

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



REGENTS OF THE UNIVERSITY OF
CALIFORNIA,

Employer,

and

UNIVERSITY PROFESSIONAL AND
TECHNICAL EMPLOYEES, CWA LOCAL 9119,

Exclusive Representative.

Case No. SF-UM-779-H

PERB Order No. Ad-453-H

September 29, 2017

Appearances: Renne Sloan Holtzman Sakai by Timothy G. Yeung and Erich W. Shiners, Attorneys, for Regents of the University of California; Leonard Carder by Andrew Ziaja, Attorney, for University Professional and Technical Employees, CWA Local 9119.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Regents of the University of California (University) from an administrative determination (attached) by PERB's Office of the General Counsel. Following its investigation, the Office of the General Counsel found that unrepresented employees in the newly-created classifications Systems Administrator 1, 2 and 3 share a community of interest with information technology classifications in the University's Technical (TX) Unit, which is exclusively represented by the University Professional and Technical Employees, CWA Local 9119 (UPTE). In accordance with this finding, on May 23, 2017, the Office of the General Counsel issued its administrative determination granting a unit modification petition filed by UPTE and ordering the University to add the newly-created Systems Administrator classifications to the TX unit.

On appeal, the University argues that employees in the Systems Administrator positions are “professional employees” within the meaning of the Higher Education Employer-Employee Relations Act (HEERA),¹ and that they do not share a community of interest with employees in the TX unit. It also contends that by repeatedly petitioning for unit modifications affecting less than ten percent of the existing units, UPTE is “engaging in piecemeal accretion” and that the Office of the General Counsel erred by ordering the Systems Administrator classifications be included in the TX unit without requiring UPTE to show proof of majority support. The University has also requested a stay of the administrative determination, pending resolution of this appeal.

UPTE contends the University’s appeal is meritless and opposes the University’s request to stay the Office of the General Counsel’s order for any period beyond 30 days. UPTE has also requested expedited consideration of this matter, arguing that, based on its experience of moving other non-represented classifications to exclusively-represented units, any delay in bringing the Systems Administrator employees into the TX unit will have irreparable consequences on the employees’ retirement benefits.

We have reviewed the entire case file and fully considered the issues raised by the University’s appeal and request for stay, and by UPTE’s response to the appeal and its opposition to the University’s request for stay, in light of applicable law. We conclude that the administrative determination was in accordance with PERB Regulations² and Board precedent, and we adopt the administrative determination as the decision of the Board itself, subject to the

¹ HEERA is codified at Government Code section 3560 et seq.

² PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

following discussion of issues raised by the University's appeal and request for stay. For reasons explained below, we also grant UPTE's request for expedited processing of this matter.

FACTUAL AND PROCEDURAL BACKGROUND

The TX unit is a systemwide bargaining unit of non-supervisory employees who provide technical support services for academic and scientific research throughout the University system and the Lawrence Berkeley National Laboratory. PERB certified UPTE as the exclusive representative of the TX Unit on December 1, 1994.

Since 2009, the University has been in the process of reviewing and revising job classifications of its unrepresented employees in an effort to establish systemwide job classifications that more accurately reflect the work performed at all locations in the University system. As of the filing of the present appeal, the University has yet to complete this process. One of the titles affected by this process is the Programmer Analyst series, which has been reclassified into 22 different job functions, including systems and infrastructure administration, which is the job function of the newly-created Systems Administrator 1, 2 and 3 positions at issue in this appeal.

On December 22, 2016, UPTE filed with PERB a unit modification petition requesting that the TX unit be modified to include the newly-created Systems Administrator 1, 2 and 3 classifications. As of December 22, 2016, when UPTE filed its unit modification petition, the TX unit included 4,059 employees, and the petitioned-for Systems Administrator 1, 2 and 3 classifications included 325 employees located at 12 of the University's campuses, laboratories and medical centers. At the five locations where the process has not yet been completed, the University estimated that between 172 and 190 employees would eventually be reclassified as Systems Administrators.

On February 28, 2017, the University filed its position statement regarding the petition, contesting placement of the System Administrator titles in the TX Unit, and on March 7, 2017, UPTE filed a reply to the University's position statement.

On March 30, 2017, the Office of the General Counsel issued an order to show cause (OSC) why UPTE's petition should not be granted.

On May 1, 2017, the University filed a response to the OSC, acknowledging that its position in this matter was contrary to the Board's decision in *Regents of the University of California* (2010) PERB Decision No. 2107-H (*Regents*), and indicating that, on appeal, it would ask the full Board to overturn that decision. On May 15, 2017, UPTE filed a reply.

On May 23, 2017, the Office of the General Counsel issued the attached administrative determination, which incorporated by reference the previous OSC, and an Order granting UPTE's petition to modify the TX unit to include the Systems Administrator 1, 2 and 3 classifications.

On June 7, 2017, the University filed the present appeal and request for stay, and on June 21, 2017, UPTE filed its response to the University's appeal. On June 23, 2017, UPTE also filed its opposition to the University's request for stay and a request for the Board to expedite processing of this case.

On July 6, 2017, the University requested permission to file a reply to UPTE's opposition to "clarify" and respond to issues raised in UPTE's opposition, which were not raised in the University's appeal.

DISCUSSION

The University's Appeal

PERB Regulation 32781 governs petitions for unit modification. Subdivision (e)(1) of the Regulation provides, in relevant part, that if a unit modification petition "requests the

addition of classifications or positions to an established unit, and the proposed addition would increase the size of the established unit by ten percent or more, the Board shall require proof of majority support of persons employed in the classifications or positions to be added.”

Primarily at issue in this appeal is whether, by implication, this language eliminates the Board’s discretion to require proof of majority support when a unit modification petition seeks to add classifications which would increase the size of the existing unit by less than ten percent.

As the University acknowledges, this is not a matter of first impression. In *Regents, supra*, PERB Decision No. 2107-H, a case involving the same parties, and many of the same issues, the Board concluded that the ten percent rule was added to the Regulation in 2006 “to eliminate ambiguity and add clarity regarding when majority proof of support is required for a petition that seeks to add unrepresented positions to a unit.” (*Id.* at p. 20, citing Cal. Reg. Notice Register 2005, No. 51-Z, p. 1773.) The *Regents* Board also concluded that, “[t]he necessary implication from the amended regulation, in light of PERB case law, is that increasing [a] unit by less than ten percent does not call into question the incumbent union’s majority support,” and therefore, that “PERB may not require proof of majority support when a unit modification petition seeks to add unrepresented positions that total less than ten percent of the established unit.” (*Id.* at p. 21.)

In reaching this conclusion, the *Regents* Board also considered and rejected the University’s request that PERB follow private-sector precedent under which the National Labor Relations Board (NLRB) has discretion to require proof of support such as a representation election, unless there is an “overwhelming community of interest” among the unrepresented employees who are to be added to an existing bargaining unit. Under the NLRB’s cases, an important consideration in demonstrating whether an “overwhelming

community of interest” exists is how long the unrepresented positions have been excluded from the unit. However, after reviewing the history of Regulation 32781 and associated case law, the *Regents* Board concluded that “the length of time a particular classification has been excluded from the bargaining unit is irrelevant to whether proof of support is required among the positions to be added to the unit pursuant to a unit modification petition.” (*Id.* at p. 23.) Finally, the *Regents* Board also considered and rejected the University’s contention that the principle of employee choice in representation matters necessarily requires proof of majority support in the context of a unit modification petition. (*Id.* at pp. 23-24.) The Board reasoned that, while HEERA “grant[s] higher education employees the right to choose which employee organization, if any, will represent them in their employment relations with the employer,” the statute also balances several competing policy objectives, and that the Legislature had made a deliberate choice to “subordinate[] this right of employee free choice to the overriding policy of avoiding proliferation of bargaining units.” (*Regents, supra*, PERB Decision No. 2107-H, pp. 23-24.)

