was a credible witness who testified that CUE agreed to the side letter in return for the agreement on hours, and the record evidence supports her testimony, not that given by Hayden. The record shows that the parties signed a side letter that contains the agreement on

June 7, the end of the session, just as Wilkinson testified. And the parties on June 7 agreed to a provision in the hours article that CUE had sought earlier, just as Wilkinson testified. Although Hayden testified that she could not recall if she told CUE that agreement was urgent, she conceded that she told the union "I really wanted it." There is no apparent reason for CUE to have agreed to a side letter regarding benefits if it received nothing in return. Accordingly, I find the timing of the agreement between CUE and the University does not represent mere coincidence. In this context, the most logical inference to be drawn from Hayden's explanation for proposing the side letter ("I was proposing to the Union that we have their agreement as to the benefits for the rest of the year since it was looking like it was going to take us a long time to finish this contract.") is that she believed she needed to bring CUE "on board" before the changes were implemented

In addition, Hayden testified that she served as the University's chief negotiator during negotiations with the University Professional and Technical Employees (UPTE) in 2002. UPTE is the exclusive representative of an appropriate unit of University professional and technical employees. On October 16, 2002, UPTE proposed specific changes to the University's contributions to various health plans. The proposal envisioned UPTE remaining in the University's systemwide benefits program. In response, the University on December 12 presented a counterproposal. The multi-faceted proposal included, among other things, a specific contribution for all benefit plans and did not include the standard waiver language that was in the prior agreement. (The prior UPTE contract included language similar to that in the UC-AFT agreement.) Instead, the University proposed retaining the right to increase contribution rates "by an amount determined by the University based on the identified allocation in the State Budget for the University of California, as additional funds are identified in the State Budget to contribute toward the cost of benefits." Hayden testified that if UPTE had accepted the proposal its members would have remained in the systemwide benefits program.

ISSUE

Did the University implement changes in health benefits for 2002 and/or 2003 without affording UC-AFT notice and an opportunity to negotiate, in violation of its duty to bargain in good faith under HEERA?

CONCLUSIONS OF LAW

The Contract Clause

The parties' expired collective bargaining agreement contains a provision that gave the University the right to alter health benefits "during the term of this agreement." UC-AFT argues that under the explicit terms of the agreement, the University's right to make changes to health benefits expired with the contract. As a matter of law, UC-AFT argues, contract waivers do not continue beyond the expiration of the agreement, unless the parties agree otherwise. And there was no such agreement here.

The University does not contend that the mere existence of the benefits article in the agreement permitted implementation of the changes at issue here. Rather, it argues that the actual practice of annual change under both the benefits article and the years preceding the first contract with UC-AFT allowed the University to treat members of UC-AFT the same as all other participants in the health benefits system.

Article 11, section A, of the expired contract provides:

> Faculty/instructors in the unit who are eligible to participate in University-sponsored benefit programs listed in Appendix B.1 participate to the same extent as other eligible faculty, including Senate faculty, of the University. Costs in excess of the University's contributions are to be paid by the faculty/instructor in the unit, normally through payroll deduction. The coverage(s)

> and the carrier(s) of the benefit plans listed in Appendix B.1 shall be the same as for other faculty at the same location.
>
> During the term of this agreement the University may alter in any way, at its sole discretion, any aspect of these plans, including but not limited to coverages, benefit schedules, carriers, contribution rates, and/or eligibility criteria during the term of this Agreement and if the University does so, such changes will apply to faculty/instructors in the unit eligible for benefits to the same extent as they apply to other eligible faculty, including Senate faculty, at the same campus. Benefits identified in Appendix B.1, including coverages, schedules, carriers, contribution rates and/or eligibility criteria shall not be differentiated among eligible faculty titles.

Similar language has been included in the parties' contracts for the past 20 years.

According to the plain language of the agreement, the University had the right to make changes in health benefits *during the term of the agreement.* The National Labor Relations Board (NLRB) has held that managerial authority over matters in a contract does not authorize unilateral action upon expiration of the contract, concluding that "a contractual reservation of managerial discretion does not extend beyond the expiration of the contract unless the contract provides for it to outlive the contract." (Blue Circle Cement Company (1995) 319 NLRB 954 [151 LRRM 1356].) It is the practice that develops under the agreement that sets the status quo and defines the post-expiration actions the employer is permitted to take unilaterally. (California State Employees Association v. PERB (1996) 51 Cal.App.4th 923 [59 Cal.Rptr.2d 488] (CSEA v. PERB). In that case, the collective bargaining agreement provided that the California State University (CSU) would grant merit salary adjustments (MSA) "for the duration of this agreement." A longstanding practice existed under which MSAs were granted or denied based on fixed criteria such as merit and effective performance. During post-expiration negotiations and prior to impasse, CSU unilaterally stopped paying MSAs. In response to the allegation of bad faith bargaining, CSU asserted that the union had contractually waived its right to payment of MSAs after expiration of the agreement. The court concluded that the "duration of this agreement" language did not constitute a clear and unmistakable waiver of the right to negotiate about any post-expiration changes in the practice under which MSAs were granted.

> Nor is the general phrase – "duration of this Agreement" – the equivalent of stating in clear and unmistakable terms the parties were expressly waiving the right to have the provisions for MSA's continue at expiration of the agreement while all other terms could continue during negotiations. Moreover, to interpret agreement on mere "duration" language as a waiver of the statutory right to bargain would severely undermine the principles of collective bargaining by allowing widespread unilateral changes after expiration of collective bargaining agreements containing such general and innocuous language while bargaining over a successor agreement. To give this term a significance not clearly intended or expressed by the parties could wreak havoc, rather than promote harmony, in employer-employee labor relations contrary to the purposes of HEERA. [CSEA v. PERB at p. 939; fn. omitted.]

The court noted that "[a] collective bargaining agreement is not an ordinary contract. Employers may not change terms or conditions of employment after expiration of such an agreement until it affords the union an opportunity to bargain over those changes." (Ibid.; see also State of California (Department of Personnel Administration) (1998) PERB Decision No. 1296-S, p. 3, adopting proposed decision of administrative law judge at pp. 23-26 ["for the duration of this agreement" language insufficient to constitute waiver of right to negotiate about post-expiration changes]; State of California (Department of Mental Health) (1990) PERB Decision No. 840-S, p. 2, adopting proposed decision of administrative law judge at p. 15.)

