STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COLLEGE AND UNIVERSITY SERVICE EMPLOYEES - SERVICE EMPLOYEES INTERNATIONAL UNION, AFL/CIO,	)	
Charging Party,	)	Case No. SF-CE-3-H
v.	)	PERB Decision No. 231-H
CALIFORNIA STATE UNIVERSITY, HAYWARD,	)	August 10, 1982
Respondent.	)	

Appearances: Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg & Roger) for College and University Employees-Service Employees International Union, AFL/CIO.

Before John W. Jaeger, Marty Morgenstern, and Virgil W. Jensen, Members.

DECISION

This case is before the Public Employment Relations Board (hereafter PERB or Board) on exceptions filed by the College and University Employees-Service Employees International Union, AFL-CIO (CAUSE-SEIU or Charging Party), to the proposed decision of the hearing officer finding that the California State University, Hayward, (hereafter University) violated subsection 3571(a)[1] when it required employees to use time

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[1]All references are to the Government Code unless otherwise noted. The Higher Education Employer-Employee Relations Act (HEERA) is codified at Government Code section 3560 et seq. Subsection 3571(a) reads:

> [It shall be unlawful . . . to] Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate

clocks in reprisal for engaging in protected activity. The single exception taken to the proposed decision concerns the adequacy of one portion of the proposed remedy. CAUSE-SEIU argues that the proposed order is inadequate in that it only requires the University to return to the status quo ante until either the results of the pending election to determine representation are certified, or 90 calendar days from the date the decision becomes final expire, whichever occurs first. The University did not take exception to the proposed decision nor did it respond to the exception taken by CAUSE-SEIU. The sole issue before the Board is whether the proposed order is arbitrary or insufficient in light of the circumstances of this case. We affirm the hearing officer's findings but modify the proposed order to comport with the current circumstances.

FACTS

The Board has reviewed the hearing officer's finding of facts and conclusions of law and finds them free of prejudicial error. We thus incorporate the attached hearing officer's decision.

DISCUSSION

The hearing officer found that the University violated subsection 3571(a) when it required employees to use time

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> against employees, or otherwise to interfere with, restrain or coerce employees because of their exercise of rights guaranteed by this chapter.

clocks in reprisal for protected activity. He concluded the Nanery "letter writing campaign," the grievances, and the organizing drive focusing on the time reporting issue was protected activity. He found that the employees in Plant Operations were required to use the time clocks in reprisal for that protected activity.

The proposed order in this matter requires the University to cease and desist from retaliating against employees by requiring them to use time clocks, or enforcing timekeeping policies in retaliation for exercising rights guaranteed by HEERA. It further requires the University to return to the previous timekeeping system for a period of 90 days or until a representation election is held, whichever occurs sooner.

CAUSE-SEIU excepts to only that portion of the proposed order that requires the University to return to the former timekeeping procedure for a maximum of 90 days. It argues that the University will benefit from its violation of HEERA because the time limit imposed for return to the status quo ante is less than the period in which the University's retaliatory policy was in effect.

In Santa Clara Unified School District (9/26/79) PERB Decision No. 104, the Board determined that a remedy for a violation of subsection 3543.5(a) of the Educational Employment Relations Act should be "designed to restore, so far as possible, the status quo which would have been obtained but for

the wrongful act." The identical language is contained in subsection 3571(a). We have carefully reviewed the findings of fact and conclusions reached by the hearing officer that formed the basis for the proposed remedy, and we find them to be free from error. However, because of the change of circumstances since the issuance of the proposed decision, we modify the order to reflect the change in conditions.

The Board takes official notice of information contained in its records that indicates that a representation election has occurred for nonprofessionals, including employees in the Plant Operations Department.[2] The ballots were mailed on December 14, 1981 and were required to be returned by January 26, 1982. The ballot presented a choice between the California State Employees Association and no representative. CAUSE-SEIU did not appear on the ballot. No objections were filed and the results of this election were certified on February 16, 1982, with CSEA being designated as the exclusive representative of all nonprofessional employees in Unit 5, Operations/Support.

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[2]In PERB Case No. LA-HR-5, California State University, Unit 5, Operations Support, a representation election occurred and an exclusive representative was certified to represent employees, including those in the Hayward Plant Operations Department on February 16, 1982. The Charging Party in the matter pending before us today was not a party to the representation proceeding.

Because CAUSE-SEIU is no longer involved in any organizing activity at the CSU-Hayward campus, the Board concludes that a change in circumstances has occurred that requires us to modify the proposed order. We will require only that the University post a notice indicating it will cease and desist from retaliating against employees in Plant Operations for engaging in protected activity. To further require that the University return to the former timekeeping procedure, in light of the subsequent change in circumstances regarding the representational status of the Charging Party, would not effectuate the purposes of the Act, nor would it be consistent with the factual basis for the conclusion that the University violated subsection 3571(a).

ORDER

Upon the foregoing facts, conclusions of law, and entire record in this case, and pursuant to Government Code section 3563.3, it is hereby ORDERED that the California State University, Hayward, and its representatives shall:

A. Cease and desist from:

1. Retaliating against employees or otherwise interfering with, restraining or coercing employees because of the exercise of rights guaranteed by the HEERA. In particular, the University shall not, in the future, institute changes in timekeeping policies and requirements to retaliate against employees.

B. Take the following affirmative action designed to effectuate the purposes of the HEERA:

1. Post at all work locations on campus, where notices to employees are customarily placed, copies of the Notice attached as an appendix hereto. Such posting shall be maintained for a period of at least 30 consecutive workdays. Reasonable steps shall be taken to ensure that said Notices are not reduced in size, altered, defaced or covered by any other material.

2. At the end of the posting period, notify the San Francisco Regional Director in writing of the actions taken to comply with this ORDER.

This ORDER shall become effective immediately upon service of a true copy thereof on the California State University, Hayward.