While the present appeal raises several arguments for reversing the administrative determination, they are, in large measure, the same points previously considered and rejected in *Regents, supra*, PERB Decision No. 2107-H. Consequently, a threshold issue, and indeed the central issue, presented by the present appeal is whether we should overrule *Regents* and similar PERB cases holding that, unlike the private-sector accretion doctrine, PERB has no discretion to require proof of majority support when a unit modification petition seeks to add classifications amounting to less than ten percent of the existing unit. (*Regents, supra*, at pp. 19-25; *Orcutt Union Elementary School District* (2011) PERB Decision No. 2183 (*Orcutt*), adopting proposed decision at pp. 15-16; see also *County of Riverside* (2011) PERB Decision No. 2163-M, pp. 3-5; *County of Riverside* (2012) PERB Decision No. 2280-M, pp. 6-9.)

For several reasons, we decline the University's invitation and affirm *Regents* and similar cases as correctly applying the ten percent rule established by PERB Regulation 32781. We also conclude that, because UPTE's proposed unit modification would expand the TX unit by less than ten percent, as of the date the petition was filed, adding the Systems Administrator classifications does not violate the rights of higher education employees to freely choose a representative or to decline to do so, under HEERA.

PERB's Unit Modification Procedures are Inconsistent with the NLRB's Accretion Doctrine Because the Plain Language and Policies of HEERA and Regulation 32781 Differ from Those of the Private-Sector

Reiterating arguments made in the 2010 *Regents* case, in the present appeal the University again urges PERB to apply the ten percent rule only to the extent it is consistent with the private-sector accretion doctrine and NLRB case law, as set forth in *Laconia Shoe Co.* (1974) 215 NLRB 573, 576 and similar cases which consider whether a position has historically been excluded from the bargaining unit to which it is to be accreted. (See also *Union Electric Co.* (1975) 217 NLRB 666, 667.)

However, as noted in *Regents*, PERB Regulation 32781 (e)(1) makes no mention of requiring proof of support based upon any time period of exclusion from the unit, and unlike the NLRB, PERB has never considered the length of time the classification was excluded from the established unit in determining whether a showing of majority support is required. Instead, PERB has always looked to the number of employees in the classifications or positions to be added to the established unit. (*State of California, Department of Personnel Administration* (1989) PERB Decision No. 776-S.) Indeed, in *Regents, supra*, PERB Decision No. 2107-H, the Board expressly overruled *Trustees of the California State University* (2004) PERB Order No. Ad-342-H to the extent it implied that PERB had adopted the *Union Electric/Laconia Shoe* rule. (*Id.* at p. 22.)

Subsequent decisions of the Board have affirmed that, “PERB does not follow the NLRB’s approach to accretion” for a variety of statutory and policy reasons. (*County of Riverside, supra*, PERB Decision No. 2163-M, p. 3; *County of Riverside, supra*, PERB Decision No. 2280-M, p. 9.) As we recently explained, “PERB has generally construed its regulations governing representation matters narrowly and declined to look to private-sector authority for guidance when PERB’s regulations expressly address the policy concerns underlying the practice and procedure of private-sector labor boards, such as the NLRB or Agricultural Labor Relations Board.” (*Regents of the University of California* (2016) PERB Order No. Ad-434-H (*Regents (Teamsters)*), pp. 8-9, citing *City of Sacramento* (2014) PERB Decision No. 2354-M, pp. 3-7].) As the Board explained in the 2010 *Regents* decision, by adopting the ten percent rule PERB consciously rejected the NLRB’s accretion doctrine and, in particular, the reasoning of *Laconia Shoe* and similar cases. (*Regents, supra*, PERB Decision No. 2107-H, p. 22.)

Moreover, we agree with *Regents* that, by adopting a regulation providing that an increase in the size of a bargaining unit by ten percent or more through the addition of unrepresented positions creates a question concerning representation, the “necessary implication from the amended regulation, in light of PERB case law, is that increasing the unit by less than ten percent does not call into question the incumbent union’s majority support,” and that the agency is therefore without discretion to require a showing of support in such circumstances. (*Regents, supra*, PERB Decision No. 2107-H, p. 21.) Because an administrative agency must follow its own rules, even if we were inclined to modify or repeal the ten percent rule expressly provided for by Regulation 32781, which we are not, we could do so only through the rulemaking process with notice and opportunity for public comment, and not through decisional law. (*Regents (Teamsters), supra*, PERB Order No. Ad-434-H,

p. 9.) Because it appears to be contrary to the plain language of the Regulation and PERB case law, we, once again, decline the University's request to incorporate the rule from *Laconia Shoe* and its progeny into PERB's unit modification procedures.

Neither the Ten Percent Rule nor the Administrative Determination's Application of thereof Violate the Principle of Employee Choice Guaranteed by HEERA

The University correctly notes that employee choice is a bedrock principle of HEERA. (§§ 3560, 3565.) However, it ignores the fact that employee choice in matters of representation is conceptually distinct from questions of unit placement. While employees have the right to choose which employee organization, if any, will represent them in their employment relations, they have no right to choose the bargaining unit in which their classification or position is placed. (HEERA, § 3579; see also *City of Livermore* (2017) PERB Decision No. 2525-M, p. 14, fn. 6, citing *County of Riverside, supra*, PERB Decision No. 2280-M, p. 9.)

To the extent employee choice is implicated by UPTE's unit modification petition, HEERA recognizes that employee choice is not absolute, but must be balanced against the other policy objectives identified by the Legislature, including establishing "orderly and clearly defined procedures for meeting and conferring and the resolution of impasses." (HEERA, §§ 3560, subd. (e), 3561, subd. (a).) HEERA expressly mandates various circumstances in which employee rights to self-representation and to select representatives of their own choosing may be limited to accommodate the statutory scheme of collective bargaining through exclusive representation in appropriate units. (HEERA, §§ 3567, 3580.5; *Trustees of the California State University* (2014) PERB Decision No. 2384-H, p. 28 [employee choice "does not extend to organizations or individuals acting on behalf of the employer," emphasis omitted].) For example, as much as 49 percent of affected employees

may oppose the results of a representation election, but nonetheless be required to accept its results. The fact that less than ten percent of employees affected by a unit modification may also oppose representation by the petitioning organization is an imperfect, but not fatal, limitation on the bedrock principle of employee choice guaranteed by HEERA.

As explained in an early Board decision predating the ten percent rule at issue in this appeal, PERB's unit modification procedures provide a mechanism whereby positions or classifications may be, among other things, added to an established unit when a community of interest exists. (*El Monte Union High School District* (1982) PERB Decision No. 220 (*El Monte*), p. 9.) However, "[t]o require an election every time a new position or classification is at issue would have the inevitable consequence of destabilizing existing employer-employee relationships contrary to the Act's fundamental purpose, as well as being financially prohibitive and administratively cumbersome for the Board." (*Id.* at p. 10.) Because HEERA does not itself mandate an election where an established unit is modified, it is within the Board's discretion to adopt and interpret regulations defining under what circumstances an election is appropriate, or conversely, removing the Board's discretion to require an election under specified circumstances. (HEERA, §§ 3563, subd. (f), 3576; *Regents (Teamsters)*, *supra*, PERB Order No. Ad-434-H, p. 9.) The "inflexible" interpretation of the ten percent rule adopted in *Regents* and criticized by the University's appeal is consistent with the language and purpose of HEERA and PERB Regulation 32781. The ten percent rule accommodates the principle of employee choice and the policy of establishing "orderly and clearly defined procedures for meeting and conferring and the resolution of impasses" through exclusive representation in an appropriate unit by preventing a proliferation of bargaining units in higher education. (*Regents*, *supra*, PERB Decision No. 2107-H, pp. 23-24; see also *Los Angeles Unified School District* (1998) PERB Decision No. 1267 (*Los Angeles*), p. 5,

quoting from California Assembly Advisory Council, Final Report (March 15, 1973), “Aaron Commission Report”, p. 85.) Unless we are prepared to declare the principle of employee choice absolute, such that it may *never* be limited by other legislatively-declared purposes of HEERA, we must strike a balance somewhere, and the University has presented no persuasive evidence or argument that doing so at the ten percent threshold is any more or less arbitrary or objectionable than at some other given percentage of the existing unit. We therefore affirm *Regents* that the ten percent rule established by PERB Regulation 32781 is the appropriate procedure for changing unit determinations that carries out the provisions and effectuates the purposes and policies of HEERA. (HEERA, § 3563, subds. (e), (f); *Regents (Teamsters)*, *supra*, PERB Order No. Ad-434-H, p. 9.)