In this case, the plain terms of the contract provide that the waiver to negotiate about health benefits existed during the life of the agreement. The cases cited above establish that a contract-based management right ends with the expiration of the agreement, and an employer may not unilaterally alter the status quo established by the expired contract or a past practice under that contract. Therefore, the question to be addressed here is not whether Article 11 permitted the University to implement the changes at issue here. The question is whether the University breached its duty to bargain during the post-contract period by implementing changes in health benefits that went beyond the parameters of the dynamic status quo that developed during the life of the agreement.

The Unilateral Changes

UC-AFT argues that the University has unilaterally implemented changes in health benefits for calendar years 2002 and 2003 that were inconsistent with the dynamic status quo. Relying on PERB and NLRB case law, the union contends the University unlawfully departed from the dynamic status quo when it exercised its discretion to implement the changes at issue here. According to UC-AFT, a practice under the dynamic status quo concept is not created merely because the University has changed health benefits each year. To fit within the dynamic status quo, the union asserts, changes must conform to a fixed formula or criteria, and the employer's subsequent changes must follow the same pattern for the employer to lawfully make the changes without bargaining.

In this case, UC-AFT continues, the evidence shows that the University has implemented a radical shift in the methodology used to provide health benefits, and has acted in areas where it enjoyed vast discretion. These include, for example, setting contribution rates, determining the amount of money for health benefits, and allocating cost increases between copayments and premiums. It is the union's position that the University, by unilaterally exercising its discretion in these and other areas, breached its duty to bargain.

The University responds that the factors to determine if an employer has departed from the dynamic status quo include expectations of the parties, the longevity of the practice and the employer's discretion to implement the change in question. Applying these factors in the context of this record, the University contends that there has been no unlawful change. It asserts that it has provided health benefits for employees since 1962 under a complex system that permits it to make changes on an annual basis, and the type and nature of the changes have varied from year to year. Moreover, the University contends there is a reasonable expectation among employees not only that they will be permitted to participate in the system, but also that they will be treated the same as other employees. According to the University, even UC-AFT has developed the expectation of participation in the system. As evidence of the union's expectation, the University points to UC-AFT's acceptance of the 2001 changes in health benefits without protest, admission that it did not expect the enrollment process to stop pending negotiations in late 2001, and its failure to follow through on its demand to bargain in November 2001. The University further asserts that UC-AFT made no specific proposals after its meeting with French in June 2002, and any proposals made by the union were mere tactics designed to obtain leverage and a favorable agreement.

In addition, the University contends UC-AFT's claim that it has unfettered discretion in setting health benefits ignores the actual constraints under which the University operates, including the cyclical swings in the health care market and resource limits. In this regard, the University argues that even if it has some discretion in providing health benefits, the mere fact that it can make choices among certain options does not defeat its dynamic status quo defense. If an employer's ability to exercise discretion, standing alone, could defeat the dynamic status quo defense, then the very concept of the dynamic status quo would be rendered meaningless, the University argues. The key question, according to the University, is whether there exists a "recognizable pattern of change" in benefits and costs, and such a pattern exists here.

Unilateral changes are considered per se violations of the duty to bargain if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, (2) the change had a generalized impact on employees and (3) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

At the center of this case is whether the University has implemented a change in the practice under which it has provided health benefits in the past. The status quo against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment, and changes consistent with such a pattern are not violations of the status quo. (Pajaro Valley Unified School District (1978) PERB Decision No. 51, p. 6 (Pajaro).) In Pajaro, for example, the employer's practice was to pay a set dollar amount toward the total health insurance premium. When the carrier increased its premium, the employer's practice was to pass along the entire amount of such increase to employees. There was no exercise of discretion by the district. PERB held that because the employer had historically passed along increases in premiums to employees pending negotiations, it was privileged to act in accordance with that practice, and such conduct did not amount to a change in a term of employment. Thus, PERB found that a dynamic status quo existed which permitted the employer's action. (Pajaro at pp. 9-10; see also Yuba Community College District (1990) PERB Decision No. 855; Regents of the University of California (1996) PERB Decision No. 1169-H (UPTE).)

In contrast, the Board has declined to recognize a dynamic status quo defense where the employer retains discretion in adopting the changes. In the leading case of Regents of the

University of California (1983) PERB Decision No. 356-H (Regents), the Board found that the University unilaterally implemented parking fee increases without negotiating with the union. The University argued that it did not change the dynamic status quo regarding parking increases, but rather continued the practice of imposing annual increases across the board. Relying on Pajaro, the University argued that it had an established formula under which it contributed a set amount from its budget and charged consumers of parking services for any increased costs.

The Board concluded that the University's reliance on Pajaro and similar cases was misplaced.

> . . . In the instant case, the amount of increase in parking system costs was not set by a clear formula. It was not keyed to some standard method computation such as a cost-of-living increase or a regular percentage step increase. Nor was the amount of the increased cost established by a third party (such as the health care insurer in Pajaro Valley, supra). Further, the increase was not passed along on a uniform percentage basis or by a set amount. Different sorts of parking fees exist in the system (metered, quarterly, hourly, daily, etc.), and different sorts of consumers utilize them (staff, students, the public). . . . It is clear that UC exercises a vast amount of discretion in computing an annual operating budget for its parking system. Further, UC clearly exercises virtually unfettered discretion in determining how it will extract increased costs. It determines the extent to which each type of parking facility and each group of consumers will bear the increased burden. . . . [Regents at pp. 15-16.]

The Board concluded that

> . . . Where the employer has traditionally exercised a large measure of discretion in making such changes, it is impossible for the exclusive representative to know whether or not there has been a substantial departure from past practice, and therefore the exclusive representative may properly insist that the employer negotiate regarding such changes. [Regents at pp. 16-17; fn. omitted.]

Thus, in distinguishing cases such as Pajaro, the Board has determined that employer discretion is the key factor in determining whether the dynamic status quo has been changed. In cases dealing with unilateral changes in health benefits, NLRB decisions are in accord. (See e.g., Dynatron/Bondo Corp. (1997) 323 NLRB 1263 [155 LRRM 1225] (Dynatron); Maple Grove Health Care Center (2000) 330 NLRB 775, 780 [164 LRRM 1020]; Garrett Flexible Products (1985) 276 NLRB 704, 706 [120 LRRM 1124].)

Prior to 1982, the University established its annual contribution based on the PERS contribution for State employees. From 1982 to 1993, the University continued to follow the State's formula, which was to develop a contribution based on the weighted average of the four largest plans.

