STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COALITION OF UNIVERSITY EMPLOYEES, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA (DAVIS), Respondent.	Case Nos. SA-CE-246-H, SA-CE-247-H, SA-CE-251-H, SF-CE-760-H, SF-CE-795-H PERB Decision No. 2101-H March 1, 2010

Appearances: Davis, Cowell & Bowe by Winifred V. Kao, Attorney, for Coalition of University Employees; Hanson Bridgett, Marcus, Vlahos & Rudy by Michael D. Moye and Molly A. Lee, Attorneys, for Regents of the University of California (Davis).

Before Dowdin Calvillo, Acting Chair; McKeag and Neuwald, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the Regents of the University of California (Davis) (University) of a proposed decision by an administrative law judge (ALJ). The Coalition of University Employees (CUE) alleged that the University violated the Higher Education Employer-Employee Relations Act (HEERA)[1] when it replaced unit work in violation of the parties' memorandum of understanding, and when it failed to provide information upon request. CUE alleged that this conduct constituted a violation of HEERA section 3571(a), (b) and (c).

The instant case is comprised of five consolidated cases. In each case, CUE alleged the University unilaterally changed a policy of providing CUE notice and an opportunity to meet

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

and confer in cases in which the University replaced a major portion of work performed by an employee in a CUE bargaining unit with a position outside the bargaining unit. Additionally, in one of the five consolidated cases (Case No. SF-CE-760-H), CUE alleged the University refused to provide information in response to two separate information requests.

We have reviewed the entire record in this case and find that Case No. SA-CE-251-H (Tina Perez) was not timely filed and, therefore, time-barred by application of PERB's six month statute of limitations. In addition, we find the University committed an unlawful unilateral change in Case Nos. SA-CE-247-H (Refractive Surgery), SF-CE-795-H (Berkeley PMD Department) and SA-CE-246-H (Kimberly Pearson) but did not commit an unlawful unilateral change in Case No. SF-CE-760-H (International House). Last, we find the University failed to provide information requested by CUE without adequate justification in violation of HEERA section 3571(c).

FINDINGS OF FACT

CUE is an employee organization within the meaning of HEERA section 3562(f)(1) and the exclusive representative of an appropriate unit of University employees within the meaning of Section 3562(i). The University is a higher education employer within the meaning of Section 3562(g).

A. Background

CUE represents a bargaining unit composed of clerical and other administrative support employees. The instant dispute arises out of the alleged unilateral repudiation of the following language from Article 2, section E of the parties' 2003-2004 memorandum of understanding (2003-04 MOU):[2]

[2] The 2003-04 MOU expired on September 30, 2004. The successor MOU did not take effect until February 2006. However, because of the carryover of provisions contained in the expired MOU, the provisions of the 2003-04 MOU applied at all times relevant herein.

RECLASSIFICATION FROM UNIT TO NON-UNIT POSITIONS

> In the event the University determines that a position or title should be reclassified or designated for exclusion from the unit, or the University intends to replace a major portion of a bargaining unit position with a position in a classification outside of the unit, the University shall notify CUE in writing at least thirty (30) calendar days prior to the proposed implementation. If CUE determines to challenge the University's proposed action, it shall notify the University in writing within thirty (30) calendar days from the date on which the University's notice was mailed, and the proposed effective date will be extended by thirty (30) calendar days. During such an extension, the parties will meet and discuss the University's proposed action. If the parties are unable to reach agreement regarding the University's proposed action, the University may commence PERB unit modification procedures, as outlined under PERB regulations. Until the bargaining unit assignment is either agreed to by the parties or finally resolved through the PERB unit modification procedures, (1) the affected position(s) or title(s) shall remain in the unit and shall remain covered by all provisions of this agreement, (2) the University may, in compliance with Article 45 -Wages, Section D, Other Increases, of this Agreement, increase compensation for the affected position(s) or title(s), and (3) the duties associated with the proposed reclassification may be assigned to the affected employees(s). (Emphasis added.)

CUE's unit includes a variety of job classifications, some of which exist within a "series concept." The "(__) assistant" (referred to as "blank assistant") classification is a common payroll title within the University system. The series includes (__) assistant I, (__) assistant II, (__) assistant III, and, on at least one campus, (__) assistant IV. The "blank" is often filled with a term such as "payroll" or "administrative" so as to specifically describe the position. Classifications into which (__) assistants are typically reclassified at higher rates of pay are the administrative specialist and administrative analyst classifications. These classifications, however, are not in CUE's bargaining unit.

B. Prior Disputes Regarding Article 2.E

In 2001, a dispute arose regarding the predecessor language of Article 2.E contained in the parties' first negotiated agreement.[3] That language, which expressed the notice obligation in more limited fashion, provided, "[i]n the event the University determines that a position should be reclassified or designated for exclusion with the result that the position would be removed from the unit . . ." CUE filed an unfair practice charge in connection with this dispute, but eventually settled the matter with the University.

In the 2003-04 MOU new language was added to Article 2.E that extended the notice obligations to cases where the University "intended" to replace a "major portion" of the work performed in a bargaining unit position with a non-bargaining unit position. The parties agree that "major portion" means at least 50 percent of the position's duties. According to Margy Wilkinson (Wilkinson), CUE's chief negotiator when the revision was adopted, the addition was written "fairly broadly" to address the wide variety of ways in which bargaining unit work could be reassigned out of the unit.

Additionally, CUE filed a grievance regarding the University's alleged breach of Article 2.E in which it claimed that the University wrongfully filled open administrative analyst or administrative specialist positions (non-bargaining unit positions) by reassigning (___) assistant incumbents to such positions. In the ensuing arbitration, CUE argued a similar theory to the one advanced in the instant case. In December of 2005, Barry Winograd (Winograd) issued an arbitration decision in which, among other things, he interpreted Article 2.E. Finding in favor of CUE, Winograd stated:

[3] CUE was recognized as the exclusive representative in May 1997.

> Here, abundant evidence was offered that in several instances the University at first sought to follow the established and required reclassification approach, but then shifted gears once the Union raised questions or expressed concerns. By then posting non-unit positions and hiring unit incumbents into the positions, or by doing so without even a posting, all without recourse to the PERB, the University violated the labor agreement since the duties for the affected positions, whether vacant or not, either did not change or remained largely the same. [Emphasis added.]

C. Unilateral Change Allegations

As indicated above, the instant case consists of five consolidated cases, all of which allege the University committed an unlawful unilateral change when it replaced major portions of work performed by a position within the CUE bargaining unit to a position outside the bargaining unit. The following is a factual summary of the unilateral change allegations organized by each consolidated case.

1. Case No. SA-CE-251-H (Tina Perez)

The Information and Educational Technology (IET) Department employs a number of staff to handle its human resource functions, such as recruitment, selection and records management. Tina Perez (Perez) worked in the IET Department as an analyst II. She was one of a complement of three analysts.

Following a departmental reorganization in July 2003, one of the analysts, Nancy Harrington (Harrington), became Perez's supervisor. Harrington reviewed Perez's work and concluded Perez was not performing satisfactorily. After two years of observation, Harrington proposed the following two options to Perez: (1) continue in the analyst position with the prospect of a negative evaluation, or (2) release her problematic duties, likely resulting in a downward reclassification, and seek an outside position with assistance from the department. Perez chose the latter option. Over time, the duties involving advising managers

on performance issues, taking corrective action, and interaction with employees were removed from Perez and shifted to Harrington and another analyst.