The University complains that UPTE has engaged in “piecemeal accretion” by strategically timing its unit modification petitions to avoid the ten percent threshold for requiring majority support. However, because we reject the University’s invitation to overrule *Regents*, which affirms the ten percent rule, the Board has no further role in questioning UPTE’s motive or its decision to avail itself of PERB’s unit modification procedures by accreting multiple groups of employees at different times.

It bears repeating that adding unrepresented classifications to an existing unit is primarily concerned with issues of *unit determination*, not *employee choice* (*Elk Grove Unified School District* (2004) PERB Decision No. 1688, adopting proposed decision at pp. 27-28), and that, while “employees [] get to pick whom they want to represent them, if anyone,” they “do not get to pick and choose which unit they will be in, at least not at the expense of the community of interest factors.” (*Salinas Union High School District* (2002) PERB Order No. Ad-315 (*Salinas*), p. 6.) While the employee choice of a representative, if any, is a legitimate concern of employees in the Systems Administrator classifications and one

guaranteed by HEERA, the placement of these classifications in an appropriate unit is not. (HEERA, §§ 3565, 3579; *Salinas, supra*, at p. 6; see also *County of Riverside, supra*, PERB Decision No. 2280-M, p. 9.)

The ten percent rule established by PERB Regulation 32781 recognizes that a question concerning representation *may* arise as a result of a proposed unit modification, if the number of employees affected is large enough, but that neither existing law nor sound public policy requires a showing of majority support every time an employee organization seeks to add unrepresented employees to an existing bargaining unit. (*Regents, supra*, PERB Decision No. 2107-H, pp. 20-21; *Salinas, supra*, PERB Order No. Ad-315, p. 6; *County of Riverside, supra*, PERB Decision No. 2163-M, p. 4.)

The ten percent rule also adequately accounts for those instances when a proposed unit modification raises a question concerning representation. Even if every employee in an accreted classification opposed representation by the petitioning employee organization, the ten percent rule ensures that, by themselves, the accreted employees would constitute less than ten percent of the unit, far fewer than the 49 percent of employees who may oppose representation by an employee organization but may, nevertheless, have to accept the results of a recognition election under the principle of exclusive representation *by majority*. (PERB Regs. 32734, subd. (c), 51340.) Alternatively, if the addition of previously unrepresented employees to an existing unit through a unit modification petition changes the prevailing sentiment among employees within the unit against representation by the incumbent, then the newly-accreted employees, along with other like-minded employees already in the unit, may gather signatures and file a decertification petition. (PERB Reg. 32770.)

A rule may be criticized as “inflexible” and “arbitrary” or praised as “bright line,” depending upon whether one approves of its application in particular circumstances. In

representation matters, PERB has generally favored establishing clear standards to assist the parties and Board staff in resolving questions of representation without unnecessary delay. (*County of Fresno* (2016) PERB Order No. Ad-433-M, pp. 7-8; *Capistrano Unified School District* (1994) PERB Order No. Ad-261, pp. 10-11; cf. *North Monterey County Unified School District* (1996) PERB Order No. Ad-274, pp. 10-11.) While the ten percent rule has the potential to limit employee choice to some extent, it also establishes a clear standard for determining when proof of majority support will be required. As such, it undeniably serves the purpose of “quickly resolv[ing] representational issues, avoid[ing] lengthy litigation, and promot[ing] stable employer-employee relations” to “effectuat[e] the purpose of the Act.” (*City of Livermore, supra*, PERB Decision No. 2525-M, pp. 21-22, and authorities cited therein.)

For the reasons set forth in the administrative determination and in Board decisional law, we conclude that “the doctrine of employee free choice does not compel PERB to require proof of majority support when a unit modification petition seeks to add unrepresented positions that total less than ten percent of the unit to which they would be added” (*Regents, supra*, PERB Decision No. 2107-H, p. 24), and that the administrative determination correctly applied the Regulation’s ten percent rule to permit UPTE’s proposed unit modification without requiring proof of support.

The Administrative Determination Appropriately Found that the Systems Administrator Classifications Shares a Community of Interest with TX Unit Employees

The material facts, including those underlying the administrative determination’s community of interest finding, are not in dispute, and the Office of the General Counsel appropriately determined that no formal evidentiary hearing was necessary to resolve this dispute. (*Children of Promise Preparatory Academy* (2013) PERB Order No. Ad-402

(*Children of Promise*), pp. 16-19.) Consistent with our precedent, the administrative determination also appropriately reasoned that the proposed addition sought by a unit modification petition *at the time the petition is filed* is determinative and “not whether the proposed addition grows or shrinks after the time the petition is filed.” (Admin. Determination, p. 5; see also *Orcutt, supra*, PERB Decision No. 2183, adopting proposed decision at p. 15, fn. 11, citing *Kings County Office of Education* (1990) PERB Decision No. 801, p. 11.) This is another instance where a bright-line rule is appropriate as a policy matter. (See *City of Livermore, supra*, PERB Decision No. 2525-M, proposed decision at pp. 21-22, citing *State of California* (1983) PERB Decision No. 348-S.)

We therefore reject the University’s arguments that, because it had not yet completed the process of reclassifying unrepresented employees and because it had projected to reclassify a significant number of additional employees as Systems Administrators, PERB should not apply the ten percent rule as of the date UPTE filed its unit modification petition.

As noted in the administrative determination, the duties of the Systems Administrator series, such as maintaining and analyzing computing systems, did not exist when the TX unit was established in 1982, but they overlap significantly with those of current TX unit employees, including Computer Resource Specialists, Technical Support Analysts and Business Technical Support Analysts and, as noted in the administrative determination, no party has identified another existing bargaining unit in which the Systems Administrator classifications would more appropriately belong.

Additionally, while employees in the Systems Administrator classification meet some of HEERA’s criteria for “professional employees,” as explained in the administrative determination, they do not meet the educational criterion of the statutory definition because they are not *required* to have an advanced degree to perform the job. The TX unit includes

nonprofessional employees whose work involves the use of independent judgment and the exercise of specialized skills, *often*, but not always or necessarily, gained through advanced education or training. (*Unit Determination for Technical Employees of the University of California* (1982) PERB Decision No. 241-H (*Unit Determination for Technical Employees*), p. 7.) Therefore, the administrative determination appropriately did not exclude the Systems Administrator classifications from the TX unit as “professional employees” within the meaning of HEERA section 3562, subdivision (o)(1), and the University’s contention that the Office of the General Counsel’s community of interest finding was in error is without merit.

The University’s Request to Stay the Administrative Determination and UPTE’s Request for an Expedited Decision from the Board

An appeal from a Board agent’s decision will not automatically prevent the Board from proceeding in a case. Parties seeking a stay of a Board agent’s decision, pending resolution of an appeal, must file a request for a stay with the administrative appeal. (PERB Reg. 32370.) The request for stay must include all pertinent facts and justification for the request. (*Ibid.*) The University has requested that implementation of the administrative determination and order to modify the TX unit be stayed, pending resolution of this appeal because, if the appeal is successful, implementation would be unnecessary. (*City of Carson* (2003) PERB Order No. Ad-323-M, p. 3.)

The University points out that it is currently in negotiations with UPTE for a successor agreement for the TX unit, which is set to expire on September 30, 2017. If the administrative determination and order are implemented immediately, the parties would either have to include the Systems Administrators in these negotiations or create a “side table” to address the effects of adding these new bargaining unit members, until the Board has rendered a decision on the present appeal. The University argues that by preserving the prior status quo, a stay would

minimize uncertainty and confusion among affected employees, particularly if the University prevails in this appeal and any negotiated changes to wages or benefits of Systems Administrators are implemented and then undone.