In 1993, the University adopted a benchmark methodology, under which its annual contribution was equal to the cost of the lowest priced HMO at the nine University campuses. Under the benchmark methodology, the University always offered at least one fully paid HMO, assuming the resources were available to fund it. This methodology continued until 2002. Even when the University commenced using risk adjustment in 2000, the benchmark methodology was used, with the University setting its contribution equal to the price of the lowest risk-adjusted HMO.

Beginning with calendar year 2003, however, the University adopted a significantly different approach to establishing its contribution. For the first time, the University did not establish its contribution based on the cost of the lowest priced HMO or a specific plan's premium. Rather, it based its contribution on budgetary considerations. A chronology of major health and welfare program changes prepared by the University states for January 1, 2003: "Employer contributions targeted to budget requirements rather than to a specific plan's premium." The change involved an exercise of discretion that rendered it negotiable under the rationale set forth in Regents.

Under the established budget process, the University has significant discretion to determine its contribution to health benefits because it determines how much it will pay for the benefits as compared with payments for other items, such as salaries. And the University does not have to negotiate the amount of its contribution with health plan vendors. While every example of University discretion need not be set forth here, a few are noteworthy.

The Legislature provides a particular amount of money to the University for health benefits, but the amount devoted to employee health benefits is not set in concrete. Under the Partnership Agreement with the State, the University may allocate the 4 percent allotment among various types of cost increases. As Hershman testified, the amount projected for health benefit increases is based on two factors: "One is staying within this total pot of 4 percent and what the priorities are for salaries, what we estimate costs for other inflation, and an estimate of the cost increase for health benefits, yes. So we look at all those and figure out an allocation of that 4 percent and that would be included in the plan, absolutely." Hershman also said "since the partnership hasn't been fully funded, we're behind on salaries. So we're behind on a lot of things, given what's happened recently. And so we have to make a judgment within the amount of money that we would hope to get how to distribute that."

Granted, under the Partnership Agreement, the University initially tells the Legislature and the Governor how much it plans to spend for health benefits. However, in addition to the discretion the University has in presenting its request in the first place, after the University receives its money from the Legislature, it is legally free to exercise discretion in the way it spends the money. While the University ordinarily does not deviate from the original request, it tries to stick to the spending plan to maintain credibility with the Governor and the

Legislature. Hershman described the process as follows: "if we present a plan, we try to stick to that plan. If we deviate from that plan, we will get severely criticized when we go back the next year. I mean, we'd be very hard-pressed to do that."

In addition, the University uses a "total compensation" approach under which it evaluates the entire employee compensation package, including salary, health benefits, and retirement. The package may include anything that can be considered compensation, such as vacation. Under this approach, the cost of different forms of compensation are pooled so that an increase in health benefits can be funded by decreasing another form of compensation, such as salaries. And, as French testified, the University sets its actual contribution toward employee health benefits without negotiation with the health benefit providers. Hershman similarly testified that although the University presents a spending plan to the Legislature, it legally has options such as giving different salary increases to different employee groups or treating employees differently with respect to benefits based on the amount of money they earn. Salaries, health benefits and retirement benefits clearly are matters within the scope of representation. It follows that the discretion to allocate resources within an overall compensation package that includes such benefits is similarly negotiable and is further evidence of the University's discretion in areas within the scope of representation.

Evidence of the University's discretion is found in its conduct during fiscal year 2002-2003. The University's original budget request indicated that it planned to allocate part of the 4 percent Partnership Agreement funding to a 10 percent increase in its health benefit contribution. When the State provided the University with only 1.5 percent funding under the Partnership Agreement, rather than 4 percent, the University decided to reduce its increase in health benefits contributions to 6.7 percent. As Hershman testified, "[t]hat was our estimate and that's based on a priority decision that we made that we had to fund merit increases at least at the minimum level for faculty and do equivalent for the staff, and that we cut way back on what we were going to do for other inflationary increases and put together a package and try to do the best we could for health benefits at that time and that was 6.7 percent." It is noteworthy as further evidence of discretion that the decrease adopted by the University was not in proportion to the State's reduction. The State's 1.5 percent funding represented almost a two-thirds cut from the full 4 percent funding, but the University responded by planning to cut its increase in health benefits contributions by only one-third.

When the University decided that a 6.7 percent increase in its health benefits would not be enough to fund an adequate salary increase for faculty and staff, the University implemented another plan to raise additional revenue by increasing non-resident tuition and using the increased revenues to supplement health benefit programs. While the University discussed this increase with the Governor and the Legislature, it did so primarily for political reasons to maintain credibility in Sacramento, not because it did not have the legal authority to make the decision itself. In fact, Hershman testified that the Regents had the legal authority to take the action. No one in Sacramento objected and the University went ahead with its plan. Thus, in 2003, the University chose to increase its non-resident tuition by 16 percent and to put 6 percent of that money toward health benefit contributions.

Another example of the University's discretion lies in its authority to vary its health benefit contribution for different employees groups. As French testified, for calendar year 2003, the University departed from past practice when for the first time it established a transitional allowance, under which the University's health benefit contribution was higher for employees whose annualized salaries are less than $40,000. As Hershman testified, the University made a decision that we would "deviate from history here and do even extra for lower-paid people because of this fear of reduction in take-home pay." French said the

University arrived at these figures after an "interactive process" with the budget office. "[I]t was a combination of assessing what we can fund, what's competitive and what do we want to look at in terms of the relativity from year to year," French said. The decision to set the amount of contribution and the cut-off point was somewhat subjective and discretionary, and based on "equity considerations," French said, underscoring the University's discretion.

Although the changes in health benefits for calendar year 2002 were not as great as those for 2003, they were nevertheless significant, conformed to no fixed formula or criteria and involved the exercise of discretion by the University. The allocation of cost increases between copayments and premiums in the 2002 changes to health benefits was not in conformance with the dynamic status quo. As French testified, in dealing with increased health care costs the University has the discretion to raise premiums, increase copayments or modify the plan design. In fact, during the dealing with vendors for the 2002 changes the University agreed to increased copayments in return for smaller premium increases. During that year, the health plans proposed a double digit increase in premiums. The University's idea of copayment increases in order to decrease premiums in 2002 was accepted by the plans. While there had been increases in copayments in the past, the evidence does not support the conclusion that they were implemented in accord with an established methodology that restricted the University's discretion. Thus, even for calendar year 2002, when the University had not abandoned its benchmark approach, it had discretion in making decisions that determine employee copayments.