By: John W. Jaeger, Member

Matty Morgenstern, Member

Virgil W. Jensen, Member

APPENDIX A

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

After a hearing in Unfair Practice Case No. SF-CE-3-H, College and University Employees/Service Employees International Union, AFL/CIO v. California State University, Hayward, in which both parties had the right to participate, it has been found that California State University, Hayward, violated the Higher Education Employer-Employee Relations Act, Government Code section 3571(a). As a result of this conduct, we have been ordered to post this Notice and to abide by the following:

A. We will CEASE AND DESIST FROM:

1. Retaliating against employees or otherwise interfering with, restraining or coercing employees because of the exercise of rights guaranteed by the HEERA. In particular, the University shall not, in the future, institute changes in timekeeping policies and requirements to retaliate against employees.

CALIFORNIA STATE UNIVERSITY,
HAYWARD

By _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 WORKING DAYS FROM THE DATE OF THIS POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED, OR COVERED BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

COLLEGE AND UNIVERSITY EMPLOYEES - SERVICE EMPLOYEES INTERNATIONAL UNION (CAUSE - SEIU), AFL/CIO, Charging Party, v. CALIFORNIA STATE UNIVERSITY, HAYWARD, Respondent.	Unfair Practice Charge Case No. SF-CE-3-H PROPOSED DECISION (8/22/80)

Appearances: Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg & Roger) for College and University Employees--Service Employees International Union (CAUSE-SEIU), AFL/CIO; Jaffe D. Dickerson, Attorney, for California State University.

Before Michael J. Tonsing, Hearing Officer.

PROCEDURAL HISTORY

On October 10, 1979, the charging party, College and University Service Employees-Service Employees International Union, AFL/CIO (hereafter CAUSE-SEIU or the Union) filed its original unfair practices charge against the respondent, California State University, Hayward (hereafter the University). The original complaint alleged that the University had violated section 3571(a) of the Higher Education

Employer-Employee Relations Act[1] by installing time clocks and requiring employees of its plant operations department to punch in and out in retaliation for protected activity; that it had violated section 3571(a) and (b) of the Act by refusing to meet and confer with CAUSE-SEIU and ignoring its grievances;[2] that it had violated section 3571(f) of the Act by meeting with a staff advisory group after a petition for certification had been filed by CAUSE-SEIU.[3]

On October 11, 1979, the Union filed an amendment to its charge, specifying the reasons for the reprisal as: membership by employees in CAUSE-SEIU, organizing activity, a desire to single out plant operations employees, and retaliation for representation by the Union. The University filed its answer

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[1]Government Code section 3560 et seq. (hereafter HEERA, or the Act). All references are to the Government Code unless otherwise noted. Section 3571(a) reads:

> [It shall be unlawful to] Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain or coerce employees because of their exercise of rights guaranteed by this chapter.

[2]Section 3571(b) reads:

> [It shall be unlawful to] Deny to employee organizations rights guaranteed to them by this chapter.

[3]This portion of the charge was later withdrawn. See text infra.

On November 2, 1979, denying all the charges. An informal conference was held at the San Francisco Regional Office of the Public Employment Relations Board (hereafter the PERB or the Board) on November 5, 1979, at which it was agreed that the Union would supply a Statement of Particularization by November 21, and a formal hearing would be held on December 11.

On December 4, 1979, the parties agreed to request a continuance of the charge so that it could be consolidated with a subsequent charge anticipated by the Union. On December 10, 1979, the parties were notified by the hearing officer that the formal hearing was reset for January 23-24, 1980. It was subsequently agreed that the charging party would provide the aforementioned Statement of Particularization, along with notice of the anticipated charge, by January 15, 1980.

The respondent received the Statement of Particularization on January 16, 1980. The charging party indicated that the subsequent charge either had not been filed, or it would not seek consolidation with the present charge. Subpoenas and subpoena duces tecum were issued on January 21, 1980. The hearing was held on January 23-24, 1980, at Hayward, California. At the hearing, the Union withdrew that portion of the charge which alleged a violation of section 3571(f).

FINDINGS OF FACT

The charging party, CAUSE-SEIU, is an employee organization within the meaning of the Act. The respondent, California

State University, Hayward, is a higher education employer within the meaning of the Act.[4]

Plant operations is the largest non-academic department on the Hayward campus of respondent, employing over 200 people, including approximately 75 student assistants. Don Farley is the chief of plant operations. Under him are two assistant directors, Don Brooks and Al Dusel, an administrative assistant, George Anderson, and heads of various sections--engineers, building trades, custodial services, and grounds. It was stipulated that all of these individuals, with the exception of George Anderson, are managerial or supervisory employees within the meaning of the Act.

Prior to July 1979, the procedure for timekeeping in plant operations was for employees to sign in on a master time sheet upon arrival and sign out before leaving. Employees working in diverse locations on campus, such as custodians, reported directly to their worksites. Several employees and the director of personnel, Slade Lindeman, testified that this was an informal, flexible system. This system was changed in July and August of 1979 when employees were required to "punch in" and "punch out" on time clocks at a central location and follow stricter timekeeping procedures. It is the implementation of

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[4]"Employee organization" is defined in section 3562(g). "Higher education employer" is defined in section 3562(h).

this new time clock system which is the subject of this unfair practice charge.

Emmett Nannery's "Letter Writing Campaign"

Emmett Nannery was employed in plant operations as a carpenter in the building trades section. He had been an active member of the California State Employees Association (hereafter CSEA). In mid-1978, he became a member of CAUSE-SEIU and became active in that organization. For several years prior to the filing of this charge, Nannery had complained about an alleged "double standard" of time reporting for employees and supervisors, alleged changes by supervisors in time sheets, and claimed harassment by his own supervisor, Lou Morsilli, for tardiness. These complaints took the form of both grievances and letters to the administration.