UPTE opposes a stay longer than 30 days on two grounds. First, it argues that any delay implementing the order to modify the TX unit will deprive Systems Administrators of the right to enjoy the benefits of union representation, which the Board has previously recognized is “immeasurable in dollar terms once it is delayed or lost.” (*City of Fremont* (2013) PERB Order No. IR-57-M, pp. 26-27, quoting *Small v. Avanti Health Systems* (9th Cir. 2011) 661 F.3d 1180, 1192.) Second, UPTE argues that because Systems Administrators stand to receive enhanced pension benefits negotiated by UPTE for employees in its units, any delay in implementation will irreparably harm their terms and conditions of employment. Based on its experience in other unit modification cases,³ UPTE contends that when previously unrepresented classifications are added to one of its units, the affected employees become eligible for the enhanced retirement benefits negotiated by UPTE on a prospective basis only. However, affected employees are assigned a “blended” retirement formula for their entire period of University service, which retains the less advantageous terms of the University’s retirement system for unrepresented employees for the period of service in any unrepresented classification.

We find it unnecessary to address the parties’ concerns about potential hardship or confusion that might result if the unit modification order is reversed because, as explained

³ As noted in the administrative determination, UPTE has previously accreted other groups of unrepresented employees to its units, including Technical Support Analyst positions, who were added to the TX unit in 2009 pursuant to a settlement of Case No. SF-UM-674-H, and approximately 317 Business Technical Support Analysts, who were added to the TX unit in November 2016. In 2010, UPTE also successfully petitioned to add certain case manager positions to the residual health care professional unit (HX unit), which was the subject of *Regents, supra*, PERB Decision No. 2107-H discussed above.

below, we have processed this case on an expedited basis, and because, as explained above, we have found no merit to the University's appeal. The University's request to stay the administrative determination and implementation of the order to modify the TX unit is therefore denied.

Next, we turn to UPTE's request for an expedited decision from the Board. Pursuant to PERB Regulations, the Board may expedite a unit modification case arising under PERB Regulation 32781. (PERB Reg. 32147, subd. (a).) Because the present dispute is a cause of great concern to the parties and affected employees, we have processed it on an expedited basis in effort to promote stable employer-employee relations, and thereby effectuate the policies and purpose of HEERA.

Board Consideration of the University's Reply

Because PERB Regulations neither expressly permit nor preclude the submission of reply briefs, consideration of such filings is discretionary with the Board. (HEERA, § 3563, subds. (k), (m); *City of Milpitas* (2015) PERB Decision No. 2443-M, pp. 13-14; *Los Angeles Unified School District/Los Angeles Community College District* (1984) PERB Decision No. 408 (*Los Angeles*), pp. 4-5.) *Los Angeles* holds that:

Where the response raises new issues, discusses new case law or formulates new defenses to allegations, the Board might well be persuaded to permit the complainant to submit a reply in order to aid the Board in its review of the underlying dispute.

(*Id.*, at pp. 4-5.) A reply may also be appropriate when it clarifies or narrows the issues or the scope of relief requested. (*City of San Luis Obispo* (2016) PERB Order No. Ad-444-M, pp. 4-5.) The University's reply raises several issues, only some of which are arguably new or aimed at clarifying issues raised by UPTE's opposition.

Clarification of Whether PERB Should Require Proof of Support

First, the reply seeks to “clarify” the University’s position on why the ten percent rule is triggered by the facts of this case. The reply argues that, in determining whether UPTE’s unit modification affects ten percent or more of the existing TX unit, PERB should consider not only the 325 employees who had been reclassified as Systems Administrators as of December 22, 2016, but also 40 employees at the Santa Barbara campus and 75 employees at the Los Angeles campus who had been “pre-mapped” to one of the Systems Administrator classifications.⁴ According to the reply, for unit determinations, PERB considers actual duties performed, rather than an employee’s job title, and because these pre-mapped employees were performing the duties of the classification when UPTE’s petition was filed, they must be included among the number of employees affected by the proposed modification of the TX unit. If, as the University suggests, these 115 “pre-mapped” employees at the Santa Barbara and Los Angeles campuses are added to the 325 reclassified Systems Administrators, then the number of employees affected by UPTE’s petition is 440, which is more than ten percent of the TX unit’s 4,059 employees.

However, this “clarification” is not new to the University’s reply. In fact, the University’s appeal similarly argued, at page 2, that “the University offered uncontradicted evidence that additional employees – enough to put the total well over the 405.9 needed to clear the ten percent threshold – were already performing the duties of the Systems Administrator classifications.” It elaborated on this point on page 5 of the appeal, by mentioning 40 employees at the Santa Barbara campus and 75 employees at the Los Angeles

⁴ According to the University, “pre-mapping” is the term to describe the preliminary process of reviewing an employee’s actual job duties to determine which Career Tracks classification best corresponds to his or her duties. The employee is then preliminarily “mapped” to the appropriate classification.

campus⁵ who, according to the University, had been “pre-mapped” to the Systems Administrator classifications, but whose reclassifications had not yet been implemented. The University’s appeal then argued, at pages 10-11, that, because these 115 employees at the Santa Barbara and Los Angeles campuses “have been premapped to the Systems Administrator classifications” and “were already doing the work of Systems Administrators when the petition was filed,” they “should have been counted by the Board agent when determining whether the ten percent threshold had been reached.” Because the point was already fully argued in the University’s appeal, there is no reason for the Board to consider the reply’s “clarification” of the same point.

As to the merits of the University’s argument, as presented in its appeal, there are other, more fundamental problems. In its February 28, 2017 position statement, the University indicated that 325 employees were working in Systems Administrator titles as of December 22, 2016, when UPTE filed its unit modification petition. The University’s position statement acknowledged that the 325 employees in the Systems Administrator classifications constituted less than ten percent of the approximately 4,059 employees comprising the TX unit as of December 22, 2016. The University’s position statement indicated that the Santa Barbara campus had “preliminarily mapped” an unidentified number of employees for reclassification to Systems Administrator positions, but that these reclassifications had not yet been implemented. The position statement also noted that other locations, including the UCLA

⁵ The University’s papers variously mention 75 or 77 employees at the Los Angeles campus. The discrepancy is due to two employees who were hired as Systems Administrators in 2017, i.e., after UPTE filed its petition. Pursuant to Board precedent, the two new hires have been excluded from consideration because they were not performing the duties of Systems Administrators when the petition was filed. (*Children of Promise, supra*, PERB Order No. Ad-402, pp. 14-15.)

Campus and UCLA Medical Center, “have not yet implemented Career Tracks or even mapped employees to these classifications at this time.” (Position Statement, p. 5.)

In its May 1, 2017 response to the Office of the General Counsel’s OSC, the University provided declarations by the University’s Santa Barbara Compensation Manager, Kathy Moore, and Director of Compensation Programs and Strategies, Terry Weinstein, which revealed that the pre-mapping process was based on “the most recent job description on file” and not necessarily on the duties actually performed by the incumbent. Indeed, both the Moore and Weinstein declarations indicated that the affected employees were not made aware of the pre-mapping process or its results, from which we may infer that the process did not involve desk audits, interviews with affected employees, or any other means of determining the employees’ actual job duties, to the extent such duties differed from their job descriptions. Moreover, the University’s response and the supporting declarations indicated that the names of affected employees and any other identifying information had been redacted from the job descriptions of the 115 employees at the Santa Barbara and Los Angeles campuses because “it is only appropriate that the employees hear this information from the University before their names are released to UPTE and/or PERB.”

Based on the Moore and Weinstein declarations, the University’s response to the order to show cause asserted that, as of May 1, 2017 the pre-mapping process at the Los Angeles campus had progressed far enough that the University could now “confidently declare” that, *approximately five months earlier* when the petition was filed, the total number of employees actually performing Systems Administrator work exceeded ten percent of number of employees in the TX unit. The University’s response to the order to show cause also argued that “there can be no dispute that PERB must take into account the employees newly identified as performing the work of a Systems Administrator 1, 2, or 3,” because “[t]hese employees

existed as of the date of the filing of this petition and perform the same work as employees already mapped into the Systems Administrator 1, 2, or 3 classifications.” We disagree.