Eventually, a revised job description was prepared for review by the campus classification and compensation unit. A downward reclassification of Perez's position to a (__) assistant III was approved, but Perez's higher salary was red-circled. Harrington delayed implementation of the reclassification, allowing Perez to search for another analyst position. Perez resigned from the (__) assistant III position in December 2005.

Following Perez's departure, Harrington debated whether to fill the position vacated by Perez or return to the original configuration of three analysts. Harrington concluded that she wanted to return to the complement of three analysts. On December 2, 2005, the University posted a job vacancy announcement for a non-bargaining unit analyst position. The position was filled by Elisabeth Adler-Lund.

At some point in December, CUE Representative Beverly Kelley (Kelley) submitted a request for information as follows:

> Please provide a copy of the previous job description and a copy of the job description that was reviewed by Compensation and Classification that resulted in the decision to remove the position, previously held by Tina L. Perez, from the CUE bargaining unit, and make it a non-represented position.

The University mailed its response to her request on December 20, 2005. The response included a job description of the open analyst position, Perez's former analyst job description, and her most recent (__) assistant III job description.

The charge was filed on July 14, 2006, alleging a wrongful replacement of unit work within the IET department at the Davis campus.

2. Case No. SA-CE-246-H (Kimberly Pearson)

The IET Department at UC Davis has five sub-units, one of which is Mediaworks. Mediaworks provides graphic, photographic, audio/video, illustration, animation/simulation and programming services for the campus. Kimberly Pearson (Pearson) was a (__) assistant III in Mediaworks until her departure in early 2005. The position remained vacant for several months.

Patricia Mitchell (Mitchell), a (__) assistant II in the IET business services sub-unit, noticed that Pearson's (___) assistant III position was not posted following her departure.[4] Instead, on April 6, 2005, Mitchell saw an electronic job posting for a financial and administrative analyst I position in Mediaworks. Mitchell reviewed the posted job description and concluded that it comprised the same duties as Pearson's position, but with the added duty of financial and statistical report generation. The vacant analyst I position was subsequently filled by Diana Francis (Francis). According to observations made by Mitchell, Francis generates financial reports under the direction of the lead business services budget analyst, arranges meetings for the directors and managers, prepares entertainment expense reports, and processes purchase order requests.

Sometime after seeing the job posting, Mitchell, along with her co-worker, Bridgett Moon (Moon), told CUE representative Kelley that they believed the job posting was for Pearson's position. There is no evidence in the record, however, when Mitchell shared this information with Kelley, nor is there any evidence regarding when Kelley became aware of the vacancy.

[4] Mitchell interacted with Pearson one or two days per month and claims she had some familiarity with Pearson's work based on this interaction.

After she was informed of the University's alleged replacement of Pearson's (___) assistant III position, Kelley submitted a request for a job description for the period "after the reclassification for the position previously held by Kimberley Pearson." On October 11, 2005, the University responded to the request and stated the analyst position was submitted for a classification determination on March 20, 2005. The response further stated the University classified the position as an analyst I on April 5, 2005, and released it for recruitment on April 6, 2005. The charge was filed on November 29, 2005.

3. Case No. SA-CE-247-H (UC Davis Refractive Surgery)

Laser Vision Correction Services (hereafter Refractive Surgery) is a division of the UC Davis Medical Center Department of Ophthalmology and Vision Science. David Claunch (Claunch) was an administrative assistant II in Refractive Surgery until he resigned his position in June 2005. Claunch's duties included scheduling laser surgery for patients, answering routine questions on eligibility for surgery, processing case-payments, preparing monthly reports for the department's billing analyst, preparing spreadsheets documenting cash flow, and maintaining supplies for surgery.

Claunch began employment as a staff research associate in the unit represented by the University Professional and Technical Employees. His position, however, was reclassified due to job performance issues. Following a series of transfers, Claunch was moved to the Refractive Surgery Center in 2003 and assigned to a reception position. Martha Barber (Barber), the clinical practice manager, testified that these transfers were occasioned by Claunch's poor work performance. Although most of the positions handling receptionist and intake duties in the Department of Ophthalmology are medical office service coordinators (MOSCs) (there was at least one other administrative assistant position in surgery scheduling),

Barber testified that she did not submit Claunch's position for reclassification because it would have been perceived as a demotion and would have resulted in a decrease in salary.

Claunch testified that, over the course of time leading up to his resignation, he trained Marian Vaitai (Vaitai) to perform his position. Vaitai also worked the front desk of the ophthalmology clinic. Vaitai was classified as a MOSC III, a non-bargaining unit position. Her primary duties included verifying insurance coverage and collecting co-payments. Claunch continued to train Vaitai even after the Refractive Surgery Center moved to a new location. Barber testified that despite his performing at the lower level of a MOSC, the University maintained Claunch in the administrative assistant II position as an accommodation to him.

In July 2005, shortly after Claunch left employment, Kelley asked the medical center labor relations consultant, Stephen Chilcott (Chilcott), if Claunch's position would be filled. Chilcott responded that the position was not eliminated and remained vacant, but that recruiting had not commenced. Chilcott pledged to notify CUE if there were changes to the position.

Sometime thereafter, Kelley learned that Vaitai assumed Claunch's duties but remained a MOSC III. Claunch confirmed this fact in a conversation with Vaitai. Indeed, Barber also confirmed this fact when she testified that there were three front-desk personnel at the Refractive Surgery Center both during and after Claunch's tenure. After Claunch's departure, another MOSC was hired and Vaitai took the lead position of the three MOSC positions working at the reception desk.

4. Case No. SF-CE-795-H (Berkeley PMB Department)

Yulia Golubovskaya (Golubovskaya) and Sonja Braden (Braden) were administrative assistant IIs who managed contract proposals and provided grant administration in the Plant and Microbial Biology Department. The department has 29 professors who require administrative support for the submission of grant proposals.

The department distinguishes grant support work in terms of pre-grant and post-grant phases. Pre-grant work involves the development and timely submission of the proposal. Under the direction of the principal investigator, the support staff assembles the proposal by collecting supporting documentation and preparing the grant budget. Post-grant work involves monitoring the expenditure of the grant monies, including assuring proper posting of expenses, monthly reconciliation, and compliance with the terms and conditions of the grant award. Post-grant financial services work was assigned at the administrative assistant II level.

For some period of time, Jenny Sun (Sun), a non-bargaining unit analyst, was responsible for much of the department's pre-grant work. Because of a growth in demand for grant development work, an overuse of Sun for pre-grant work, and a need to provide comprehensive pre- and post-grant services to principal investigators, the department's operations manager proposed assigning some of the pre-grant work to Golubovskaya and Braden along with on-the-job training.

In 2003, Golubovskaya and Braden agreed to take on pre-grant work and were reclassified to administrative assistant IIIs. In June 2005, Golubovskaya left the department to accept an administrative specialist position in a different department. Beverly Thomas (Thomas), an administrative assistant III, who did work similar to Golubovskaya, testified that after Golubovskaya's departure, Golubovskaya's professors were temporarily reassigned both

to her and Braden, as well as Sun. Thomas's job description included entry for pre-grant work comprising 20 percent of her job duties.