On October 10, 1977, Nannery filed a grievance with a CSEA representative, alleging, inter alia, that he had been harassed by his supervisor for tardiness when he had not been tardy. On March 17, 1978, he sent a letter to Executive Dean William Vandenburg, charging that Administrative Assistant George Anderson was abusing his lunch hour by taking "extended lunches." Vandenburg replied on April 17, saying that any complaints about Anderson's time were the responsibility of Don Farley. Nannery wrote back to Vandenburg on April 26, 1978, sending a copy to Farley, claiming that Farley had not done

anything about the problem and that he had been subjected to verbal abuse from his supervisor because of his complaints.

On May 11, 1978, Nannery made further allegations concerning Anderson's extended lunches, also sending copies to several legislators and University officials. Vandenburg replied on May 25, again directing Nannery to go through Farley. On June 9, Lou Morsilli, Nannery's supervisor recommended that Nannery be reprimanded for tardiness and "inappropriate language." On June 26, 1978, Nannery sent another letter to Vandenburg, repeating his allegations against Anderson, and also mentioning "fraudulent recording of time." Farley received a copy of this letter, as well as previous correspondence. On January 24, 1979, Nannery sent a memo to Vice President Robert A. Kennelly (again with a copy to Farley) repeating his charges, and also alleging that a supervisor was recruiting employees for outside work during normal working hours, encouraging them to call in sick so that they could be paid twice. This last allegation was related to a grievance on behalf of an employee who had called in sick when working on an outside job in which Nannery was involved as a representative of the charging party.

During this time, Nannery had also been involved in several other grievances. In mid-1978, he was the first person to join CAUSE-SEIU in plant operations, becoming one of the most active members there. Overall, it is apparent that Nannery had been

involved in a prolific campaign of letters and grievances for several years, both individually, and as a representative of CSEA, and later CAUSE-SEIU. The two main thrusts of this campaign were an alleged "double standard" and claimed abuses of timekeeping by supervisors.

Organizing Activity by the Charging Party

In September 1977, Alexis Rankin began organizing on the Hayward campus for CAUSE-SEIU. In mid-1978, during the exchange of correspondence between Nannery and Vandenburg, she began to organize in plant operations. Nannery was the first to sign up, switching from CSEA. Union meetings were held on campus, with the knowledge of Farley. Although there was conflicting testimony as to the Union's actual membership in plant operations, it appears that this was one of the Union's strongest areas on campus.

When the decision was announced to institute time clocks, CAUSE-SEIU, along with Nannery, became associated with opposition to the new system, and much of the Union activity in plant operations centered around this issue.

On July 2, 1979, the charging party filed a petition for certification with the Public Employment Relations Board, seeking to represent a systemwide unit of non-craft maintenance personnel in the California State University system, which would include most of the Hayward plant operations employees.

CSEA also filed a petition for a similar systemwide unit of both skilled and unskilled employees.

The Decision to Switch to Time Clocks

Don Farley was responsible for the decision to use time clocks in plant operations. Although the record is vague as to the exact time the decision was made, it was undoubtedly before January 15, 1979, when the clocks were ordered.

On May 9, 1978, Ed Nordstrom, the business manager, wrote a memo to the effect that "as a result of Emmett Nannery's concerns," there should be a review of timekeeping procedures in plant operations. Time clocks were not mentioned in this memo. Vandenburg testified that Farley first mentioned the subject of time clocks to him in the spring of 1978, and that he subsequently made inquiries within the administration for Farley.

The first documented reference to time clocks occurred on August 15, 1978, when Vandenburg reported to Farley that conversion to time clocks had received "tacit approval" in the administration. Farley testified that in the fall of 1978, he asked Slade Lindeman, the personnel director, whether implementing time clocks would be "legal." Lindeman confirmed that it was. On December 1, 1978, Vandenburg asked Farley to prepare a written procedure regarding the recording and movement of personnel records, referring to Nordstrom's memo of May 9, and specifically mentioning time clocks. On January 15,

1979, two time clocks were ordered.

Request to Meet and Confer

Plant operations employees first became aware of the decision to switch to time clocks after Farley sent a memo announcing the decision to his supervisors, dated February 6, 1979. On March 21, CAUSE-SEIU made a request to meet and confer, simultaneously distributing a leaflet among employees (with a copy delivered to Farley) protesting the time clock decision and listing Emmett Nannery as the Union representative in plant operations. Before a formal response to the Union's request was issued, Farley sent the following memo to Nannery, Vandenburg, and all plant operations supervisors:

> Your letter writing campaign has resulted in a through (sic) review of the timekeeping in plant operations. Installing time clocks is the last step in that review process. With your concurrence, I would like to place this plaque on each of the clocks.
>
> This time clock installed to commemorate
> EMMETT NANNERY's
> contributions to accurate timekeeping
> C.S.U.H.[5]

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[5]Nannery testified that he talked to Farley about this "plaque memo" after he took a couple days to "cool off." According to Nannery, when he asked Farley what was the reason for the memo, Farley pulled out a file and pointed to a letter which, by Nannery's description, appeared to be one of the letters sent to Vandenburg by Nannery. Farley did not recall

On April 2, Ellis McCune, president of the Hayward campus, formally replied to the Union's request, naming Vandenburg as his representative to meet with the Union. On April 20, before the meeting took place, the time clocks were installed.

On April 26, a meeting was held at which representatives of both the Union and the University were present. At that meeting, the Union protested the University's failure to meet before the clocks were installed, and made two requests -- that Vandenburg meet with all plant operations employees to discuss time clocks, and that a vote be taken among employees on the subject. At the end of the meeting, the Union presented a grievance, signed by 39 employees, alleging that the University violated section 3530 of the Government Code (which was then still in effect) by failing to meet and confer prior to the installation of the time clocks.