Under our precedents, “Proof of support is determined by PERB when a petition is filed and an employer provides a list of employees that comprise the petitioned-for unit.” (*Children of Promise, supra*, PERB Order No. Ad-402, p. 14.) Although the present case involves a proposed modification to an already-existing unit, the underlying rationale remains the same. In unit determination proceedings, the employer is in the unique position of having sole access to the pertinent information including which employees perform what duties and under which job titles. Where the employer is unable or unwilling to produce complete and accurate lists of employees in a proposed unit at the time, it is impossible for PERB to verify a showing of support or, as in the present case, whether such a showing is required. (*Regents of the University of California* (1980) PERB Order No. Ad-100-H, pp. 5-6.) In such circumstances, the Board agent conducting the investigation may make reasonable assumptions about the proposed unit or unit modification, including that the number of affected employees estimated by the party of interest applicant is accurate. (*Ibid.*)

Here, based on information provided by the University, UPTE’s unit modification petition estimated that 325 employees had been reclassified to the Systems Administrator classification as of December 22, 2016. The University did not dispute this number and, in fact, acknowledged that 325 employees did not reach the ten percent threshold necessary to require proof of support for the proposed modification. Although the University estimated that additional employees would be added to the classification at a later time, or that additional employees were already performing the Systems Administrator duties as of December 22, 2016, it was unable to provide PERB and UPTE a complete and accurate list at the time the Office of the General Counsel made its administrative determination. Under these

circumstances, the Office of the General Counsel correctly relied on the estimated figure of 325 affected employees, as stated in UPTE's petition.

Propriety of PERB Case Law Disfavoring a Proliferation of Bargaining Units

The University's reply also seeks to rebut the argument, ostensibly made in UPTE's opposition, that requiring proof of majority support among Systems Administrators would result in a proliferation of bargaining units in this case. However, UPTE's opposition does not appear to argue this point, or indeed to argue that requiring proof of majority support in this case would have any effect one way or the other on the number of units in the University system. We therefore need not consider this portion of the University's reply either, since it does not respond to new arguments or authorities raised in UPTE's opposition.

UPTE's opposition does argue, more generally, that the exercise of employee choice may be curtailed to prevent a proliferation of bargaining units in the University system, and that *Regents* and other PERB decisions appropriately seek to promote this policy of HEERA. In response to this point, the University's reply contends that *Regents* and other PERB decisions have erroneously relied on the Aaron Commission Report, which recommended that California public-sector employees generally be grouped in the largest reasonable units. (*Los Angeles Unified School District* (1998) PERB Decision No. 1267, p. 5, citing Aaron Commission Report, pp. 84-85.) The University contends that, while the Aaron Commission undoubtedly made this recommendation, HEERA contains no provisions indicating that the Legislature ever adopted or agreed with this particular recommendation. According to the University's reply, because of its reliance on the Aaron Commission Report, "one must question whether *Los Angeles* was correct."

Here, the University's reply does indeed respond to points and authority raised for the first time in UPTE's opposition, and we therefore consider this argument. However, for various reasons, we do not find it persuasive. While HEERA does not expressly require that unit determinations result in the "largest reasonable unit," as recommended by the Aaron Commission, the University understates the extent to which the Legislature was concerned with preventing the fragmentation of employee groups and the proliferation of units. Several of the factors PERB must consider when making unit determinations under HEERA directly relate to this concern. This includes: the effect of a proposed unit on efficient operations and its compatibility with the employer's mission (§ 3579, subds. (a)(3)); the number of employees and classifications in a proposed unit, and its effect on the employer's operations, the employees' right to effective representation, and the meet and confer relationship (*id.*, subd. (a)(4)); and the "impact on the meet and confer relationship created by fragmentation of employee groups or any proliferation of units among the employees of the employer" (*id.*, subd. (a)(5)).

Thus, while HEERA does not repeat the Aaron Commission's recommendation verbatim, it plainly evidences the Legislature's concern with preventing the fragmentation of employee groups and the proliferation of bargaining units and, accordingly, it left PERB considerable discretion in how best to balance this policy objective with others embodied in the statutory community of interest factors. (§§ 3563, subd. (f), 3576.) Regardless of whether it was formally adopted or expressly quoted by the Legislature, PERB's reliance on the Aaron Commission Report for guidance is a reasonable construction of the statute and well within the discretion afforded by HEERA.

Another problem with the University's argument here is that, ultimately, it proves too much. Since its earliest days, PERB decisions interpreting both HEERA and other PERB-

administered statutes have repeatedly sought to avoid fragmentation of employee groups and unnecessary proliferation of units. (*Unit Determination for the State of California* (1979)

PERB Decision No. 110-S, p. 6; *El Monte, supra*, PERB Decision No. 220, pp. 9-10.))

Whether the Legislature formally adopted the exact language of the Aaron Commission Report is, at this late date, less significant than the fact that a concern with avoiding fragmentation of employee groups and a proliferation of bargaining units has featured prominently in PERB's unit determination decisions for decades, including decisions establishing the TX and other statewide units throughout the University system. (*Unit Determination for Technical Employees, supra*, PERB Dec. No. 241-H, pp. 5-6, 10.)

Assuming, purely for the sake of argument, that PERB has incorrectly relied on the Aaron Commission's Report because the Legislature never expressly adopted or agreed with its recommendation against a proliferation of units, it seems remarkable that, in the ensuing thirty-five year period, the Legislature has never again spoken on the subject or otherwise indicated that PERB's unit determinations at the University of California were made in error. Nor do we find any persuasive evidence or policy reason in the University's appeal or reply to reverse the administrative determination in this case, or to upset decades of Board law on this subject.

Reclassification of Computer Resource Specialist at the Davis Campus

The remainder of the University's reply is concerned with refuting UPTE's assertion that the Davis campus has reclassified a Computer Resource Specialist position to a Systems Administrator position, and the Office of the General Counsel's finding, as stated in its order to show cause, that this reclassification demonstrates that the duties of the two positions were comparable. (Order to Show Cause, p. 3; see also UPTE Opposition, pp. 39-42.) According to the University's reply, the facts of the Davis reclassification do not support UPTE's contention that the work of a Computer Resource Specialist is similar to that of a Systems Administrator.

Although mentioned in the order to show cause, the discussion of community of interest factors in the administrative determination did not reference the single reclassification at the Davis campus. It relied instead on the more general finding that Systems Administrators “perform work related to computer systems, as do Computer Resource Specialists” and various other job titles in the TX unit. (Admin. Determination, p. 6.) Because it would not alter either the determination as to whether proof of support was required, or the community of interest analysis, we find it unnecessary to consider this argument further.

Correspondence from Affected Employees

After the filings were complete and this matter was submitted to the Board for consideration, several affected employees contacted the Board to express their concerns and disagreement with the administrative determination that proof of majority support is not required before accreting the Systems Administrator classifications to the TX unit.

Although PERB has previously considered employees preferences as one factor in unit determination cases (*State of California (Department of Personnel Administration)* (1993) PERB Decision No. 1025-S), as suggested already, it has rejected the idea that employee free choice will supersede either PERB’s unit determination authority or alter its application of the community of interest and other statutory criteria. (*Orcutt, supra*, PERB Decision No. 2183, proposed decision at p. 24; *Los Angeles, supra*, PERB Decision No. 1267, pp. 3-6.)

Accordingly, although the Board has reviewed the correspondence from affected employees, we have determined that it does not affect the issues on appeal or the Board’s decision to adopt the administrative determination.

ORDER

For the above reasons and based upon the entire record in this case, we hereby DENY the Regents of the University of California's appeal and AFFIRM the Office of the General Counsel's administrative determination granting the unit modification petition of University Professional and Technical Employees, CWA Local 9119 to add the Systems Administrators 1, 2 and 3 positions to the Technical (TX) Unit.

Chair Gregersen and Member Winslow joined in this decision.