After receiving approval by the dean's office, the department posted an advertisement for a non-bargaining unit specialist position. Kris Luppino (Luppino), a former administrative assistant III, was hired for the position, but left after a brief stay. The position was reposted, and Braden was selected for the vacancy. According to Braden, she continued to perform all of her previous work as an administrative assistant III, but was assigned the grant work for two additional professors.[5] Instead of reposting Braden's vacated administrative assistant III position, the department hired another specialist, Elma Serrano (Serrano), from the original specialist recruitment pool to fill Braden's former position. Serrano was assigned the grant work of the professors previously assigned to Golubovskaya.

5. Case No. SF-CE-760 (International House)

Fredda Olivares (Olivares) held a 50 percent time position as an administrative assistant II within the physical operations unit at the International House, a dormitory facility. Olivares was hired as an administrative assistant I before promoting to an administrative assistant II. Olivares handled duties at the reception desk, prepared residential rooms for occupancy, conducted room inventories, handled parking, and performed other related support functions. She left her position in April 2005. The University, however, was unable to recruit a replacement for Olivares because of a hiring freeze expected to last through the end of the fiscal year ending June 2005.

After Olivares vacated her position, the International House hired Sharleshia Henderson (Henderson) in May 2005 to a 50 percent, student position, first for a one-week period.

[5] Braden's specialist job description lists pre-grant work as a 25 percent duty and post-grant work as a 50 percent duty. It also indicates that the incumbent is expected to be able to handle more complex issues if presented.

Student positions are not a part of the CUE bargaining unit. Henderson was hired with the understanding that her initial task would be to take inventory of vacated dorm rooms. Henderson performed this work for approximately one week. Thereafter, Henderson's term was extended to August 2005. According to Henderson, she performed the duties previously performed by Olivares during her extended term. In support of her claim, Henderson cited e-mails documenting that she performed parking permit issuance duties and performed note-taking for various meetings. The University, on the other hand, presented testimony (through Henderson's supervisor) that several other student employees were hired on a temporary basis only to perform the end-of-year room inventory work.

In July 2005, the University posted an opening for an administrative assistant II position. Henderson was interviewed and selected for the position. She assumed the status of a CUE bargaining unit member in August 2005 as an administrative assistant II.

In none of the cases described above did the University provide notice to CUE required by Article 2.E of the MOU.

D. CUE's Information Requests

1. The Levine Requests

On December 13, 2004, Berkeley Campus Chief Steward Elinor Levine (Levine) sent an e-mail to Beverly Terlep (Terlep), the Berkeley Office of Human Resources Labor Relations analyst, requesting lists of all campus administrative specialist and assistant administrative analyst positions posted for recruitment in the years 2003 and 2004, as well as the "classification history" for each of the positions, including before and after job descriptions if the positions were reclassified while vacant.

Upon receipt of the request, Terlep consulted with labor relations staff who concluded the only way to gather the information was through a search of the institutional memory of the

various departments at each campus. By letter dated December 16, 2004, Terlep informed CUE that the University would not provide the information. She asserted that a position once vacated "ceases to exist." Further, Terlep indicated that because the University retains a managerial prerogative regarding "how to fund positions and how to use them," CUE did not have a right to request information pertaining to recruitment of specialist and analyst positions. Terlep also stated that CUE itself could obtain the job vacancy listings and job descriptions for such open positions on the campus human resources website.

In response to this denial, Levine submitted a second request for information in which she indicated CUE had a concern about clerical work being reclassified out of the bargaining unit, and clerical positions being lost. Consequently, Levine requested a copy of the job vacancy listings for all administrative specialist and assistant administrative analyst positions for 2003 and 2004. In addition, Levine requested the classification history for such positions, including the job descriptions before and after the reclassification if the position was reclassified while vacant.

The University denied the request asserting that CUE only had a right to information regarding the clerical unit. The University also reiterated that positions cease to exist when they are vacated and that the University possessed the managerial prerogative to determine how to both fund positions and use them. Therefore, according to the University, the decision to list a position as an Administrative Specialist or Assistant Administrative Analyst does not fall within CUE's purview.

2. Wilkinson's Request

In May 2005, Wilkinson submitted the following information request to aid in bargaining:

> [F]or each instance since March 12, 2002 in which a position was in the bargaining unit but became vacant and was reclassified out

> of the clerical bargaining unit when it was opened for recruitment (or the position ceased to exist and was instead replaced in large part by a new position out of the clerical unit), please provide the title of the position when it was in the clerical bargaining unit, the title once the position was removed from the clerical bargaining unit (or replaced in large part by a new position out of the clerical unit), and job descriptions for both positions.

Peter Chester (Chester), the University's chief negotiator for the clerical bargaining unit, responded to Wilkinson's request. Chester asserted that the University does not maintain system wide position control (i.e., a system of recording and tracking filled and vacant positions).[6] Consequently, because there was no way to track it, the University would be unable to provide the information.[7] To further support the denial of the request, the University claimed it possessed the managerial prerogative to fill a vacancy with the equivalent position, leave the position vacant, or fill the position with a different classification. In addition, the University contested the relevance of the information because Article 2.E did not refer to vacant position and only applied to situations in which a formal reclassification occurred.

Wilkinson replied to Chester by letter dated July 15, 2005. In her letter, Wilkinson suggested that, although there was no centralized position control system, the University could gather the information through inquiry. In addition, she noted that the FTP site would contain

[6] There is currently no system wide database maintained that tracks this information. The payroll database systems in use track the history of employees in terms of their start and end dates, but not in terms of their positions. Human resource database capabilities vary from campus to campus. Higher level, "integrated" databases, which may have position-tracking capability, are just now coming into use at two of the medical centers.

[7] CUE's bargaining unit ranges from 12,000 to 15,000 employees. According to Chester, developing a history of vacant bargaining unit positions on a system wide basis would require coordination through the Office of the President, using the 17 campus, medical center, and laboratory labor relations managers as contact points for gathering position information from each of the campus departments.

information with respect to vacant positions.[8] The University did not provide the requested information.

REQUEST FOR ORAL ARGUMENT

Pursuant to PERB Regulation 32315[9], the University filed a request for oral argument. Historically, the Board has denied requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Arvin Union School District* (1983) PERB Decision No. 300.) Based on our review of the record, all of the above criteria are met in this case. Accordingly, the University's request for oral argument is denied.

DISCUSSION

A. Timeliness

HEERA section 3563.2(a) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the

[8] The University maintains a "depot" for database files known as the File Transfer Protocol (FTP) site, where CUE may access a current list of bargaining unit members, individual payroll information and personnel transaction records, including dates of entry into the unit, exit from the unit, and separation from University employment. While transfers out of the unit are noted, no continuing record of the status of the vacated bargaining unit position is provided.

[9] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32315 provides in full:

> A party desiring to argue orally before the Board itself regarding the exceptions to the proposed decision shall file with the statement of exceptions or the response to the statement of exceptions a written request stating the reasons for the request. Upon such request or its own motion the Board itself may direct oral argument.

filing of the charge." In unilateral change cases, the limitations period begins to run on the date the charging party obtains actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequently evinces a wavering of that intent. (*Regents of the University of California* (1990) PERB Decision No. 826-H (Regents).) Thus, a charging party that rests on its rights until actual implementation of the change bears the risk of running afoul of the statute of limitations. (*South Placer Fire Protection District* (2008) PERB Decision No. 1944-M.)