Granted, negotiations with health plan vendors is complex and must be accomplished within a fixed time frame in tandem with State budget negotiations. However, the record supports the conclusion that the procedure does not preclude meaningful bargaining over health benefits. French testified that, while it may not be possible to change the open enrollment as late as October or November, with enough lead time it would be impossible to negotiate about changes in the health benefits plan. With respect to the timing of Rhine's February 2003 request to negotiate about health benefits for 2002, French testified that such an early request gives the parties "the option," but "[i]t really depends on what the parties agree to and how soon they agree to it, as to whether or not it can be implemented for 2004."

UC-AFT does not argue that the open enrollment period should have been stopped. However, the union has set out in its brief several examples of issues that could have been negotiated prior to the open enrollment period. While all of these need not be set forth here, a few are noteworthy. Because the University may set its contribution rate without negotiating with health plan vendors, establishment of the contribution amount is outside the lengthy and complex process involving the vendors and thus falls within the University's discretion and is subject to negotiations. Further, it is possible for the University to make benefit changes that apply only to lecturers, as the UPTE negotiations indicate. For example, as UC-AFT points out in its brief, the union may have wanted to trade a decrease in salaries in exchange for increased health benefit contributions. It is also possible to negotiate about various aspects of the transitional allowance concept. For instance, Elkins testified that many part-time lecturers earn less that $40,000 per year, but because their annualized salary would be more than $40,000 per year it appears that they are not eligible for the transitional allowance.

Accordingly, I find that there are several areas that lend themselves to resolution within the collective bargaining process. The Board has held that in order to establish a business necessity defense to an allegation of unilateral action an employer must show a crises offering "no real alternative and no opportunity for meaningful negotiations." (Compton Community College District (1989) PERB Decision No. 720, p. 23 (Compton).) The University has not met its burden here.

The University argues that its actions in 2002 and 2003 were consistent with past practice and thus were permitted under the reasoning of UPTE, a case the University contends is controlling here. In UPTE, during negotiations for an initial collective bargaining agreement, the University notified the union of upcoming changes in health benefits. The union demanded to bargain. The University declined to negotiate on the ground that the changes were consistent with past practice. The union filed an unfair practice charge, the regional attorney dismissed the charge and the Board upheld the regional attorney on appeal. The Board held that the alleged unlawful changes were consistent with a longstanding practice of reevaluating health care costs and benefits on a yearly basis.

The University contends UPTE cannot be distinguished from the instant case, emphasizing that this dispute and the UPTE case have many factors in common. Both cases involve the same health benefit system, with the same overriding goals of choice, quality, access and affordability. Both cases concern the identical process for plan renewal and open enrollment. In 1995, just as in 2001 and 2002, the University sent requests for renewal to the plans, received their renewal proposals and engaged in complex negotiations to achieve the best array of plans available. Following completion of the renewal negotiations, the University held open enrollment in November to allow employees an opportunity to change their coverage and cost options. Moreover, both cases involve changes in benefits offered through various plans, as well as changes in the University's and the employees' contribution to the plans.

The University would reject the UC-AFT claim that the Board in UPTE considered only a formulaic change to the benchmark methodology, noting that the underlying unfair practice charge alleges a unilateral change in "benefit plan modifications," "benefit changes" and costs, as well as a change in the methodology. The University thus would construe UPTE as upholding its broad right to make the changes at issue here.

The University argues further that PERB, in UPTE, recognized its longstanding practice of annually changing health benefits and costs and determined that those changes constituted the status quo. In short, the University concludes, the UPTE decision encompassed the regular and consistent pattern of changes both in benefits and costs implemented each year for all participants in the health benefits system.

In response, UC-AFT argues that not only is UPTE not controlling in this matter, the University presented arguments in that case that undercut its position here. In that case, UC-AFT asserts, the University relied on its "established formula" to convince the Board that dynamic status quo principles permitted it to continue following the formula in making changes, even after UPTE was certified as the exclusive representative. UC-AFT contends that the regional attorney and the Board relied on the University's representations in dismissing the unfair practice charge. Thus, UC-AFT concludes, according to both the University's arguments in UPTE and PERB's decision, the dynamic status quo principle prevented the University from unilaterally changing health benefits as alleged in the amended complaint in this case.

For the following reasons, I find that the University has advanced an overly broad interpretation of UPTE. While there are some similarities between this case and UPTE, I conclude that UC-AFT's argument is more persuasive and thus UPTE may be distinguished from the instant case.

It is important to note initially that the decision in UPTE was based on a dismissal of the unfair practice charge by the regional attorney. There was no hearing and thus no evidentiary record that is comparable to the record in this matter. UPTE's claim rested on bare-boned allegations in the underlying unfair practice charge. The regional attorney gave UPTE the opportunity to amend the charge, but UPTE did not do so. The regional attorney and the Board concluded that UPTE failed to state even a prima facie case. Moreover, as discussed below, the centerpiece of UPTE is that the University had not changed its methodology of setting its contribution at or near the lowest-cost HMO. The present dispute is set in a wholly different context and thus presents different legal and factual questions that were not present in UPTE and thus were not considered by the Board.

The decision of the Board and the warning letters of the regional attorney, read together, suggest that the Board addressed a narrow issue in UPTE. The regional attorney's warning letter of May 14, 1996, indicates that the informational packet provided by the University to UPTE outlines the policy on contributions to health care premiums. The letter describes the University's explanation of its contribution as follows:

> The maximum UC contributions are set close to the price of the lowest cost HMO plan, which varies from year to year. Your monthly cost is based on the difference between the cost of your plan and UCs maximum contributions. Your medical plan cost will go up, down, or remain the same as a result of these two changing factors. . . . Generally, UC contributions are set so that there is at least one HMO plan at each major UC location with no cost to employees. If you want one of the more expensive plans you will need to pay the difference in premium. The amount UC contributes is also subject to state appropriate, which may change or be discontinued in future years.

Later in the dismissal letter, the regional attorney noted that "the University clearly states that its contribution will be near or equal to, the premiums of the lowest-costing HMO. No evidence has been provided by UPTE to demonstrate that this is a new policy or the revision of a prior policy. Nor has evidence been provided that the University is failing to adhere to its stated policy. Without such evidence, UPTE cannot establish that the University has changed a policy within the scope of representation." (Regional attorney warning letter of May 14, 1996.)

Clearly, the warning letter addressed a narrow aspect of the alleged unilateral change in health benefits; that is, whether there had been a change in the methodology of setting contributions equal to or near the cost of the lowest-cost plan. It is this letter that the Board affirmed, for UPTE declined to present additional evidence when requested to do so.