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Re: University of California
Case No. SF-UM-779-H

ADMINISTRATIVE DETERMINATION

Dear Interested Parties:

The above-referenced petition for unit modification was filed with the Public Employment Relations Board (PERB or Board) on December 22, 2016. The University Professional and Technical Employees, CWA Local 9119 (UPTE) seeks to modify the Technical Unit (TX unit) of employees of the University of California (UC). Pursuant to the Higher Education Employer-Employee Relations Act (HEERA)¹ UPTE seeks to add to the TX unit the classifications of Systems Administrator I, II, and III (SysAdmins).

On February 28, 2017, UC filed a verified position statement and supporting declarations. On March 7, 2017, UPTE filed a verified position statement in response.

On March 30, 2017, PERB issued an Order to Show Cause (OSC) as to why the petition should not be granted. On May 1, 2017, UC provided a verified second position statement and

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

accompanying declarations. On May 15, 2017, UPTE filed a verified further position statement in response. All of these materials have been reviewed during this investigation.

Summary of Facts

The following factual allegations supplement those summarized in the OSC.

1. Career Tracks and Number of SysAdmins

On November 7, 2016, PERB issued an administrative determination and unit modification order in case number SF-UM-765-H to include the of classifications of Business Technical Support Analysts (BTSAs) in the TX unit. This action added approximately 317 employees to the TX unit, which was 9.2% of the employees then in the unit. Proof of support was not required for this accretion.

As of the day the instant petition was filed, December 22, 2016, according to UC, there were 4,059 employees in the TX unit, and there were 325 employees in the classification of SysAdmin. However, UC alleges, it was at that time in the midst of a lengthy process of converting additional employees into SysAdmin positions.

Under this process, called Career Tracks, UC was creating new classifications—including the SysAdmin positions—to better describe the actual work of the employee, as opposed to using a general classification term for all employees, such as Programmer Analyst. UC examined the positions at each campus or medical center and “mapped” the employees into the different classifications. Once the mapping process was completed, UC reclassified some employees into their new classifications. The employees generally continued to perform the same work as before, only now with a different job title.

At the time the petition was filed, UC had completed the process of mapping and reclassifying employees at 12 of its campus locations. However, it had not yet implemented Career Tracks or completed the mapping process at five locations: UC Santa Barbara campus, UC Los Angeles (UCLA) campus, UCLA Medical Center, UC Irvine campus, and UC Irvine Medical Center.

In September 2016 (before the petition was filed), UC had performed a “pre-mapping” process at UC Santa Barbara and had identified 40 employees who were performing the work of SysAdmins. However, UC Santa Barbara had not yet implemented Career Tracks and so these employees were not reclassified as SysAdmins as of the date the petition was filed.

After the petition was filed, UC began pre-mapping at the UCLA campus. It has identified 77 employees who are performing the work of one of the SysAdmin levels. It appears that UC expects to reclassify these 77 employees as SysAdmins but, as with the employees at UC Santa Barbara, they have not been reclassified yet.

For the other three locations—UCLA Medical Center, UC Irvine campus, and the UC Irvine Medical Center—UC has begun the pre-mapping process and expects it will be completed

within five months. For these locations, UC has made some estimates regarding how many employees it expects to reclassify as SysAdmins. UC generated these estimates based upon how many employees it had already reclassified at the other locations. UC expects to reclassify between 19 and 36 employees at UCLA Medical Center, between 29 and 43 employees at UC Irvine campus, and between 4 and 8 employees at the UC Irvine Medical Center.

In total, with respect to the five campuses where the process has not been completed, UC estimates that between 172 and 190 employees will ultimately be reclassified as SysAdmins.

2. Other Bargaining Units

In May 2003, UPTE filed with PERB a petition for certification of a proposed bargaining unit² called the Operations Support Professional Unit. This proposed unit would have included the positions of Programmer/Analyst and Network Engineer. PERB conducted a mail ballot election, with the result that a majority of employees selected no representation. Accordingly, UPTE was not certified as exclusive representative and this bargaining unit never came into existence. It is not currently listed as a bargaining unit on UC's website.³

UC provides printouts from websites that UPTE apparently used in its 2003 organizing efforts. These documents are not authenticated or dated. There is a seven-page list of "administrative professional job titles at UC" which includes Systems Administrator 2 and Systems Administrator 3. This list is not dated or authenticated. It appears from one of the printouts that may have been issued in 2016 or 2017 that UPTE is continuing its efforts to organize administrative professionals. A printout dated 2012-2013 states that those in the unit of administrative professionals are "currently organizing," and that many have joined UPTE.

Discussion

PERB Regulation 32786(a)⁴ provides:

Upon receipt of a petition for unit modification, the Board shall investigate and, where appropriate, conduct a hearing and/or a representation election, or take such other action as deemed necessary in order to decide the questions raised by the petition and to ensure full compliance with the provisions of the law.

² This proposed unit was not created or recognized in the systemwide unit determination cases for the UC bargaining units, which were mostly made in 1982 and 1983.

³ <http://ucnet.universityofcalifornia.edu/labor/bargaining-units/>.

⁴ PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the PERB Regulations may be found at www.perb.ca.gov.

The Board has held that there is “no guarantee or entitlement to an evidentiary hearing in a representation proceeding.” (*Children of Promise Preparatory Academy* (2013) PERB Order No. Ad-402.) Rather, after completing an investigation, the Board agent may “determine that sufficient evidence has been submitted to raise a material issue that necessitates an evidentiary hearing,” or, alternatively, “that no material issue of fact exists and thus that a hearing is unnecessary.” (*Ibid.*)

A Board agent may use an order to show cause to investigate whether a representation petition raises a material factual dispute that must be resolved through an evidentiary hearing. (*Children of Promise Preparatory Academy, supra*, PERB Order No. Ad-402 at pp. 17-18.) If none is raised, then an administrative determination is appropriate. (*Ibid.*)

1. Regulatory Basis for Unit Modification Petition and Proof of Support

As discussed in the OSC, PERB Regulation 32781(e)(1) states the following:

If [a unit modification] petition requests the addition of classifications or positions to an established unit, and the proposed addition would increase the size of the established unit by ten percent or more, the Board shall require proof of majority support of persons employed in the classifications or positions to be added.

PERB Regulations indicate that the date a petition is filed is determinative in most proof of support issues. PERB Regulation 32700 states that proof of support is valid if it is “obtained within one year immediately prior to the date the petition or amendment requiring employee support is filed[.]” (PERB Regulation 32700(c) [emphasis added].) Similarly, PERB Regulation 32784 states the following:

If proof of support has been filed pursuant to section 32781(e)(1) or (2), the employer shall, within 20 days of the date the support was filed, file with the regional office an alphabetical list, including job titles or classifications, of all employees proposed to be added to the unit as of the last date of the payroll period immediately preceding the date the petition was filed with PERB, unless otherwise directed by the Board.

(PERB Regulation 32784(a) [emphasis added].) Thus, PERB determines whether proof of support is sufficient based on the number and identity of employees employed at the time a petition is filed. In sum, the regulations require PERB to look to the date a petition is filed to decide proof of support issues.

In *Regents of the University of California* (2010) PERB Decision No. 2107-H, the Board, after examining the history of PERB Regulation 32781(e)(1), held that “PERB may not require proof of majority support when a unit modification petition seeks to add unrepresented positions that total less than ten percent of the established unit.” (*Regents of the University of*

California, supra, PERB Decision No. 2107-H.) This holding emphasizes that it is the proposed addition sought by the petition, at the time of the petition, that matters – not whether the proposed addition grows or shrinks after the time the petition is filed. Thus, the Board views the date a petition is filed as the date that determines whether proof of majority of support is needed. (See also *Children of Promise Preparatory Academy, supra*, PERB Order No. Ad-402 [PERB makes unit determination decisions based on a review of conditions at the time a petition is filed.]])

As of the date the petition was filed, there were 4,059 employees in the bargaining unit. Therefore, if more than 405 employees are added to the unit, proof of support is required. It is undisputed that, as of the date the petition was filed, there were 325 SysAdmin positions. This is less than the threshold amount and therefore proof of support cannot be required.