On May 8, 1979, the University responded to both the grievance and the Union's requests. Vice President of Administration Robert Kennelly found the grievance not within the scope of the grievance procedure and dismissed it. Vandenburg partially granted the Union's request for a meeting with all plant operations employees by arranging a series of

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any such meeting. However, because of Farley's general evasiveness on this matter during his testimony, it is found that Nannery's testimony on this matter is essentially correct.

three meetings on May 11. The request for an election on the matter was denied.

At the May 11 meetings, Vandenburg and Farley discussed the reasons for installing the time clocks and the procedures for implementing them, while many employees expressed their dissatisfaction with the decision. The Union conducted its own election on May 20, reporting an overwhelming majority of those voting were against time clocks.

On July 6, another meeting was held at the request of the Union (the only meeting after the effective date of the Act). The result of the vote was presented. (There is a dispute as to whether the accusation that the time clocks were being installed in retaliation for Union activity was made at this meeting. That dispute need not be resolved here.) President McCune wrote to the Union on July 19, indicating that after reviewing the matter, he had decided it was best to continue plans to implement the time clocks.

On July 16, 1979, employees were required to use the time clocks, in stages. Office staff, including Farley, were the first to use the new system. Then each section of plant operations, one-by-one, was required to punch in at a central location. Along with the actual use of the time clocks, the accompanying procedures developed by Farley were implemented.

The Union made a request to meet and confer on September 24, which was denied. This charge was filed on October 10.

Subsequent to the filing of this charge, the University denied another request by the Union to meet and confer. The systemwide policy of the University was that it no longer had any obligation to meet and confer with an employee organization which was not an exclusive representative according to the Act. The University also dismissed a grievance which was essentially a copy of the April 26 grievance.

STATEMENT OF THE ISSUES

1. Can evidence of conduct prior to the six-month limitation period of section 3563.2(a) or prior to the effective date of the Act be used to shed light on the true motive for the implementation of time clocks, or does reliance on such evidence bar the charge as untimely?

2. Was the implementation of time clocks in plant operations a reprisal for protected activity?

3. What statutory duty, if any, does the employer have to meet and consult with a nonexclusive representative before an exclusive representative is chosen?

4. Did the refusal of the University to consider the merits of grievances filed by the charging party violate section 3571(a) and (b)?

DISCUSSION

The Charge is not Barred by Section 3563.2(a)

In its brief, the University asked that this charge be dismissed as untimely filed, or, in the alternative, that all

evidence prior to the six-month limitation period be excluded. For the reasons discussed below, it is found that the charge was timely filed, and that evidence prior to the six-month limitation period may be considered in providing background to the employer's action within the statute of limitations.

Section 3563.2(a) provides, in relevant part, that:

> . . . the board shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

This charge was filed on October 10, 1979. Therefore, any conduct prior to April 10 may not be the basis for an unfair practice charge. The Act became effective on July 1, 1979. Therefore, conduct before this date similarly may not be the basis for an unfair practice charge. The University points out that, although the time clocks were implemented both within the statute of limitations and after the effective date of the Act, the decision to implement the time clocks, and the announcement to employees of the decision, occurred before the six-month limitation period.

The basis for this charge, however, is not the decision to implement time clocks, but the actual implementation. It was this act which arguably constituted a retaliation for union activity. Before this, the employer's actions constituted only an arguable threat of reprisal, not a reprisal itself. (A threat of reprisal could constitute a separate and distinct violation under circumstances other than those alleged here.)

Similarly, in Oceanside-Carlsbad Federation of Teachers (1979) PERB Decision No. 89, the Board ruled that the six-month limitation period did not begin to run when the decision to transfer a teacher was made, but when the actual transfer occurred.

Respondent also argues that all evidence dated prior to April 10, 1979, and all testimony as to events prior to that date, should be excluded. This raises the question of whether section 3563.2(a) can operate as a rule of evidence, as well as a statute of limitations.

Section 3563.2(a) of the Government Code is similar to section 10(b) of the National Labor Relations Act[6]. The leading case interpreting section 10(b) of the NLRA is IAM Local Lodge 1424 v. NLRB (1960) 362 U.S. 411 [45 LRRM 3212]. There, a party sought to block the enforcement of an otherwise legal contract, which was illegally entered into without majority support before the six-month limitation period, by means of an unfair practice charge. The Court found the charge was based on the formation of the contract, not its enforcement, and the charge therefore was barred. In

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[6]29 U.S.C. 151 et seq. Federal precedent interpreting similar provisions of federal labor law may be used as guidance in interpreting California labor legislation. Fire Fighters v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal. Rptr. 507]; Sweetwater Union High School District (1976) PERB Decision No. 4.

distinquishing those situations where section 10(b) also operates as a rule of evidence, the Court said:

> . . . due regard for the purposes of section 10(b) requires that two different kinds of situations be distinquished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose, section 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There, the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful (362 U.S. at 416-17, 45 LRRM at 3214-15).

Later cases applying Local Lodge have emphasized the time at which the aggrieved party could have filed a charge as determinative. See e.g., NLRB v. Longshoremen (9th Cir. 1977) 549 F.2d 698 [94 LRRM 3072]; Communication Workers v. NLRB (2d Cir. 1975) 520 F.2d 411 [84 LRRM 3028]. In Beckett Aviation Corp. (1975) 218 NLRB 238 [89 LRRM 1341], the NLRB ruled that pre-limitation interrogations and threats by an employer are barred as independent charges by section 10(b), but they still may be used to prove unlawful motivation for conduct within the limitation period.

Applying Local Lodge and subsequent cases to the instant case, it is apparent that this unfair practice falls within the first category described in Local Lodge. That is, pre-limitation conduct may be used to "shed light" on the motivation for the implementation of the time clocks. Such evidence would tend to show the intent of the respondent in implementing time clocks and the protected activity of employees for which this action was allegedly a reprisal. Motive is an element in a reprisal case.