The regional attorney, in the dismissal letter that followed, reiterated the above-quoted language from the warning letter, concluding that "any changes made in the health benefits provided to University employees and any modifications in costs, are consistent with the University's past practice of reevaluating health care costs and benefits on a yearly basis." (Regional attorney letter of May 28, 1996, p. 2.)

The Board adopted the conclusions reached by the regional attorney as the decision of the Board itself.

> . . . While the University must continue to negotiate with UPTE over the mandatory subject of health benefits, it may act in accordance with its past practice of adjusting health benefits until the parties have completed negotiations for their first contract or they have completed impasse procedures. UPTE has failed to allege facts which demonstrate that the University's actions in adjusting health care benefits and the University's contribution rate were contrary to the established past practice. Accordingly, this argument is without merit. [UPTE, at pp. 5-6.]

While the underlying unfair practice charge in UPTE may have included various allegations that the University made "benefit changes" or changes in "health care benefits," the allegations were of a general nature with no supporting evidence. The only specific allegation addressed in the regional attorney's letters, which were affirmed by the Board, concerned the methodology under which the University set its contribution rate. The regional attorney dismissed that charge because the methodology was not changed in 1996. The regional attorney and the Board found the allegation did not state a prima facie case, noting that UPTE was invited but failed to amend the charge to include sufficient facts to support its claim.

Simply put, UPTE failed to state a prima facie case, and I decline to read UPTE as broadly as the University construes the decision.

The instant case is significantly different in critical respects. As discussed elsewhere in this proposed decision, the University changed its methodology in 2003. UC-AFT has presented evidence establishing the University's discretion in making specific changes in benefits in 2002 and 2003, along with legal argument in support of its claim that the changes fall outside the dynamic status quo. None of these issues were before the Board in UPTE. For these reasons, it would be inappropriate to conclude that UPTE is controlling here.

In addition, it is worth noting that University's arguments presented to the Board in its opposition to the appeal of the dismissal in UPTE undercut its position here and tend to support the interpretation of UPTE set forth above. Specifically, in arguments submitted to PERB the University argued that its

> . . . . maximum monthly contribution is based upon the lowest cost HMO available to members at all major University locations, which may vary from year to year. A member's monthly cost for his or her health plan depends upon the difference between the cost of the member's chosen plan and the University's maximum contribution. Thus, each year, a member's monthly health plan cost may increase, decrease, or remain the same, depending upon the employee's choice of coverage and the price of the lowest cost HMO available at all major University locations.
>
> Under the University's *established practice*, which began in 1993, maximum contributions are set so that one HMO, known as the "*benchmark plan*," is available to members at no cost. . . . The University followed its *established past practice of setting the benchmark plan* and the University's maximum contribution by the lowest cost HMO plan available at all major University locations. [Italics added.]

Later in its submission to PERB, the University argued:

> The determination of the University's maximum monthly contribution per member and the identity of the benchmark plan has been established since 1993 by a *clearly defined, set formula*

> – the price of the lowest cost HMO plan available at all major University locations. Moreover, the price of the benchmark plan is determined essentially by the insurance carrier, as the carriers have the ultimate authority to set their prices at a given level. (Italics added.)

The University further asserted that

> under the dynamic status quo as established by the University's past practice, *the University must provide an unspecified benchmark plan at no cost to employees and offer other health plan options at some cost to employees.* UPTE did not, and cannot, provide any evidence that the University acted contrary to a written policy or past practice. . . . [Italics added.]

PERB relied on these arguments in rendering its decision in UPTE.

Therefore, according to the University's own arguments, the established practice included the benchmark plan and a clearly defined methodology. Under dynamic status quo principles, the University was required to continue setting its maximum contributions based upon the benchmark methodology it relied on in UPTE. The University did not do so in the changes at issue here.[6]

Based on the foregoing, I find the University has substantial discretion in the health benefits area, and thus the changes at issue here were not in accord with the dynamic status quo. Yet the University did not negotiate about the changes with UC-AFT. I conclude, therefore, that the University has unilaterally implemented changes in matters within the scope of representation in violation of its duty to bargain under HEERA. (Regents at p. 16; Dynatron at p. 1265.)

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[6] Although evidence about the CUE negotiations is not dispositive of the issues presented here, it tends to undermine the University's argument that it had the right to make changes in health benefits. Hayden clearly felt it was important to bring CUE "on board" before French negotiated changes with health plan vendors. If she truly believed the University had the right to make changes in health benefits, there would have been no reason to agree to the side letter with such urgency.

The Waiver Issue

The University contends UC-AFT had a reasonable expectation that its members would continue to participate in its benefits system and changes would continue to occur unless the parties negotiated something different. Consequently, the University claims in effect that UC-AFT did not truly attempt to negotiate about health benefits because of its expectation. Although the University does not expressly cast this claim as a waiver defense, I construe its contentions in this regard as akin to an argument that the union has waived its right to bargain by its conduct.

Specifically, the University asserts that UC-AFT never complained about the changes in health benefits for calendar year 2001, even though it had pending at that time a proposal to eliminate the University's ability to unilaterally change any aspect of health benefits. And, shortly after the 2001 changes, UC-AFT modified its benefits proposal to indicate its desire to maintain the status quo under the agreement. Even after the UC-AFT submitted its demand to bargain in November 2001, the University continues, the union presented no proposals regarding specific health benefits. Likewise, after the UC-AFT received information from French in June 2002, the union presented no proposal regarding specific health benefits. On the contrary, UC-AFT pursued only its proposal to include more members (part-time lecturers) in the University's systemwide program.

According to the University, the evidence shows that UC-AFT's demands to bargain were mere tactical maneuvers designed to gain an advantage at the bargaining table. In the University's view, UC-AFT had "no real expectation" that the University was required to bargain with it regarding open enrollment changes, and it acted accordingly.

UC-AFT contends that it received no notice of the specific changes that were announced in October 2001 to become effective in calendar year 2002. Any attempt to negotiate at that stage of the health benefit process would have been futile due to the timing of the announcement. With respect to the 2003 changes, UC-AFT advances a similar argument; that is, it did not receive adequate notice of the specific changes and the University adhered to the position that it would not negotiate about health benefits while the union's members remained in the systemwide program. Even if notice had been provided, UC-AFT asserts, the changes at issue here were implemented prior to impasse and on that basis alone are unlawful.