1. Case No. SA-CE-251-H (Tina Perez)

Case No. SA-CE-251-H involves a case in which the IET Department allegedly posted a job announcement for an analyst position instead of filling a vacant (__) assistant III position. On December 2, 2005, the University posted a job vacancy announcement for the non-bargaining unit analyst position. The charge was filed on July 14, 2006. Therefore, CUE must establish it knew or should have known of the alleged reclassification no earlier than January 14, 2006.

Perez worked for the department as an analyst II (non-bargaining unit position) but was downgraded to a (___) assistant III (bargaining unit position) for performance reasons. Following Perez' departure, the University posted an announcement for an analyst II vacancy. At some point in December, Kelley submitted a request for information as follows:

> Please provide a copy of the previous job description and a copy of the job description that was reviewed by Compensation and Classification that resulted in the decision to remove the position, previously held by Tina L. Perez, from the CUE bargaining unit, and make it a non-represented position.

The University mailed its response to her request on December 20, 2005. The response included a job description of the open analyst position, Perez's former analyst job description, and her most recent (__) assistant III job description.

Based on the foregoing, we find that the University's response provided CUE with sufficient information to conclude the University may have violated Article 2.E. Since the University's response was sent three weeks prior to January 14, 2006, we find Case No. SA-CE-251-H (Tina Perez) was not timely filed.

2. Case No. SA-CE-246-H (Kimberly Pearson)

Case No. SA-CE-246-H involves the financial services position in Mediaworks at the Davis campus. On April 6, 2005, the University posted a job vacancy announcement for a non-bargaining unit analyst position. The charge was filed on November 29, 2005. Therefore, CUE must establish it knew or should have known of the alleged reclassification no earlier than May 29, 2005.

Mitchell testified that when she read the job vacancy announcement she immediately knew it was the same job performed by Pearson as a (___) assistant III, a bargaining unit position. Thereafter, Mitchell, along with her co-worker, Moon, told CUE representative Kelley that they believed the advertised position was Pearson's position. However, there is no evidence in the record regarding when Mitchell shared this information with Kelley, nor is there any evidence regarding when Kelley became aware of the vacancy.

After she was informed of the University's alleged replacement of Pearson's (___) assistant III position, Kelley submitted a request for the job description for the period following the reclassification of the position previously held by Kimberley Pearson. On October 11, 2005, the University responded to the request and stated the analyst position was submitted for a classification determination on March 20, 2005. The response further stated the University classified the position as an analyst I on April 5, 2005, and released it for recruitment on April 6, 2005. The charge was filed on November 29, 2005.

The University asserts that the notice to Mitchell and Moon was imputed to the union because she and the coworker were CUE members. However, notice of a proposed change must be given to an official of the union who has the authority to act on behalf of the organization. (*State of California (Department of Corrections)* (2000) PERB Decision No. 1392-S, adopting ALJ's decision, at pp. 18-22.) The knowledge of one or even several members of the bargaining unit, who lack authority to act in an official capacity, will not be imputed to the organization. (*Victor Valley Union High School District* (1986) PERB Decision No. 565, at pp. 5-6.) Thus, we will not impute notice to CUE through Mitchell or her coworker, despite their belief in the movement of unit work.

As in Case No. SA-CE-251-H (Tina Perez), we find the University's October 11, 2005, response provided CUE with sufficient information to conclude the University may have violated Article 2.E. Since CUE filed the charge on November 29, 2005, less than seven weeks after the University's response, we find Case No. SA-CE-246-H (Kimberly Pearson) was timely filed.

B. The University's Notice Obligations

The heart of this case is a dispute regarding the parties' interpretation of Article 2.E (Reclassification From Unit To Non-Unit Positions) of the 2003-04 MOU. The relevant portion of Article 2.E is as follows:

> In the event the University determines that a position or title should be reclassified or designated for exclusion from the unit, or the University intends to replace a major portion of a bargaining unit position with a position in a classification outside of the unit, the University shall notify CUE in writing at least thirty (30) calendar days prior to the proposed implementation.

Although PERB does not have jurisdiction to resolve pure contract disputes pursuant to HEERA section 3563.2(b), it may interpret contract language if doing so is necessary in deciding an unfair practice charge case. (*County of Ventura* (2007) PERB Decision

No. 1910-M.) In such cases, traditional rules of contract law guide the Board's interpretation of collective bargaining agreements. (*National City Police Offcers' Assn. v. City of National City* (2001) 87 Cal.App.4th 1274, 1279; *Grossmont Union High School District* (1983) PERB Decision No. 313.)

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful. (Civ. Code, § 1636.) Where contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language of the contract itself to ascertain its meaning. (*Ibid.*; *City of Riverside* (2009) PERB Decision No. 2027-M; *Marysville Joint Unified School District* (1983) PERB Decision No. 314.) "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) Thus, "the Board must avoid an interpretation of contract language which leaves a provision without effect." (*State of California (Department of Corrections)* (1999) PERB Decision No. 1317-S.)

The parties offer contrary interpretations of Article 2.E. According to CUE, this provision requires the University to give CUE notice and an opportunity to meet and confer when the University determines: (1) "that a position or title should be reclassified;" (2) a position or title should be "designated for exclusion from the unit;" or (3) when the University "intends to replace a major portion of a bargaining unit position with a position in a classification outside of the unit." With regard to the third factor, CUE contends that the University must provide notice if it intends to replace 50 percent or more of the work of a bargaining unit position with a non-unit position.

The University, on the other hand, contends that notice is only required when there is a formal request for reclassification that would result in an incumbent leaving the bargaining unit

by virtue of the reclassification. According to Chester, the University's chief negotiator for the clerical bargaining unit, notice is only required for cases in which the University designates a group of existing and filled positions (i.e., a significant body of work) for movement outside of the unit. Chester, however, did not provide a basis for that understanding (i.e., whether it arose from the language of the agreement or by virtue of HEERA). In addition, Chester asserted that because the MOU does not explicitly define bargaining unit work, a classification analyst's conclusion of unit placement, based on a job description presented for a new position, effectively determines whether the position will be in or out of the unit.

1. Interpretation of Article 2.E

Based on our review, we find Article 2.E is not limited to formal requests for reclassification. Although such an interpretation might have found support under the prior language of Article 2.E, we find the addition of the "major portion of the bargaining unit" requirement to the 2003-04 MOU significantly expanded the notice obligations imposed by this provision. To rule otherwise would leave this addition to Article 2.E without effect and, consequently, reduce this additional phrase to mere surplusage.

We, therefore, find the plain and unambiguous language of this article clearly requires the University to give CUE notice and an opportunity to meet and confer when the University determines: (1) that a bargaining unit position or title should be reclassified to a non-bargaining unit position; (2) a bargaining unit position or title should be designated for exclusion from the unit; or (3) the University intends to replace a major portion of a bargaining unit position with a position in a classification outside of the unit.