More important, it is not necessary to establish the illegal nature of the announcement of the decision to implement time clocks in order to find that the implementation itself was illegal, unlike Local Lodge, where it was necessary to prove the illegality of the agreement in order to find the enforcement of the agreement illegal. What must be proven here is unlawful motive for the conduct. And, relevant evidence of unlawful motivation may go back long before the action on which an unfair practice allegation is based. It would defeat the purposes of the Act to "ignore reliable, probative, and substantial evidence as to the meaning and the nature of the conduct." Local Lodge, supra, at 417 [45 LRRM at 3215], quoting from Axelson Mfg. Co. (1950) 88 NLRB 761, 766 [25 LRRM 1388].

For similar reasons, pre-Act conduct by the employer and pre-Act protected activities by the employees may be used to

prove unlawful motivation for post-Act conduct. To hold otherwise would effectively postpone the date when parties would be protected by the provisions of the Act. See Radiant Mills Co. (1936) 1 NLRB 274 [1 LRRM 46]; Kawano, Inc. (1977) 3 ALRB No. 54. This is not a case where the unlawful conduct itself occurred before the effective date of the Act, as in Petrone v. Pasadena Unified School District (5/12/77) PERB Decision No. 16 (dismissing a charge based entirely on pre-Act conduct).

The Implementation of Time Clocks was a Reprisal for Protected Activity

In Oceanside-Carlsbad Federation of Teachers v. Carlsbad Unified School District (1/30/79) PERB Decision No. 89, the Board established a test to be used to determine whether there has been a violation of section 3543.5(a) of the Educational Employment Relations Act (EERA), which is identical to section 3571(a) of HEERA.[7] First, ". . . a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent." Oceanside-Carlsbad, supra. Second, a charge will be sustained if either, (a) the harm is inherently destructive of employees' rights and the employer's

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[7]See fn. 1, supra, for full text of section 3571(a).

conduct was not made necessary by circumstances beyond its control where there was no alternative; or (b), there is slight harm to the employees' rights and the harm outweighs any operational necessity which may justify the action.

In the present case, it is found that "but for" the employer's unlawful motive, the time clocks would not have been implemented. Therefore, it is not necessary to determine whether the harm is slight or inherently destructive.

A. The Protected Activity

"[S]ome nexus must exist between the exercise of employee rights under the [HEERA] and the actions of the employer which have provoked the filing of an unfair practice charge." Oceanside-Carlsbad, supra. In the present case, this protected activity includes the grievances and "letter writing campaign" of Emmett Nannery, the continuing organizing activities by the charging party, and the continuting opposition to time clocks itself.

There is no question that the filing of grievances is a right of employees and therefore "protected activity." Neilman v. Baldwin Park Unified School District (1979) PERB Decision No. 92. Nannery's "letter writing campaign," though not a formal grievance, was conducted for the purpose of adjusting employer-employee relations on behalf of himself (harassment by his supervisor for tardiness) and other employees (fraudulent recording of time, the "double standard"). Such complaints also constitute protected activity.

See Springfield Library and Museum Association (1978) 238 NLRB No. 221 [99 LRRM 1289].

In mid-1978, CAUSE-SEIU began to organize in plant operations. This was the same time that Nannery was corresponding with Dean Vandenburg. It was then that Nannery joined SEIU and became one of its most active members, listed as the "representative" of the Union in plant operations. Union organizer Alexis Rankin testified that there was a great deal of Union activity in plant operations subsequent to this, which was known to Farley and the administration. Once the decision to implement time clocks became known to employees, this became a major issue of the Union. As pointed out in respondent's brief, no other employee organization protested the time clocks.

These protected activities, the grievances, the "letter writing campaign," and Union organizing, are all connected through Emmett Nannery and to the response to this activity, the time clocks. Although much of this activity occurred before the effective date of the Act, it may be used to show the unlawful motivation of the employer. And, it is manifest that the activity and the employer's "response" to it continued both in fact and in effect, well beyond the operative date of the Act. Most importantly, the retaliation itself occurred after the effective date. Freedom from retaliation for organizational activity is the statutory right at stake here. See Radiant Mills Co. (1936) 1 NLRB 274 [1 LRRM 46]. The

employer's action, if not remedied, could have a chilling effect on future protected conduct by employees, and could tend to influence the representation election now pending.

B. "But for" the Protected Activity of Nannery and the Union, the Time Clocks Would Not Have Been Implemented

In proving unlawful intent, the Board said, in Oceanside-Carlsbad, supra:

> Unlawful motivation, purpose or intent is essentially a state of mind, a subjective condition generally known only to the charged party. Direct and affirmative proof is not always available or possible. However, following generally accepted legal principles, the presence of such unlawful motivation, purpose or intent may be established by inference from the entire record. [Footnote omitted.]

The National Labor Relations Board and the federal courts have developed a set of legal principles for establishing unlawful intent in order to prove discrimination in violation of section 8(a)(3) of the Labor-Management Relations Act.[8]

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[8]Section 8(a)(3) of the Labor-Management Relations Act reads, in relevant part:

> [It shall be an unfair labor practice for an employer-] by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . .

See fn. 6, supra, regarding the applicability of federal precedent where a provision of a federal labor statute is analogous to that of a state labor statute.

Under federal precedent ". . . specific evidence of intent to encourage or discourage is not an indispensable element of proof. . . ." Radio Officers Union v. NLRB (1954) 347 U.S. 17, [33 LRRM 2417, 2428]. "[W]hen specific evidence of a subjective intent to discriminate or to encourage or discourage Union membership is shown, and found, many otherwise innocent or ambiguous actions which are normally incident to the conduct of a business may, without more, be converted into unfair labor practices." NLRB v. Erie Resistor Corp. (1963) 373 U.S. 221, 227 [53 LRRM 2121, 2124]. Such an evidentiary standard is appropriate here, as well.