UC contends that between 172 and 190 employees will be reclassified as SysAdmins in the near future. If so, this would bring the total number of SysAdmins to between 497 and 515 employees, and exceed the 10% threshold. Proof of support would be required under this scenario. However, because the instant petition was filed on December 22, 2016, PERB must determine how many SysAdmin employees were employed on that day. That number is 325, less than 10% of the bargaining unit, and proof of support is not required.

As discussed in *Regents of the University of California* (2010) PERB Decision No. 2107-H, the Board agent does not have discretion to require proof of support if the 10% threshold is not met. Accordingly, proof of support cannot be required for this petition even though the number of individuals employed in the SysAdmin positions will likely increase in coming months.

2. Exclusion of Professional Employees

As discussed in the OSC, “professional” employees are defined by section 3562(o)(1). Professional employees meeting this definition may properly be excluded from units of non-professional employees. The SysAdmins do not meet the definition of professional in section 3562(o)(1) because there is no showing that they “possess advanced knowledge usually acquired by a specialized or advanced degree, as opposed to a general academic education.” Therefore, exclusion from the unit on this basis is not warranted.

3. There is Not an Administrative Professionals Unit at UC

Where PERB has determined that a classification belongs in a particular bargaining unit, there is a rebuttable presumption that the classification should not be removed to another bargaining unit: “PERB’s placement is presumptively valid.” (*Trustees of the California State University* (2007) PERB Decision No. 1881-H, p. 4.) This rebuttable presumption applies when a party seeks to move an existing classification to a different bargaining unit, or to separate a bargaining unit. (*Id.*, at p. 9.) However, it is not properly applied when placing a new classification into a unit because there is no presumption to rebut. (*Ibid.*)

The rebuttable presumption is not applicable to the instant case. Here, PERB made no determination to create an Operations Support Professional Unit or Administrative Professionals Unit. The Operations Support Professional Unit was a proposed unit that was agreed to by UC and UPTE for the purposes of a representation election. The election did not result in the selection of an exclusive representative, and the proposed unit never became an actual unit. Although it appears UPTE has made efforts over the years to organize a new Administrative Professionals Unit, that unit also has not been created by PERB or recognized as an existing unit. Moreover, the SysAdmin position is not an existing classification; it is a new position. Accordingly, the presumption discussed above does not apply.

4. Community of Interest Factors

A community of interest analysis is applied in cases where the appropriateness of a bargaining unit is an issue, for example, if a party contends that a classification is more appropriately placed in one of two different bargaining units. (*Hemet Unified School District* (1990) PERB Decision No. 820.) In determining units, PERB need not seek to determine the most appropriate unit. (*Antioch Unified School District* (1977) EERB Decision No. 37.)

Section 3579 identifies the following community of interest factors: (1) internal and occupational community of interest among employees, including functionally related services, work toward common goals, history of employee representation, extent to which the employees belong to the same employee organization, extent of common skills, working conditions, job duties, or similar educational or training requirements, and the extent of common supervision; (2) the effect that the projected unit will have on the meet and confer relationship, including factors such as work location, size of unit, the relationship of the unit to organizational patterns of the employer, and the effect of dividing a classification schematic among two or more units; (3) the effect of the proposed unit on efficient operations of the employer and its ability to serve students and the public; (4) the number of employees and classifications in a proposed unit, its effect on the operations of the employer, the employees right to effective representation, and on the meet and confer relationship; and (5) the impact created by fragmentation of employees groups or proliferation of units.

Although UC contends that SysAdmins should be part of the Administrative Professionals unit, as noted above, this unit does not presently exist. Therefore, PERB cannot determine that SysAdmins are more appropriately placed in this different bargaining unit. The only existing unit that has been offered up as an appropriate unit is the TX unit.

As noted in the OSC, the community of interest factors point to inclusion of the SysAdmins in the TX unit. SysAdmins perform work related to computer systems, as do Computer Resource Specialists (CRSs), Technical Support Analysts (TSAs) and BTSAs, all positions currently within the TX unit. UC accurately points out that employees who work with computers perform a vast array of tasks that are not interchangeable or alike. SysAdmins perform higher-level work of design and planning of information systems, whereas the CRSs, TSAs and BTSAs perform different types of work. However, these employees appear to perform functionally related services and work towards common goals. UPTE alleges that educational and training requirements for SysAdmins are in line with other employees in the TX unit,

focusing on work experience as opposed to specific educational requirements. UC alleges that while some SysAdmins have common supervision with BTSAs and CRSs, most have separate supervision, so this factor may not weigh strongly in favor of inclusion. However, SysAdmins work in the same departments as do CRSs. Including the SysAdmins in the TX unit, as opposed to creating a new separate unit, would also avoid the proliferation of units. No party has alleged that inclusion would have a negative impact on the meet and confer relationship or the operations of the employer, or that it would be inappropriate based on the other factors identified by section 3579.

Accordingly, it is determined that the SysAdmins are appropriately placed in the TX bargaining unit. A unit modification order will issue.

Right of Appeal

An appeal of this decision to the Board itself may be made within ten (10) calendar days following the date of service of this decision. (Cal. Code Regs., tit. 8, § 32360.) To be timely filed, the original and five (5) copies of any appeal must be filed with the Board itself at the following address:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The appeal must state the specific issues of procedure, fact, law or rationale that are appealed and must state the grounds for the appeal (Cal. Code Regs., tit. 8, § 32360, subd. (c)). An appeal will not automatically prevent the Board from proceeding in this case. A party seeking a stay of any activity may file such a request with its administrative appeal, and must include all pertinent facts and justifications for the request (Cal. Code Regs., tit. 8, § 32370).

If a timely appeal is filed, any other party may file with the Board an original and five (5) copies of a response to the appeal within ten (10) calendar days following the date of service of the appeal (Cal. Code Regs., tit. 8, § 32375).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding and on the San Francisco Regional Office. A "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see Cal. Code Regs., tit. 8, § 32140 for the required contents). The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Sincerely,

Laura Z. Davis
Supervising Regional Attorney

LD

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Re: Case No. SF-UM-779-H
University of California
ORDER TO SHOW CAUSE

Dear Interested Parties:

The above-referenced petition for unit modification was filed with the Public Employment Relations Board (PERB or Board) on December 22, 2016. The University Professional and Technical Employees, CWA Local 9119 (UPTE) seeks to modify the Technical Unit (TX unit) of employees of the University of California (UC). Pursuant to the Higher Education Employer-Employee Relations Act (HEERA)¹ UPTE seeks to add to the unit the classifications of Systems Administrator I, II, and III.

Factual Summary—SysAdmin Positions

In the last several years, UC has been reviewing job classifications of its non-represented employees as part of a program called Career Tracks. The purpose of Career Tracks is to align written job classifications with the actual work performed by the employees. As part of this program, non-represented employees may be reassigned to new job titles that better describe the specific work they perform.

As part of the Career Tracks program, UC created three new job classifications: System Administrator I, II, and III (SysAdmins). Most incumbents in these positions were previously in the classification of Programmer Analyst. However, the work they perform remains the same.

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

According to UC, the TX unit includes 4,059 employees. UPTE seeks to add all the SysAdmins to the TX unit. According to UC, there are 325 SysAdmins.²

The job summary for the SysAdmins states:

Involves serving as the technical administrator for hardware, operating systems, and network management. Plans and coordinates the installation, configuration and testing of hardware and software components. Work may involve central or departmental computer systems and networks. Includes web systems administration.

UC's job description matrix places the SysAdmins in the Information Technology job family. UC categorizes positions eligible for Career Tracks as either Operational and Technical, Professional, or Supervisory and Management. It has categorized the SysAdmins as "professional."

UPTE provides job descriptions for all three levels of the SysAdmin positions. According to UC, these job descriptions were developed as part of the "Career Compass" program, which was a precursor to Career Tracks, and was implemented only at UC Berkeley. However, UC states that the information provided by UPTE is "not materially different" from later documentation developed through Career Tracks. Thus, it is assumed herein that the job descriptions accurately describe the educational background required for the position. The job descriptions state that SysAdmins must have a "Bachelors degree in related area and/or equivalent experience/training."