With regard to the third factor, the duty to provide notice and an opportunity to meet and confer is triggered when the University intends to replace more than 50 percent of the work of a bargaining unit position with that of a non-bargaining unit position. It is noteworthy

that this requirement specifically uses the phrase "the University intends to replace." We believe the inclusion of this phrase adds a requirement to the third factor that the University manifests an intent to impose such a replacement. We find this latter requirement is significant because it creates a *de facto* exception for temporary assignments. For example, when a non-bargaining unit employee fills in for a bargaining unit employee to cover for vacation or sick leave, Article 2.E would not be triggered because the University would not have the requisite intent to replace a major portion of the bargaining unit position. Instead, the position would continue to exist during the pendency of the leave and the duties would be resumed by the employee upon his/her return to duty.

2. Bargaining History is Unavailing

As indicated above, when contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language of the contract itself to ascertain its meaning. (*City of Riverside* (2009) PERB Decision No. 2027-M.) In the instant case, we find the language of Article 2.E is clear and unambiguous. Accordingly, we need not consider the provision's bargaining history.

However, even if the language was not clear, the bargaining history sheds little light on the meaning of Article 2.E. It is undisputed that CUE proposed the additional language to Article 2.E. According to Wilkinson, she told the University's chief negotiator, Sharon Hayden, that the additional language was written "fairly broadly" to address the wide variety of ways in which bargaining unit work could be reassigned out of the unit. She did not, however, explain to the University what she meant by "fairly broadly" nor did she explain any situations that might apply to the new language that did not apply to the existing language. Given the ambiguities of Wilkinson's testimony and the fact that there were seemingly no

bilateral discussions regarding this provision, we find the bargaining history to be of little probative value in the interpretation of Article 2.E.

3. Prior Arbitration Decision

In December of 2005, Winograd issued an arbitration decision in which he interpreted Article 2.E. The primary issue in the Winograd arbitration was whether the University violated Article 2.E when it created new non-bargaining unit positions and filled the positions with bargaining unit members who continued to perform the same work they previously performed in their prior bargaining unit position.

In his decision, Winograd concluded that when the University posted non-unit positions and hired unit incumbents into positions, the University violated Article 2.E when the duties for the new positions either did not change or remained largely the same. According to Winograd,

> As stated in Article 2.E of the contract, the Union's entitlement to notice and an opportunity to discuss the matter arises when 'the University determines that a position or title should be reclassified or designated for exclusion from the unit or the University intends to replace a major portion of a bargaining unit position with a position in a classification outside the unit.'

Although the manner in which the University replaced major portions of bargaining unit positions in the instant case differed from the cases under consideration in the Winograd decision, the arbitration decision is still probative as to the interpretation of Article 2.E. Relevant to this discussion is the fact that the Winograd interpretation clearly rejected the notion that Article 2.E only applies to formal reclassifications and adopted a standard similar to the standard expressed herein.[10]

[10] In its response to the University's exceptions, CUE notes that the Winograd decision "did not consider or even inquire whether the assignments were temporary . . . or about the individual circumstances behind each assignment." Based on our review, such factors were

C. Unilateral Change Allegations

According to CUE, the University's interpretation of Article 2.E is too narrow and is not supported by the plain language of the provision, the bargaining history or the arbitral authority. CUE, therefore, argues that the University committed an unlawful unilateral change in the parties' Article 2.E policy when, based on its narrow interpretation of Article 2.E, the University replaced major portions of work performed by bargaining unit positions with non-bargaining unit positions without providing CUE adequate notice.

In determining whether a party has violated HEERA section 3571(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143 (*Stockton*).) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer breached or altered the parties' written agreement or past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change of policy (i.e., has a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members); and (4) the change in policy concerns a matter within the scope of representation. (*Trustees of the California State University* (2005) PERB Decision No. 1760-H.)

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not at issue in the Winograd arbitration. Accordingly, the fact that Winograd failed to consider such factors is of limited probative value in our interpretation of Article 2.E.

1. Case No. SA-CE-247-H (UC Davis Refractive Surgery)

The charge in case number SA-CE-247-H alleged the University replaced a major portion of an administrative assistant II position (a bargaining unit position), with an MOSC III position (a non-bargaining unit position).

The administrative assistant II position was formerly held by Claunch. Claunch resigned his position in June 2005. Prior to his resignation, Claunch trained Vaitai to perform his position. Vaitai, who worked the front desk of the Ophthalmology Clinic, was classified as a MOSC III. Three people worked at the front desk of the clinic, Claunch, Vaitai and Anna McCarr (McCarr). McCarr was an MOSC II (a non-bargaining unit position).

In July 2005, shortly after Claunch left employment, CUE Business Agent Kelley asked the medical center labor relations consultant, Chilcott, if Claunch's position would be filled. Chilcott responded that the position was not eliminated and remained vacant, but that recruiting had not commenced. Chilcott informed Kelley that CUE would be notified if there were changes to the position. However, shortly thereafter, Kelley discovered that Claunch's work was reassigned to Vaitai and that the University recruited another MOSC II to work the front desk. Vaitai took the lead position of the three employees working the front desk.

a. The University Breached Article 2.E

We find that virtually all of the duties performed by Chaunch were transferred to Vaitai or the other two MOSCs working at the front desk.[11] We further find that the University was aware of the vacancy created by Claunch's resignation and intentionally choose to transfer his

[11] The University claims the "overlapping duties doctrine" compels a finding that there was no unilateral transfer of work. Specifically, the University argues that in order to prevail on a transfer of work theory, CUE must prove that the employees ceased to perform work which they previously performed or that non-unit employees began to perform duties previously performed exclusively by unit employees. CUE's case, however, is not based on a traditional transfer of work theory. Rather, it is based on the University's unilateral change of Article 2.E. Accordingly, this argument has no merit.

work to a position outside the CUE bargaining unit (i.e., an MOSC position). Last, we find the University failed to notice CUE of this replacement of work as required by Article 2.E. Therefore, the first element of the prima facie case for an unlawful unilateral change has been met. In addition, we find the University did not notify CUE of the change in policy. Therefore, the second element is also satisfied.

b. The University's Conduct Constitutes A Change In Policy Within Scope

The Board has held that a contract breach can support a unilateral change claim when the breaching party asserts that the contract authorizes its conduct. (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186 (*Hacienda*).) Thus, in *Hacienda*, the Board held that the district's unilateral change to a unit member's shift was a change in policy, rather than an isolated breach, because the district relied upon its interpretation of the management rights clause in the contract and believed that the clause authorized it to make the change in shift. In addition, the Board has held that contract breaches may also support unilateral change claims when there is a change in policy that is generally applicable to future situations. (*State of California (Department of Youth Authority)* (2000) PERB Decision No. 1374-S (*State of California*).) Thus, in *State of California*, the Board held that the State's change in the pattern of union representation at one institution was not a mere default in a contractual obligation, but constituted an unlawful unilateral change in policy. The Board reasoned that the State's denial of permission for a steward to travel to other institutions was not a one-time breach, but rather, was generally applicable to future situations.

In the instant case, the University maintained, and continues to maintain, that Article 2.E was not intended to protect against transfers of work across bargaining unit lines except through formal reclassifications. As indicated above, we find this interpretation of Article 2.E is contrary to the intended meaning of the language of that provision and

constitutes a repudiation of a policy contained in the parties' applicable MOU. (*Grant Joint Union High School District* (1982) PERB Decision No. 196.) Moreover, absent a finding to the contrary by this Board, it is clear that the University will continue to apply its narrow interpretation of Article 2.E in future cases. Therefore, we find the University's breach in this instance constitutes a change in policy. In addition, we find the change in policy concerns a matter within the scope of representation. (*Alum Rock Union Elementary School District* (1983) PERB Decision No. 322 (*Alum Rock*).) Accordingly, the third and fourth elements of the prima facie case for an unlawful unilateral change have been met.