Here, however, there is direct evidence that the time clocks were in response to, at least, the "letter writing campaign" by Nannery. Farley's "plaque" memo, claiming that the time clocks were being installed as a result of the "letter writing campaign," and commemorating "Emmett Nannery's contributions to accurate timekeeping," is possibly the closest thing to a direct admission of unlawful intent. Although Farley testified that this memo was just a joke, the circumstantial evidence surrounding the memo only confirms Farley's true intent. It was sent not only to Nannery, but to all plant operations supervisors and Dean Vandenburg. Plant operations employees also saw the memo. The memo was issued within days of the Union's first request to meet and confer, and the accompanying distribution of a leaflet protesting time

clocks which listed Emmett Nannery as one of the plant operations representatives for the Union, both of which were sent to Farley just prior to his memo. A statement coercive enough to interfere with employee rights need not be an explicit denial of those rights. See Rio Hondo Community College District (1980) PERB Decision No. 128, concurring opinion, pp. 26-27.

The timing of several actions by the respondent suspiciously follows on the heels of protected activity. Farley testified that he made the decision to implement time clocks approximately in August. This would immediately follow both Nannery's "letter writing campaign" and the beginning of organizing activity by SEIU in plant operations. As mentioned above, the "plaque memo" immediately followed the Union's meet and confer request and accompanying leaflet. Finally, employees were required to actually use the time clocks shortly after the petition for certification had been filed by CAUSE-SEIU. Although the timing of each of these actions alone may be explained by coincidence, together they suggest a pattern of unlawful intent to discourage and disparage protected activity, and cast the responsibility for implementing the time clocks on Nannery and the Union.

Farley also admitted that he knew the time clocks would be met by resistance. He found it necessary to consult with the Personnel Director as to whether it was legal. The hearing

officer also takes note of the fact that time clocks can be viewed as demeaning to employees, and may be used effectively as a symbol of stricter working conditions which would be imposed if the employees "brought in the Union." See e.g., Jocquel Supply Co. (1971) 192 NLRB 485 [77 LRRM 1909], finding time clocks part of a course of action to penalize workers for support of a Union. See also, Knapp Foods, Inc. (1980) 247 NLRB No. 146 [103 LRRM 1276]; Sevakis Industries, Inc. (1978) 238 NLRB No. 50 [99 LRRM 1682].

Respondents raise the defense of legitimate business justification for the time clocks. In fact, they claim, the time clocks were but a legitimate response to the "concerns raised by Emmett Nannery." Nannery's testimony made it clear that, both at the time of his grievances and after the plaque memo, time clocks were far from what he envisioned as an innocuous solution. He was so insulted by the "plaque" memo that he had to "cool off" for a couple days before seeing Farley in order to avoid losing his temper. Several other employees in addition to Nannery testified that the time clocks did not alleviate any of the timekeeping or attendance problems, and may, in fact, have aggravated them. Ed Nordstrom, the personnel director, admitted that most of the problems in plant operations were "supervisory," and would not be solved by time clocks.

Time clocks are rare in the California State University and

College system, a fact which makes their implementation appear to be more in the nature of a reprisal. See e.g., Nathan Littauer Hospital Association (1977) 229 NLRB 1122 [95 LRRM 1296], involving a failure to negotiate over the imposition of time clocks for nurses. Time clocks have been used in the library and the admissions and records office of the Hayward campus, but respondent offered no evidence as to any improvement in these departments after time clocks were implemented. Although respondent points to the size and diverse work locations of plant operations, it offers no explanation as to why other campuses did not find a need to use time clocks in plant operations, nor has it offered any evidence to show that this was a factor in the decision.

Where a "dual motive" for an employer's action may exist, several tests have been proposed regarding how dominant a role the unlawful motive must play. See Morris, The Developing Labor Law (1978 supplement) pp. 25-26. The "but for" test described in Oceanside-Carlsbad is similar to that enunciated by the U.S. Supreme Court in Mt. Healthy City Board of Education v. Doyle (1977) 429 U.S. 274 [50 L.Ed.2d 471], involving the firing of a teacher for constitutionally protected conduct. The court ruled that the plaintiff must first prove that the constitutionally protected conduct was a "substantial factor" or "motivating conduct" in the decision. The defendant must then rebut and prove by the preponderance of

the evidence that it would have reached the same decision without the protected conduct.[9] See also Bekiaris v. Board of Education (1972) 6 Cal.3d 575 [100 Cal. Rptr. 16]; NLRB v. South Shore Hospital (1st Cir. 1978) 571 F.2d 677 [97 LRRM 3004], enunciating similar rules, and the discussion of the Oceanside-Carlsbad "but for" test, supra.

Applying the "but for" test to the instant case, it is found that respondent has done no more than suggest that legitimate business concerns may have contributed to the decision. It has not rebutted the overwhelming evidence that the decision to implement time clocks would not have been made if not for the protected activity of employees. In fact, it is doubtful that the legitimate interest raised by respondent would be served by the implementation of time clocks.

Finally, respondent points out that all plant operations employees are required to punch time clocks, including supervisors and Farley himself. This was done at the request of Dean Vandenburg, who was concerned that "otherwise grievances would surely result." This did not diminish the employees' dislike of the system, however, nor did it solve the "supervisory" problems. It is also in line with the message of

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[9]The Montana Supreme Court recently adopted this test in determining unlawful motivation in unfair labor practice charges. Board of Trustees of Billings School District v. State of Montana (1980) ___ Mont. ___ [___ P. 2d ___, 4 PBC 35,856].

the "plaque" memo--that because of Nannery and the Union, everyone now had to use time clocks.