In addition, UC-AFT argues that its decision not to challenge the changes in health benefits for calendar year 2001 is not evidence of waiver. Like the changes in 2002 and 2003, the changes in 2001 were announced without affording the union notice and an opportunity to negotiate. UC-AFT did not contest them because they were acceptable, and, in any event, the failure to contest a single unilateral change does not constitute a waiver of the right to negotiate similar changes for all time. Nor does UC-AFT's proposals or lack thereof support a finding that the union has waived its right to bargain, UC-AFT continues, for a bargaining proposal is not a waiver of the right to negotiate where it is conditioned on agreement to a complete contract. Lastly, UC-AFT argues that it had no duty to present proposals. Because the University wanted to change the status quo, it had the duty to present proposals and negotiate to impasse before implementation.

PERB has long held that waiver of the right to bargain must be "clear and unmistakable." (Amador Valley Joint Union High School District (1978) PERB Decision No. 74, pp. 8-9; Long Beach Community College District (2003) PERB Decision No. 1568, p. 14.) To establish waiver, a party must show that the matter was "fully discussed" and "consciously explored" and that the union "consciously yielded" its interest in the matter. (Los Angeles Community College District (1982) PERB Decision No. 252, p. 15 (Los Angeles CCD).) Moreover, "any doubts must be resolved against the party asserting waiver," and the "'clear and unmistakable' standard requires that the evidence of waiver be conclusive." (Compton Community College District (1989) PERB Decision No. 720, p. 18.) In the final analysis, the party asserting waiver bears the burden of proving it as an affirmative defense, and any doubts must be resolved against that party. (Placentia Unified School District (1986) PERB Decision No. 595, p. 7.)

On October 25, 2001, the University announced the 2002 health benefit changes in the midst of negotiations without affording UC-AFT notice of the specific changes and an opportunity to bargain. The HR Benefits Review newsletters distributed during the summer and fall of 2001 did not provide valid legal notice to UC-AFT. In addition to the fact that Elkins had no recollection of seeing the relevant portions of the letters, such communications do not provide the kind of notice that is necessary to inform the union of proposed changes in negotiable subjects. Actual or constructive notice must be communicated to a union official with authority to act on behalf of the organization, and it must be "reasonably calculated" to draw attention to a specific change in a negotiable matter. (See e.g., Victor Valley Union High School District (1986) PERB Decision No. 565, pp. 5-6 [school board agenda not adequate notice unless it is delivered to a proper official and presented in a manner that is reasonably calculated to draw attention to a proposed changed].) Under this standard, proper notice places an affirmative obligation on the part of the employer to tell the union of specific proposed changes in negotiable subjects, so that the union may make an informed decision about its bargaining strategy. The University has not satisfied its obligation here.

Elkins responded to the University's announcement on November 7, 2001, asking for five categories of information and requesting to negotiate. And in a counterproposal on November 30, UC-AFT agreed to accept the University's 2002 health benefit changes and not strike until at least March 2003 in return for wage increases and an agreement that the

University meet in at least eight bargaining sessions and informal sessions. Chester declined to negotiate, claiming that the University's action was consistent with the dynamic status quo and no duty to bargain existed. Thus, the October 25, 2001, announcement was presented as a fait accompli which by that time rendered meaningful negotiations impossible. (See San Francisco Community College District (1979) PERB Decision No. 105, p. 17; Vernon Fire Fighters v. City of Vernon (1980) (107 Cal.App.3d 802, 823 [165 Cal.Rptr. 908].)

Chester's testimony with respect to whether the University would negotiate about the health benefit changes for 2002 does not support its claim that UC-AFT waived its right to bargain. As noted, in November 2001, Chester made it clear that the University believed it had no duty to negotiate about health benefit changes for calendar year 2002 because the changes were consistent with the dynamic status quo. In his testimony, however, Chester said the University would have negotiated with UC-AFT in response to a timely demand. But I have found that the University unlawfully changed health benefits for 2002. Accordingly, the duty to present timely proposals was on the University, not the union, for it was the University that wanted to make the changes at issue here. Instead of presenting proposals, the University unlawfully implemented changes in health benefits prior to impasse. (Moreno Valley Unified School District v. PERB (1983) 142 Cal.App.3d 191, 199 [191 Cal.Rptr. 60] (Moreno Valley).)

Nor did UC-AFT waive its right to bargain with regard to the 2003 changes in health benefits. The meeting with French on June 26, 2002, did not constitute a valid notice of the specific changes that would eventually occur. At the time of the meeting, the University's negotiations with health plans was just beginning and French was not certain of the outcome. She knew that costs were rising. But she had only a general notion or a directional sense that the University would not be able to provide a free HMO plan, although the possibility of such a plan was not ruled out. This was the only meeting UC-AFT had with French. Thus, it cannot be concluded on this record that the meeting with French constituted the kind of notice required to alert UC-AFT to the changes that would occur. (San Diego Community College District (1988) PERB Decision No. 662, pp. 17-18, affirmed San Diego Adult Educators v. Public Employment Relations Board (1990) 223 Cal.App.3d 1124, 1136 [273 Cal.Rptr. 53] (inconclusive discussion at meeting attended by union president not effective notice of change).)

In addition, UC-AFT's reaction to the University's two-part proposal of June 26, 2002, does not suggest a waiver of the right to bargain. The first part was the same as the expired contract and provided the University would have the right to make changes to health benefits, if the changes were the same as changes for senate faculty. The second part contained a proposal that stated "This language is submitted as the language that UC proposes if we reach impasse." The terms of the proposal were essentially the same as the expired contract and included specific dollar maximums the University was willing to contribute toward benefit premiums beginning in 2003. However, rather than waiting for impasse and implementing either part of the proposal, the University announced a different set of changes in October 2002, to become effective January 1, 2003, without ever proposing the changes to UC-AFT in advance. Not only were the 2003 changes a fait accompli by the time they were announced, they were implemented prior to impasse. A unilateral change prior to impasse is unlawful, even if it is contemplated within an existing offer. (Moreno Valley at p. 199.)