Because all four elements have been satisfied, we find the University committed an unlawful unilateral change when it transferred Claunch's work to Vaitai and the other MOSCs working at the front desk of the clinic without providing notice of the transfer to CUE.

2. Case No. SF-CE-795-H (Berkeley PMB Department)

The charge in Case No. SF-CE-795-H alleged the University replaced major portions of two administrative assistant III positions (bargaining unit positions) with two administrative specialist positions (non-bargaining unit positions).

In this case, Golubovskaya and Braden performed work at the administrative assistant III level for two years. According to the job description, 60 percent of the duties for the administrative assistant III position involve contract management, 20 percent of the duties involve grant preparation, 15 percent of the duties involve departmental accounting support and 5 percent of the duties involve supervision of a work-study position.

After Golubovskaya left the position, the department, upon approval by the Dean's office, advertised for a specialist position and hired Luppino, a former administrative assistant III. Lupino left after a month and Braden was selected to fill that vacancy.

According to Braden, she continued to perform all of her previous work as an administrative assistant III position, but merely took on the grant work of two additional professors.

Instead of reposting Braden's administrative assistant III vacated position, the department hired another administrative specialist, Serrano, to fill Braden's vacated position. Serrano was assigned the grant work of the professors previously assigned to Golubovskaya.

a. The University Breached Article 2.E

Based on our review of both the applicable job descriptions and Braden's testimony, we find that a major portion of the duties performed by Golubovskaya and Braden as administrative assistant IIIs was transferred to two administrative specialist positions. Further, because the department sought (and obtained) permission from the Dean's office to advertise for the administrative specialist position, we find the University clearly intended to transfer this work to non-bargaining unit positions. Thus, pursuant to Article 2.E, the University had a duty to notice CUE of the replacement of work. The University, however, failed to provide such notice. Accordingly, we find the University breached Article 2.E. In addition, we also find the University failed to provide notice of the change in policy. Therefore, the first and second elements of the prima facie case for an unlawful unilateral change have been met.

b. The University's Conduct Constitutes A Change In Policy Within Scope

As indicated above, the Board has held that a contract breach can support a unilateral change claim when the breaching party asserts that the contract authorizes its conduct. (*Hacienda.*) In addition, the Board has held that contract breaches may also support unilateral change claims when there is a change in policy that is generally applicable to future situations. (*State of California.*)

For the reasons discussed in connection with Case No. SA-CE-247-H (UC Davis Refractive Surgery), we find the University's breach in this instance also constitutes a change

in policy. In addition, we find the change in policy concerns a matter within the scope of representation. (*Alum Rock.*) Accordingly, the third and fourth elements of the prima facie case for an unlawful unilateral change have been met.

Because all four elements have been satisfied, we find the University committed an unlawful unilateral change when it transferred a majority of the work performed by Golubovskaya and Braden as administrative assistant IIIs to two administrative specialist positions without providing notice of the transfer to CUE.

3. Case No. SA-CE-246-H (Kimberly Pearson)

Pearson was a (__) assistant III in Mediaworks until her departure in early 2005. The position remained vacant for several months. During this time, Mitchell, a (__) assistant II in the IET business services sub-unit, noticed that the (___) assistant III position formerly held by Pearson was not posted. Instead, on April 6, 2005, Mitchell saw an electronic job posting for a financial and administrative analyst I position (a non-bargaining unit position) in Mediaworks. Mitchell reviewed the posted job description and concluded that it comprised the same duties as Pearson's position, but with the added duty of financial and statistical report generation. The vacant analyst I position was subsequently filled by Francis. According to observations made by Mitchell, Francis generates financial reports under the direction of the lead business services budget analyst, arranges meetings for the directors and managers, prepares entertainment expense reports, and processes purchase order requests.

a. The University Breached Article 2.E

Based on our review, we find that a major portion of the duties performed by Pearson as a (___) assistant III were transferred to a financial and administrative analyst I position. Further, because the department submitted the position for a classification determination and because the University actually classified the position as an analyst I and released it for

recruitment, we find the University clearly intended to transfer this work to a non-bargaining unit position. Thus, pursuant to Article 2.E, the University had a duty to notice CUE of the replacement of work. Since the University failed to provide such notice, we find the University breached Article 2.E. In addition, we also find the University failed to provide CUE with notice of the change in policy. Therefore, the first and second elements of the prima facie case for an unlawful unilateral change have been met.

b. The University's Conduct Constitutes A Change In Policy Within Scope

As indicated above, the Board has held that a contract breach can support a unilateral change claim when the breaching party asserts that the contract authorizes its conduct. (*Hacienda.*) In addition, the Board has held that contract breaches may also support unilateral change claims when there is a change in policy that is generally applicable to future situations. (*State of California.*)

For the reasons discussed in connection with Case No. SA-CE-247-H (UC Davis Refractive Surgery), we find the University's breach in this instance also constitutes a change in policy. In addition, we find the change in policy concerns a matter within the scope of representation. (*Alum Rock.*) Accordingly, the third and fourth elements of the prima facie case for an unlawful unilateral change have been met.

Because all four elements have been satisfied, we find the University committed an unlawful unilateral change when it transferred a majority of the work formerly performed by Pearson as a (___) assistant III to a financial and administrative analyst I position without providing notice of the transfer to CUE.

4. Case No. SF-CE-760-H (International House)

The charge in Case No. SF-CE-760-H alleged the University replaced a major portion of an administrative assistant II position (a bargaining unit position) with a student position (a non-bargaining unit position).

In this case, Olivares held a 50 percent time position as an administrative assistant II within the physical operations unit at the International House, a dormitory facility. In that capacity, Olivares manned the reception desk, prepared residential rooms for occupancy, managed parking, and performed other related support functions. Olivares left her position in April. The International House, however, was unable to recruit a replacement for Olivares because of a hiring freeze expected to last through the end of the fiscal year ending June 2005.

Students are typically hired by the International House at the end of the school year to conduct inventory of the vacated dormitory rooms. Henderson was hired in May 2005 to a 50 percent student position, first for a one-week period, to perform such inventory duties. In addition, she performed some of the duties previously performed by Olivares. The term of this position was subsequently extended to August 2005.

In July 2005, the University posted an opening for an administrative assistant II position. Henderson was interviewed and selected for the position. She assumed the status of a CUE bargaining unit member in August 2005 as an administrative assistant II.

a. The University Did Not Breach Article 2.E

Based on our review of the record, it appears that, while employed in the student position, Henderson did perform some duties beyond those normally associated with student employees. However, even though Henderson testified that she performed some parking permit issuance duties and provided some note-taking for meetings, the record does not establish that she performed more than 50 percent of the duties of an administrative assistant in

her capacity as a student employee. Accordingly, we find CUE failed to prove that the University replaced a major portion of the administrative assistant II position with a student position.