Duty to Meet and Consult Under HEERA

The charging party has alleged that the respondent has denied its rights as an employee organization in violation of section 3571(b). The "rights" respondent is alleged to have denied include the right to meet and confer[10] which, it argues, derives from section 3565, which reads:

> Higher education employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations and for the purpose of meeting and conferring. Higher education employees shall also have the right to refuse to join employee organizations or to participate in the activities of these organizations subject to the organizational security provision permissible under this chapter.

Charging party contends that this language evinces a legislative intent to guarantee employees the right to representation before an exclusive representative is chosen. This argument finds support in section 3560(e), legislative findings:

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[10]Since the charging party is not an exclusive representative, there can be no violation of section 3571(c), which reads:

> Refuse or fail to engage in meeting and conferring with an exclusive representative. [Emphasis added.]

> It is the purpose of this chapter to provide the means by which relations between each higher education employer and its employees may assure that the responsibilities and authorities granted to the separate institutions under the Constitution and statute are carried out in an atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them. It is the intent of this chapter to accomplish this purpose by providing a uniform basis for recognizing the right of employees of these systems to full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of representation in their employment relationships with their employers and to select one of such organizations as their exclusive representative for the purpose of meeting and conferring. [Emphasis added.]

Since the Act was viewed as an extension of employees' rights, to find that there was no duty to meet and consult with a nonexclusive representative would leave employees without an exclusive representative with less rights than previously, when they were covered by the George Brown Act.[11]

Respondent points out, however, that section 3562(d)

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[11]Gov. Code section 3525 et seq. Section 3530 provides:

> The state by means of such boards, commissions, administrative officers or other representatives as may be properly designated by law, shall meet and confer with representatives of employee organizations upon request, and shall consider as fully as such representatives deem reasonable such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.

defines "meet and confer" as the, "mutual obligation of the higher education employer and the exclusive representative . . ." [Emphasis added.][12] Thus, the duty to meet and confer would not extend to nonexclusive representatives.

In San Dieguito Union High School District (9/2/77) EERB Decision No. 22, the Board[13] held that, under the Educational Employment Relations Act, there was no duty to meet and confer with a nonexclusive representative. Subsequent to this hearing, the Board issued a decision in Professional Engineers

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[12]Section 3562(d) reads in full:

> "Meet and confer" means the performance of the mutual obligation of the higher education employer and the exclusive representative of its employees to meet at reasonable times and to confer in good faith with respect to matters within the scope of representation and to endeavor to reach agreement on matters within the scope of representation. The process should include adequate time for resolution of impasses. If agreement is reached between representatives of the higher education employer and the exclusive representative, they shall jointly prepare a written memorandum of such understanding which shall be presented to the higher education employer for concurrence. However, these obligations do not compel either party to agree to any proposal or to require the making of a concession.

[13]The PERB was previously known as the Educational Employment Relations Board, or EERB.

in California Government (3/19/80) PERB Decision No. 118-S. Interpreting section 3515.5 of the State Employer-Employee Relations Act (hereafter SEERA), which is nearly identical to section 3543.1(a) of the EERA interpreted in San Dieguito, the Board held that there was a duty to meet and discuss wages with a non-exclusive representative. Although not expressly overruling San Dieguito, since, "that case was decided under the EERA," Professional Engineers, supra, at footnote 8, the Board implicitly rejected the reasoning of that case, following instead much the same argument as put forward by the charging party in the instant case. The Board reasoned that:

> The SEERA granted significant new collective negotiations rights to state employees. If we were to adopt respondent's argument that nonexclusive representatives have no right to meet and discuss wages with the state employer, employees would be left with fewer rights than they had before SEERA. It would be anomalous for the Legislature in enacting a new law which generously expands the rights of employees, to strip employees in units with no exclusive representative of any voice in a matter as basic as wages.
>
> Two statutory provisions strongly militate against such an interpretation. First, there is no requirement under the SEERA that employees select an exclusive representative. (Sec. 3515.) Second, nonexclusive representatives have the right to represent their members in their employment relations with the state until an exclusive representative is recognized. (Sec. 3515.5, supra.) The Board finds that the thrust of these two sections is to protect the right of employees to be represented by a nonexclusive representative when an exclusive representative has not been chosen.

Professional Engineers, supra. Santa Clara Federation of Teachers v. Santa Clara Unified School District (9/26/79) PERB Decision No. 104, did not affirm that the failure to meet and confer does not constitute an unfair practice under EERA, as argued by respondent, but instead found that the lack of evidence that the Union requested to meet and consult, "obviates consideration of the question . . .." Id. Thus, even before Professional Engineers, the Board considered the duty to meet and consult with a nonexclusive representative an open question.

This is a case of first impression under HEERA, since there is no precedent on the duty to meet and confer under this Act. It may be argued that Professional Engineers does not apply here since section 3515.5 of SEERA which the Board found to grant this right has no parallel in HEERA. Section 3543.1(a) of EERA (interpreted in San Dieguito) and 3515.5 of SEERA (interpreted in Professional Engineers) both described the right of employee organizations to represent members, and HEERA has no such section. Charging party counters that the duty to meet and confer is derived from section 3565 of HEERA, which is parallel to section 3515 of SEERA and section 3543 of EERA, and all of these sections concern the right of employees to be represented in their employment relations. This, the University argues, further indicates a legislative intent not to grant such a right to higher education employee organizations.

But, the argument that the Legislature intentionally omitted such a right does not stand up when HEERA is examined as a whole and in the context of previous legislation. This Act was the most recent in a series of legislative enactments granting greater collective bargaining rights to an expanding number of public employees in California, all administered by a single agency. As stated in the statute itself:

> All other employees of the public school systems in the state have been granted the opportunity for collective bargaining through the adoption of Chapter 10.3 (commencing with section 3512) and Chapter 10.7 (commencing with section 3540) of this division, and it would be advantageous and desirable to expand the jurisdiction of the board created thereunder to cover the employees of the University of California, Hastings College of Law, and the California State Universities and Colleges. These institutions of higher education have their own organizational characteristics. (Government Code section 3560(b)).