Meanwhile, after the meeting with French, the negotiations continued and the parties discussed a possible interim agreement. Elkins reiterated that UC-AFT could not agree to future changes sight unseen. And he credibly testified that Cieszkiewicz promised to provide more specific information as soon as possible. However, the University never complied with the promise. In addition, I credit Elkins' testimony that, at about the time of the meeting with

French and the University's two-part proposal, Cieszkiewicz took the position that the University would not negotiate about the changes unless UC-AFT agreed to remove its members from the systemwide plan, a predictably unacceptable proposal.[7] Elkins was a credible witness and his testimony on this point is consistent with other record evidence, including Cieszkiewicz's own testimony and her letter to Rhine. Cieszkiewicz indicated in her February 2003 letter to Rhine that the University would not negotiate about "annual plan changes" for the following calendar year and UC-AFT insistence on a "separate set of arrangements" would be a "surprising departure" from the union's prior position. At hearing, she was questioned about the position set out in the letter. Asked by UC-AFT counsel if the University would refuse to negotiate if the union proposed to keep its members in the pool with other University employees, Cieszkiewicz said "yes."[8]

Nor did the UC-AFT's lack of proposals to change specific health benefits constitute a waiver of the right to negotiate. It is true that UC-AFT made few proposals to change specific health benefits, other than the proposal to include coverage of part-time lecturers. However, it is important to note that the proposals advanced by UC-AFT evidence an attempt at substantive bargaining. In October 2001, Chester proposed extending the contract through June 2002. Elkins rejected the offer, but said UC-AFT would be willing to extend certain articles. The parties discussed the extension in return for a pass through of the salary increase. In November

[7] The University is able to offer a wide range of choices because of the large number of participants in the system. Given the relatively small role the UC-AFT membership occupies within the large University health benefits system, it is an understatement to say that bargaining outside the system would not be beneficial to the union. Thus, the condition Cieszkiewicz placed on the agreement to negotiate seems more likely to prevent the meaningful give and take of good faith bargaining rather than foster it. Plainly, it is a condition that UC-AFT could not possibly have accepted.

[8] Although not dispositive of the issues presented here, the University's conduct in its negotiations with other unions is noteworthy. As the UPTE negotiations indicate, it is possible to negotiate about health benefits without removing the union from the systemwide program.

2001, Elkins requested information and asked to negotiate, but Chester refused under the dynamic status quo defense. In late November 2001, Chester proposed a pass through of the salary increase in return for a contract extension and withdrawal of the union's earlier salary proposal. Elkins responded with a counterproposal under which UC-AFT would agree to accept the 2002 health benefit changes and not strike until March 2002 in return for a salary increase and agreement to participate in at least eight bargaining sessions prior to March 2002.

Similar exchanges occurred in 2002. In early 2002, Cieszkiewicz presented a proposal that would pass through the salary increase in return for UC-AFT accepting the 2002 health benefit changes without litigation and the 2003 benefit changes that would become effective in 2003. Elkins responded that he could not accept future changes, but he "could sell" an agreement on the 2002 health benefit changes in return for the salary increase. This proposal was reiterated a few days later by UC-AFT. Even after the University's June 2002 two-part proposal brought no agreement, the parties continued to discuss a possible interim agreement that contemplated a pass through of the salary increase in return for UC-AFT accepting the 2002 and 2003 health benefit changes. These discussions continued until October 2002, when the University announced the changes in health benefits for 2003.

It may be true that the proposals made by UC-AFT did not encompass specific changes in health benefits and in large part were contingent on the University's agreement on salaries. Nevertheless, I conclude that UC-AFT made significant proposals throughout 2001 and 2002 and its conduct does not constitute a clear and unmistakable waiver of the right to negotiate health benefits. Further, absent agreement, the proposals by UC-AFT did not entitle the University to change the dynamic status quo in regard to existing health benefits prior to impasse. The Board has held that there can be no waiver where a union's acquiescence to an employer's position occurs in the context of negotiations for total agreement and negotiations are not concluded prior to the unilateral change. (Palo Verde Unified School District (1983) PERB Decision No. 321, p. 14.)

UC-AFT's conduct in failing to protest the 2001 health benefit changes does not lead to the conclusion that the union had no intention of negotiating about the changes, expected that the changes would take place, or acquiesced to the changes in subsequent years. The 2001 changes were the only changes made during a contract hiatus in several years, other changes having been made during the life of the agreement when the waiver clause was in effect. UC-AFT declined to challenge the 2001 changes because they were positive or otherwise unobjectionable. For instance, the University did not deviate from its benchmark methodology, and the union did not find any increased copayments objectionable in the context of the negotiations then underway. A union's acquiescence in a previous unilateral change does not operate as a waiver of the right to bargain for all times. (San Jacinto Unified School District (1994) PERB Decision No. 1078, adopting proposed decision of administrative law judge at p. 23.) Moreover, the failure of UC-AFT to request negotiations about the 2001 changes does not itself establish a new status quo for the purpose of determining whether a unilateral change is unlawful. (See CSEA v. PERB at p. 944.)

Based on the foregoing, I find that UC-AFT attempted to negotiate about the changes in health benefits for 2002 and 2003, yet no agreement was reached and specific notice of the changes was not provided until they were finalized and announced to employees. Therefore, I conclude that UC-AFT at no time consciously yielded its interest in negotiating about health benefits. (Los Angeles CCD at p. 13.)

Impact of Changes

It is settled that changes in health benefits must have a material and significant effect to require negotiations. (See e.g., Oakland Unified School District v. PERB (1981) 120

Cal.App.3d 1007, 1012 [175 Cal.Rptr. 105]; State of California (Department of Forestry and Fire Protection) (1998) PERB Decision No. 1260-S, p. 12.) PERB has found for instance that a health plan provided by an employer at no cost to employees is a materially different benefit than the identical plan requiring employee contributions. Increases in the cost of prescription drugs from one dollar to between five and seven dollars, the cost of emergency room visit copayment from zero to $35, and increased copayments for general services constitute significant changes, as well. (Oakland Unified School District (1994) PERB Decision No. 1045, pp. 4-5 (Oakland); see also Savanna School District (1988) PERB Decision No. 671, pp. 3-4 (actual increases in employee contributions for health care benefits is material); Oakland Unified School District v. PERB, supra, 120 Cal.App.3d 1007, 1012-1013 [change in a benefit plan administrator from Blue Cross to Western Administration Company must be negotiated, even where the only impact is that terminated employee would no longer have the right to continuing coverage under the Blue Cross Group Conversion program and employee would not have access to Blue Cross affiliated hospitals outside the employee's geographic area].)