However, even if Henderson performed more than 50 percent of the duties of the administrative assistant II, the record does not support the notion that the University manifested an intent to replace a major portion of that position. To the contrary, the position clearly remained open during the pendency of the hiring freeze and was promptly filled when the freeze was lifted. Moreover, there was nothing in the record to suggest the University intended to reclassify the position, designate the position for exclusion from the bargaining unit or otherwise replace a major portion of a bargaining unit position with a position in a classification outside of the unit. To the contrary, the University filled the position with a administrative assistant II as soon as the hiring freeze was lifted. Accordingly, we find CUE failed to establish that the University breached Article 2.E. Because the first element of the prima facie case for an unlawful unilateral change has not been met, we find the University's conduct in connection with this case did not constitute an unlawful unilateral change.

D. Information Requests

An exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation. (*Stockton.*) PERB uses a liberal standard, similar to a discovery-type standard, to determine the relevance of requested information. (*Trustees of the California State University* (1987) PERB Decision No. 613-H (*Trustees*).) If the relevance of the requested information is rebutted by the employer, the exclusive representative must establish how the information is relevant to its representational responsibilities such as negotiations or contract administration. (*Trustees.*)

In defining the parameters of "necessary and relevant information" the Board has ruled that if the requested information pertains immediately to a mandatory subject of bargaining, it is presumptively relevant. (*State of California (Departments of Personnel Administration and Transportation*) (1997) PERB Decision No. 1227-S (*Transportation*).) Absent a valid defense, the failure to provide such information is a per se violation of the duty to bargain in good faith. (*Trustees.*) On the other hand, the Board has ruled that information not within scope is not presumptively relevant. (*Transportation.*) In such cases, absent the presumption, the burden falls on the charging party to demonstrate the information sought is relevant and necessary to its representational responsibilities. (*Ibid.*)

1. Both Requests Sought Necessary And Relevant Information

CUE made two information requests. The Levine request sought a job vacancy listing for all administrative specialist and assistant administrative analyst positions in 2003 and 2004 at the UC Berkeley campus. In addition, the request sought the classification history and job descriptions for each position (both before and after the reclassifications) if the position was reclassified while vacant. The Wilkinson request, a statewide request, sought the job titles and job descriptions for both the unit and corresponding non-unit positions in instances when the University reclassified or replaced a vacant position with a non-bargaining unit position. The request sought each such occurrence since March 12, 2002.

In both instances, the University claimed that CUE did not have the right to information regarding non-bargaining unit positions. The Board, however, has consistently held that both the removal of bargaining unit work and the preservation of unit work are mandatory subjects of bargaining. (*Regents of the University of California* (1989) PERB Decision No. 722-H; *State of California (Department of Personnel Administration)* (1987) PERB Decision No. 648.) Additionally, in cases alleging wrongful removal of bargaining unit work, the Board has held

that job descriptions and job requisition forms of non-bargaining unit employees are necessary and relevant to a union's right to protect the bargaining unit work of its own members. (*Regents of the University of California* (1998) PERB Decision No. 1255-H.)

Here, both requests sought information regarding the reclassification or removal of work from the CUE bargaining unit as well as job descriptions that were relevant to the work preservation issue. Based on the above cited authorities, the information requested was necessary and relevant to the discharge of CUE's duty of representation. Accordingly, absent a valid defense, we find the University was obligated to provide requested information.

2. The University Failed To Prove The Requests Were Unduly Burdensome

An employer's duty to provide relevant information, however, is not absolute. An employer may be excused from providing information if the information is unavailable or the request is unduly burdensome. (*Transportation.*) Similarly, the employer need not furnish information in a form more organized than its own records. (*Ibid.*) In addition, no violation will be found where the employer responds and the union does not reassert or clarify its request for information. (*Oakland Unified School District* (1983) PERB Decision No. 367.) The burden is on the employer to demonstrate its justification. (*Stockton.*)

The University's primary justification to withhold the information is the claim that with no current database system in place to collect the position histories of vacant bargaining unit positions, reconstruction of that history would impose an undue burden on its resources. It characterizes the obligation as one of searching institutional memory through individuals who do not currently have any responsibility to consider the analysis of positions which CUE seeks. According to the University, such a search would be an enormous task.

As indicated above, the University bears the burden to prove the request was unduly burdensome. (*Stockton.*) The fact that the information may not have been in the form that

would accommodate the interests of both the University and CUE does not automatically render CUE's request unduly burdensome. (*Chula Vista City School District* (1990) PERB Decision No. 834.)

In the instant case, except for its bare statements, the University failed to provide any evidence that providing the information would be unduly burdensome. The University's lack of a database with position control to track vacant positions is insufficient, standing alone, to justify its denials of the requests.

Contrary to the University's assertions, we find the record suggests there were manageable steps the University could have taken to comply with the requests. For instance, with regard to the first request, Levine testified that job vacancies are maintained electronically. Using that database, Levine stated the University could have generated a list of the jobs posted for recruitment in 2002 and 2003 and sought the requested information regarding those jobs from the individual departments with the reported vacancies. With regard to the second request, the University did not make any inquiries to the campuses or departments regarding the request. Indeed, Chester admitted that he did not take any steps to determine whether the individual campuses had the ability to provide the requested information.

Simply put, the University failed to put on sufficient evidence to demonstrate the requested information was unduly burdensome. In addition, the University failed to demonstrate it was not able to obtain the information through the exercise of reasonable diligence. Instead, from the outset of the requests, the University adopted the position that the information has no bearing on the enforcement of Article 2.E, and refused to provide any information. Accordingly, we find the University failed to establish the request was sufficiently burdensome to justify its refusal to provide the requested information.

3. Equally Available Information

In its appeal, the University claims it did not have a duty to provide information that was available to CUE on the human resources website. At the outset, the University asserts that CUE had access to current job vacancies on the human resources website. However, the record is unclear as to whether CUE had the same level of access to the information as the University. Moreover, even if the parties had equal access to the current vacancies listed on the website, the first request did not seek information about current vacancies and the second request did not seek information about job vacancies at all. Accordingly, the information to which CUE allegedly had equal access constituted, at most, a small portion of the requested information.

One of the purposes of information requests is to assist the parties in the enforcement of negotiated provisions within the MOU. In addition, such requests provide a mechanism for a requesting party to determine the accuracy of its own information. These purposes, however, are not furthered when both parties have equal access to the same information. Accordingly, we find that an employer is not obligated to provide requested information when the parties have equal access to the same information from the same source. In such cases, however, the employer must tell the requesting party the location of the information.

According to the University, its website was the sole source of some of the requested information. Thus, we find the University was not required to provide CUE with information relevant to its request if that information was available on the University's website, and CUE and the University had equal access to such information. However, the University's statement that the information was on its website was insufficient, standing alone, to discharge its duty. Instead, the University was required to inform CUE where on the website the information resided. With regard to information that was not equally available to both parties on the

University's website, we find the University failed to provide adequate justification to warrant its refusal to provide CUE the information it requested. In so doing, the University breached its duty to bargain in good faith and, therefore, violated section 3571(c) of the HEERA.

REMEDY

Pursuant to HEERA section 3563.3, PERB has the remedial 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: (1) committed an unlawful unilateral change in Case Nos. SA-CE-247-H, SF-CE-795-H and SA-CE-246-H when it unilaterally changed the policy requiring notice to CUE when it reclassifies, designates a position for exclusion from the unit, or replaces a major portion of a unit position with a position in a classification outside the unit; and (2) violated its duty to bargain in good faith in Case No. SF-CE-760-H when it refused to provide information consisting of vacancies in non-bargaining unit positions which may have assumed work of since-vacated bargaining unit positions and the history of those positions as described through job descriptions.