Factual Summary—Representation History

PERB configured the TX unit in 1982, in *Unit Determination for Technical Employees of the University of California* (1982) PERB Decision No. 241-H (*Unit Determination*). This decision established three units of technical employees, including the TX unit. In 1994, UPTE became the exclusive representative of the TX unit.

The *Unit Determination* decision describes employees in the TX unit as follows:

... nonprofessional employees whose work involves the use of independent judgment and the exercise of specialized skills, often gained through advanced education or training.

(*Unit Determination*, *supra*, PERB Decision No. 241-H at p. 7.)

A classification in the TX unit is Computer Resource Specialist (CRS), Level 1 and Level 2. Job duties included in this position are: set up and maintain computer systems, manage

² Both of these numbers are as of the date the petition was filed, December 22, 2016.

computer applications, convert files, and supervise the operation of a local area network. Some of these job duties overlap with the job duties of the new SysAdmin classifications. And, in December 2016, UC Davis planned to reclassify a CRS employee as a SysAdmin, thus showing that the job duties were comparable.

In 2007, UC created a series of Technical Support Analyst (TSA) positions. In April 2009, UPTE and UC settled case number SF-UM-674-H by modifying the TX unit to include the positions TSA I, II, and III. TSAs perform job duties involving computing systems and network support, primarily in a centralized helpdesk environment.

In 2015, UC created a series of Business Technical Support Analysts (BTSAs). These positions, similar to TSAs, also performed computing and network support in a helpdesk environment. UPTE filed a petition for unit modification, case number SF-UM-765-H. On November 7, 2016, PERB issued an administrative determination and unit modification order to include the BTSA positions in the TX unit.

Applicable Statutes and Regulations

PERB Regulation 32781(a)(1)³ provides that an employee organization may petition for unit modification to add unrepresented classifications or positions to the unit. PERB Regulation 32781(b) and (c) allow the employee organization (or employer) to petition for unit modification in order to make technical changes to clarify or update the unit description, and to resolve a dispute as to unit placement of a new classification or position.

PERB Regulation 32781(e)(1) provides:

If the petition requests the addition of classifications or positions to an established unit, and the proposed addition would increase the size of the established unit by ten percent or more, the Board shall require proof of majority support of persons employed in the classifications or positions to be added.

Section 3562 (o)(1) defines “professional employee” as follows:

Any employee engaged in work: (A) predominantly intellectual and varied in character as opposed to routine mental, manual mechanical or physical work; (B) involving the consistent exercise of discretion and judgment in its performance; (C) of a character so that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and (D) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of

³ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual or physical processes.

Section 3579 (b) provides:

There shall be a presumption that professional employees and nonprofessional employees shall not be included in the same representation unit. However, the presumption shall be rebuttable

...

Discussion

1. Regulatory Basis for Unit Modification Petition and Proof of Support

As a threshold matter, this unit modification petition is appropriately considered under PERB Regulation 32781(a)(1). The SysAdmins are currently unrepresented, and so UPTE may properly petition to represent them.

UC contends that UPTE must establish a change in circumstances in order to place the SysAdmins in the TX unit. This appears to be a reference to the rule that where PERB itself has made a unit determination, subsequent modifications to that unit require a showing of changed circumstances. (See, e.g., *Regents of the University of California* (1995) PERB Order No. Ad-269-H.) This doctrine allows the parties to relitigate representation matters if a change of circumstances is shown. (*Id.* at p. 5.) Here, the original unit was configured in 1982, and UPTE was not a party. The SysAdmins are newly-created positions and so did not exist at the time the TX unit was created. The placement of SysAdmins was not litigated in 1982 and so it cannot be relitigated now. It appears from the information provided that the change in circumstances doctrine does not apply.

PERB Regulation 32781(e)(1) requires proof of support where the proposed addition of positions would increase the unit by more than 10%. The existing unit size is 4,059, so 10% would be 405.9. UPTE seeks to add 325 employees, which is fewer than 10% of its bargaining unit. Accordingly, UPTE is not required to provide proof of support.

UC argues that the 10% rule should be applied, to further the statutory purposes of HEERA and to protect the employees' interests. However, the Board has clearly ruled on this issue already. PERB has held that "While employees have the right to choose which employee organization, if any, they want to represent them, they have no right to choose the bargaining unit in which their classification is placed." (*Regents of the University of California* (2010) PERB Decision No. 2107-H.) Consequently, when the addition of classifications to an established unit would increase the size of the established unit by less than ten percent, PERB may not require proof of employee support. (*Ibid.*) This rule is not discretionary. (*Ibid.*) Therefore, PERB cannot require proof of support in this instance.

2. Exclusion of Professional Employees

UC contends that the SysAdmins are professional employees and therefore cannot be in the TX unit, which is comprised of non-professional employees.

Section 3562 (o)(1) defines a professional employee for the purposes of unit modification petitions. Under this definition, an employee must meet all of four criteria: (1) engage in intellectual and varied work; (2) use discretion and judgment; (3) produce output or results that cannot be standardized in relation to a period of time; and (4) possess advanced knowledge usually acquired by a specialized or advanced degree, as opposed to a general academic education.

SysAdmins do not meet the fourth criteria and therefore cannot be defined as professional. SysAdmins are not required to have a college degree—they may have a Bachelor’s degree *or* they may satisfy the education requirement by showing equivalent training and experience. SysAdmins are not required to have a specialized or advanced degree, or “a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital.”

Regents of the University of California (2010) PERB Decision No. 2107-H is instructive to show the type of educational background required of professionals. In that case, PERB held that Case Managers in a healthcare setting were appropriately placed in UC’s Healthcare Professionals bargaining unit. Case Managers were required to have either a nursing degree (RN) or a Masters in Social Work. (*Id.* at pp. 8, 27.) These are specialized and/or advanced degrees.

UC contends that it has categorized the SysAdmin positions as “professional” for purposes of its Career Tracks program. The job descriptions provide that the SysAdmin II classification “applies professional concepts,” and that SysAdmins II and III perform work that is “decidedly professional, involving the management of systems and services, engagement in analysis and evaluation of computer systems, and the writing of complex script.” While this information may show that SysAdmins meet some of the criteria of section 3562 (o)(1), it is not established that they meet the educational criteria and qualify as “professional” under the statutory definition.

3. Community of Interest Factors

Section 3579 provides that “in each case where the appropriateness of a unit is an issue, in determining an appropriate unit, the board shall take into consideration” the community of interest factors. However, where the only question presented is whether a position must be excluded from the bargaining unit, for example, on the basis that it is a confidential or supervisory position, then the community of interest analysis is not needed. (*Hemet Unified School District* (1990) PERB Decision No. 820, at p. 10.) Here, the question raised is whether the SysAdmins should presumptively be excluded from the unit on the basis that they are professionals. This does not appear to raise a question of unit appropriateness necessitating a community of interest analysis.

To the extent that a community of interest analysis is required, UPTE has established several of the factors. The computer system job duties and work performed by SysAdmins relate closely to similar work performed by CRSs, TSAs and BTSAs, all positions within the TX unit. These classifications all provide support for software, computer networks, and computing systems and devices. SysAdmins and CRSs work in the same departments, and sometimes have common supervision. Inclusion of the SysAdmins in the TX unit would avoid proliferation of units, and no party has identified another bargaining unit in which the SysAdmins would more appropriately belong.

In light of the above, UC is afforded this opportunity to SHOW CAUSE as to why the unit modification petition should not be granted. Factual assertions must be supported by declarations under penalty of perjury by witnesses with personal knowledge and should indicate that the witness, if called, could competently testify about the facts asserted. If the facts asserted are reliant on a writing, the writing must be attached to the declaration and authenticated therein. Legal argument and supporting materials must be filed with the undersigned no later than April 14, 2017. Service and proof of service pursuant to PERB Regulation 32140 are required.

Upon receipt of UC's argument and factual assertions, or the expiration of the time allowed for same, the undersigned shall contact each of the parties regarding further case processing steps, including a deadline for responses to the UC's submittal, if requested.

Sincerely,

Laura Z. Davis
Supervising Regional Attorney

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