In other cases, the Board has found that changes were not significant enough to trigger a duty to bargain. For example, the Board found that the charging party failed to establish that changes in a vision care plan including, among other things, modification in "accessibility of benefits," reduction in the number of providers, cost of eyeglasses and "cosmetic extras" were not significant. The Board wrote: "To prevail in this case, [the charging party] must present evidence of the impact on actual vision care benefits, or their cost to employees, which resulted from the State's action. The evidence [charging party] presents is either speculative, insufficiently explained or unhelpful in demonstrating this impact." (State of California (Department of Forestry and Fire Protection), supra, PERB Decision No. 1260, pp. 15-22; see also State of California (Department of Personnel Administration) (1998) PERB Decision No. 1244-S, pp. 16-17 [record evidence fails to establish significant change in vision care benefits, such as retail pricing of eyeglasses].) Therefore, the Board declined to find the changes at issue significantly impacted actual benefits or the cost of those benefits.

I find the record evidence supports the conclusion that changes at issue in this case constitute a material and significant impact on benefits. While every aspect of the changes in health benefits need not be set forth here, a few are noteworthy. For instance, the change in the benchmark methodology was significant. In 2002, the PacifiCare single, two-party or family plan was free on a three-tier structure. If the University had continued its benchmark methodology, the PacifiCare plan would have remained free. Instead, for PacifiCare in 2003, rates increased so that an employee earning over $40,000 paid $18.12 per month for himself, $32.62 per month for himself and children, $38.06 per month for himself and an adult, and $52.55 per month for himself and family. Due to the implementation of the transitional allowance concept, an employee earning less than $40,000 per year in 2003 paid $10.12 per month for himself, $18.22 for himself and children, $21.26 per month for himself and an adult, and $52.55 for himself and a family. And the 2003 contributions were based on a four-tier structure, rather than a three-tier structure.

Although the changes for plan year 2002 were less dramatic, they were nevertheless significant. In brief, the changes included the following: (1) 100 percent increases in copayments for office visits, home visits, eye examinations, hearing examinations, allergy testing and treatment, abortion, podiatry, outpatient mental health and substance abuse visits, inoculations, and other outpatient services; (2) 43 percent increase in emergency room copayments; (3) establishment of a new $250.00 per occurrence hospitalization copayment for all inpatient services, maternity services and mental health/substance abuse inpatient care; and

(4) approximately 100 percent increase in prescription drug copayments. The Board has found similar changes sufficiently significant to trigger the duty to bargain. (Oakland, at pp. 4-5.)

REMEDY

Section 3563.3 gives PERB the authority to

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

It has been found that the University has implemented significant changes in health benefits for calendar years 2002 and 2003 without affording UC-AFT notice and an opportunity to negotiate, in violation of section 3571(c). By this conduct the University has denied UC-AFT the right to represent its members, in violation of section 3571(b). By the same conduct, the University has interfered with the right of Unit 18 employees to be represented by UC-AFT, in violation of section 3571(a). It is therefore appropriate to order the University to cease and desist from such activity.

In cases involving unilateral action, it is appropriate to order reinstatement of the status quo that existed prior to the unlawful actions, including making employees whole for losses suffered as a result of the unlawful actions, with interest at the rate of 7 percent per annum. (Oakland Unified School District v. PERB, supra, 120 Cal.App.3d 1007, 1014-1015.) However, liability under such a remedy will be cut off if the parties have, in the interim, reached agreement on a new contract. (Compton at p. 24.) UC-AFT indicates in its brief that the parties have reached an agreement under which the University is permitted to make changes to health benefits without bargaining. Therefore, the make whole remedy will begin the date the University implemented the unilateral actions covering calendar years 2002 and 2003 and end at the effective date of the parties' new collective bargaining agreement.

Specifically, the University will be ordered to make Unit 18 employees whole for losses suffered as a result of the unilateral changes in health benefits with interest at the rate of 7 percent per annum. The make whole remedy shall include, but is not limited to, two main areas. First, the University will be ordered to reimburse Unit 18 employees for the difference between premiums they have paid since January 2003 and the premiums they would have paid had the University followed its benchmark methodology of setting its contribution based upon the lowest cost HMO after risk adjustment. Second, the University will be ordered to reimburse Unit 18 employees for the difference between copayments they have paid since January 2002, when the University made the discretionary decision to negotiate higher copayments not in conformance with any past practice, and the copayments they would have paid had the University not made the decision.

In the alternative, upon a request by UC-AFT, the University may comply with this remedy by negotiating a different settlement with UC-AFT that effectuates the purposes of the HEERA. (Oakland Unified School District v. PERB, supra, 120 Cal.App.3d 1007, 1015.)

It is further appropriate that the University be directed to post a notice incorporating the terms of this order at all locations where notices customarily are posted for members of Unit 18. Posting of such a notice, signed by an authorized agent of the University, will provide employees with notice that the University has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the HEERA that employees be informed of the resolution of this controversy and the University's readiness to comply with the ordered remedy. (See The Regents of the University of California (1990) PERB Decision No. 826-H, p. 13.)

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, it has been found that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA) by unilaterally changing health benefits for calendar years 2002 and 2003 without affording the University Council American Federation of Teachers (UC-AFT) notice and an opportunity to bargain. By this conduct, the University has breached its duty to bargain in violation of section 3571(c), interfered with the right of Unit 18 employees to be represented by UC-AFT in violation of section 3571(a), and denied UC-AFT the right to represent its members in violation of section 3571(b).

Pursuant to Government Code section 3563.3, it is hereby ordered that the University and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to negotiate with the UC-AFT about the decision to change health benefits;

2. Denying UC-AFT the right to represent Unit 18 employees in their employment relations with the University; and

3. Interfering with the right of Unit 18 members to be represented by their chosen representative.

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

1. Unless otherwise agreed to by the parties, make employees whole for losses suffered as a result of the unilateral change in health benefits for calendar years 2002 and 2003. The make whole remedy shall include, but shall not be limited to,

(a) reimbursement for the difference between premiums they have paid since January 2003 and the premiums they would have paid had the University followed its benchmark methodology of setting its contribution based upon the lowest cost HMO after risk adjustment, and
(b) reimbursement for the difference between copayments they have paid since January 2002, when the University made the discretionary decision to negotiate higher copayments not in conformance with any past practice, and the copayments they would have paid had the University not made the decision. The period covering the make whole remedy shall begin with the date the changes were implemented and end with the effective date of a successor agreement covering health benefits. All monetary losses will include interest at the rate of 7 percent per annum.

2. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to Unit 18 employees are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the University, indicating that the University will comply with the terms of the Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Within five (5) workdays of service of a final decision in this matter, notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, of the steps taken to comply with the terms of this Order. Continue to report to in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on UC-AFT.

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

Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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, 32140, and 32135(c).)

Fred D'Orazio
Administrative Law Judge