The traditional remedy in unilateral change cases is to order the University to rescind its policy and cease making unilateral changes in negotiable matters from that point forward. Thus, with regard to Case Nos. SA-CE-247-H, SF-CE-795-H and SA-CE-246-H, it is appropriate to order the University to rescind its decision to implement the unlawful policy change. It is also appropriate to order the restoration of bargaining unit positions vacated as a result of the unlawful transfer of a major portion of their duties to non-bargaining unit positions. While it is normally appropriate to order the employer to make all employees affected by its unlawful actions whole, we will not order a return to the status quo in cases

where an adverse effect on employees may result. (*Marin Community College District* (1995) PERB Decision No. 1092.) Therefore, to the extent that employees received the benefit of movement to a higher paying position, a make-whole remedy is not imposed.

In the case of the refusals to provide information, the appropriate remedy includes a cease-and-desist order and an order to provide the information upon request by CUE. (*Regents*; *Trustees*.)

It is also appropriate that the University be required to post a notice incorporating the terms of this order at the campuses, medical centers and laboratories where notices to employees are customarily posted. Posting of such a notice, signed by an authorized agent of the University, will inform employees that the University has acted in an unlawful manner, is being required to cease and desist from such activity, and will comply with the terms of the order. It effectuates the purpose of the HEERA that employees are informed of the resolution of this dispute and the University's readiness to comply with the ordered remedy.

CONCLUSION

Based on the foregoing, we find that Case No. SA-CE-251-H was not timely filed and, therefore, is time-barred by application of PERB's six month statute of limitations. In addition, we find the University committed an unlawful unilateral change in Case Nos. SA-CE-247-H, SF-CE-795-H and SA-CE-246-H, but did not commit an unlawful unilateral change in Case No. SF-CE-760-H. Last, we find the University unlawfully refused to provide information requested by CUE without adequate justification in Case No. SF-CE-760-H.

ORDER

Based upon the foregoing findings of fact, 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: (1) unilaterally implementing changes in the policy requiring notice to the Coalition of University Employees (CUE) when it reclassifies, designates a position for exclusion from the unit, or replaces a major portion of a unit position with a position in a classification outside the unit; and (2) refusing to provide information to CUE consisting of vacancies in non-bargaining unit positions which may have assumed work of since-vacated bargaining unit positions and the history of those positions as described through job descriptions.

The unfair practice charge and complaint in Case No. SA-CE-251-H is hereby DISMISSED. The unilateral change allegation in Case No. SF-CE-760-H is also DISMISSED.

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

A. CEASE AND DESIST FROM:

1. Unilaterally implementing changes in the policy requiring notice to CUE when it reclassifies, designates a position for exclusion from the unit, or replaces a major portion of a unit position with a position in a classification outside the unit.

2. Refusing to provide information to CUE regarding vacancies in non-bargaining unit positions which may have assumed work of since-vacated bargaining unit positions and the history of those positions as described through job descriptions.

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

1. Rescind the policy limiting notice required by Article 2, section E to those cases where a formal reclassification has commenced and adhere to the obligation to provide notice to CUE pursuant to the terms of the 2003-2004 memorandum of understanding. The University shall provide notice to CUE when it intends to replace more than 50 percent of

the work of a bargaining unit position with that of a non-bargaining unit position consistent with this decision.

2. Restore bargaining unit positions vacated or eliminated as a result of the unlawful transfer of a major portion of their duties to non-bargaining unit positions in Case Nos. SA-CE-247-H, SF-CE-795-H and SA-CE-246-H.

3. Upon request, provide lists of Berkeley campus administrative specialist and assistant administrative analyst positions posted for recruitment in the years 2003 and 2004, as well as the "classification history" for each of the positions including before and after job descriptions if a bargaining unit position became vacant (or was eliminated) as a result.

4. Upon request, provide the job titles of all positions filled since March 12, 2002 where the new position replaced, in large part, a clerical bargaining unit position, as well as the job descriptions for both positions.

5. With regard to the provision of information described in Sections B.3 and B.4, above, the University is not required to provide information that is contained on the University's website and is otherwise equally accessible to both parties or information the University is not able to obtain through the exercise of reasonable diligence. In circumstances involving information that is equally available to both parties on the University's website, the University shall provide CUE with the location where the information resides on the website.

6. Within ten (10) workdays of service of a final decision in this matter, post at all work locations at the campuses, medical centers and laboratories of the University of California where notices to employees are customarily posted, copies of the Notice attached hereto as the Appendix. The Notice must be signed by an authorized agent 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.

7. Within thirty (30) workdays of service of a final decision in this matter, notify the General Counsel of the Public Employment Relations Board, or her designee, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the charging parties.

Acting Chair Dowdin Calvillo and Member Neuwald joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case Nos. SA-CE-246-H, SA-CE-247-H, SA-CE-251-H, SF-CE-760-H, and SF-CE-795-H, consolidated for hearing and decision under the title *Coalition of University Employees v. Regents of the University of California*, in which the parties had the right to participate, it has been found that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a) and (c), by: (1) unilaterally implementing changes in the policy requiring notice to the Coalition of University Employees (CUE) when it reclassifies, designates a position for exclusion from the unit, or replaces a major portion of a unit position with a position in a classification outside the unit; and (2) refusing to provide information to CUE consisting of vacancies in non-bargaining unit positions which may have assumed work of since-vacated bargaining unit positions and the history of those positions as described through job descriptions.

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

A. CEASE AND DESIST FROM:

1. Unilaterally implementing changes in the policy requiring notice to CUE when it reclassifies, designates a position for exclusion from the unit, or replaces a major portion of a unit position with a position in a classification outside the unit.

2. Refusing to provide information to CUE consisting of vacancies in non-bargaining unit positions which may have assumed work of since-vacated bargaining unit positions and the history of those positions as described through job descriptions.

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

1. Rescind the policy limiting notice required by Article 2, section E to those cases where a formal reclassification has commenced and adhere to the obligation to provide notice to CUE pursuant to the terms of the 2003-2004 memorandum of understanding. The University shall provide notice to CUE when it intends to replace more than 50 percent of the work of a bargaining unit position with that of a non-bargaining unit position.

2. Restore bargaining unit positions vacated or eliminated as a result of the unlawful transfer of a major portion of their duties to non-bargaining unit positions in Case Nos. SA-CE-247-H, SF-CE-795-H, and SA-CE-246-H.

3. Upon request, provide lists of Berkeley campus administrative specialist and assistant administrative analyst positions posted for recruitment in the years 2003 and

2004, as well as the "classification history" for each of the positions including before and after job descriptions if a bargaining unit position became vacant (or was eliminated) as a result.

4. Upon request, provide the job titles of all positions filled since March 12, 2002 where the new position replaced, in large part, a clerical bargaining unit position, as well as the job descriptions for both positions.

5. With regard to the provision of information described in sections B.3 and B.4, above, the University is not required to provide information that is contained on the University's website and is otherwise equally accessible to both parties or information the University is not able to obtain through the exercise of reasonable diligence. In circumstances involving information that is equally available to both parties on the University's website, the University shall provide CUE with the location where the information resides on the website.

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.