There is nothing unique about these institutions, as opposed to state employers (under SEERA) and public school employers (under EERA) which would compel a difference in the right of employees to be represented by an employee organization prior to the selection of an exclusive representative.

The decision in Professional Engineers was based on the right of employees, "to be represented by a nonexclusive representative when an exclusive representative has not been selected." Id. Section 3565 of HEERA assures employees the

right to participate in an employee organization for the purpose of representation and meeting and conferring. Put simply, if the employer refuses to deal with the employee organization, these rights of the employees are meaningless.

Employees now covered by SEERA and HEERA were both previously covered by the George Brown Act.[14] Exactly the same rights guaranteed by this previous legislation are at stake as in Professional Engineers. There is no indication that the Legislature intended that employees under HEERA without an exclusive representative were to lose any rights of representation while those under SEERA were to retain them. Indeed, as previously noted, section 3560(b) makes it clear that the intent of the Legislature was to extend to higher education employees the same rights previously granted to public school employees and state employees, with differences only where compelled by the unique nature of the institutions involved. It is therefore found that the respondent had a duty to meet and consult, as defined in Professional Engineers, with the charging party.

The Extent of the Duty

Although a higher education employer has a duty under the Act to meet and consult with a nonexclusive representative

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[14]See footnote 11, supra.

prior to the selection of an exclusive representative, this is not the same as the duty to meet and confer, or to bargain, with an exclusive representative. As stated in Professional Engineers, supra:

> We stress, however, that the obligation imposed on the state employer to meet with a nonexclusive representative is not the same as that imposed with regard to an exclusive representative. Thus, whereas the Governor and representatives of recognized or certified employee organizations "have the mutual obligation personally to meet and confer [in good faith] promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions and proposals, and to endeavor to reach agreement on matters within the scope of representation . . ." (section 3517), the Board finds that the obligation imposed by the statute on the state employer with respect to nonexclusive representatives is to provide a reasonable opportunity to meet and discuss wages with them prior to the time the employer reaches or takes action on a policy decision.

Thus, while the duty to meet and confer with an exclusive representative encompasses a good faith effort to reach an agreement, the duty to meet and consult with a nonexclusive representative only requires the opportunity for discussion prior to the decision or action.

Even though this duty is less than that owed an exclusive representative, it still includes some requirement of good faith. Since the duty to meet and consult with a nonexclusive representative derives in part from the legislative intent

to preserve existing rights and extend them by enactment of HEERA, this duty must at least be as extensive as it was under section 3530 of the George Brown Act. (see footnote 11). Court decisions interpreting this section have found that it includes the element of good faith. State Association of Real Property Agents v. State Personnel Board (1978) 83 Cal.App.3d 206, 211 [147 Cal.Rptr. 786]; Lipow v. Regents of the University of California (1975) 54 Cal.App.3d 215, 224 [126 Cal.Rptr. 515].

Another consideration in determining the extent of this duty is the effect on other nonexclusive representatives, especially, as here, where both organizations have petitioned to represent the employees. By meeting with one organization and not another, or by being more receptive to one organization an employer may run the risk of being accused of favoritism towards one organization in violation of section 3571(d).[15]

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[15]Section 3571(d) reads, in relevant part:

> [It shall be unlawful for the higher education employer to:] Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another; . . . (Emphasis added.)

If an employer was required to do anything more than "to consider as fully as [it] deem[s] reasonable," Gov. Code sec. 3530, the employee organizations' requests, it would be in a "Catch 22" situation if it had to bargain with two organizations which made conflicting requests.

For this reason the duty to meet and consult should not be any greater than that imposed by the George Brown Act.

The University Met its Duty to Meet and Consult

The University met with the Union and discussed the issue of time clocks prior to their implementation. On April 26, 1979, a meeting took place which both sides categorized as a "meet and confer session." This meeting was delayed until after the clocks were installed, which might be considered a "unilateral action" in violation of the Act. However, the Act was not in effect at that time so this could not constitute an independent violation, nor could it be the basis for a violation occurring after the effective date of the Act. (See footnote 6 and accompanying text, supra.) As a partial response to a request made by the Union at the April 26 meeting, a series of meetings with all plant operations employees was held on May 11, 1979. Finally on July 6 another meeting was held between the Union and the University at which the time clock issue was discussed. This was the only meeting held after the Act went into effect.

The Union bases its charge on the refusal of the University to grant its request to meet and confer made on September 24, and other requests made subsequent to the filing of this charge. But since the University did, in fact, meet and discuss the issue with the Union, and with employees, prior to taking final action, and there is no evidence of bad faith, it

is found that it met its duty to meet and consult.

Unlike the situation where there is an exclusive representative and thus a "mutual obligation . . . to endeavor to reach agreement . . .," Government Code section 3562(d), the University here is not obligated to continue to meet with the Union once it ". . . provide[s] a reasonable opportunity to meet and discuss . . . prior to the time the employer reaches or takes action on a policy decision." Professional Engineers, supra.

The subsequent refusal of the University to meet with the Union on this issue was part of the systemwide policy that there was no duty to meet and confer with a nonexclusive representative under the Act. Even though this interpretation was partially incorrect, and ignorance of the law is no excuse, it may be a factor in finding that the University was acting in good faith.[16] There was no other evidence of bad faith on the part of the University in refusing to continue discussion of the issue. No new issue was raised by the Union in its September 24 request which might activate a new duty by the

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[16]In this regard, the Board stated:

> In addition, at the time the series of events occurred in this case, San Dieguito, supra, was the only Board precedent available to serve as a guide to the parties that interpreted the breadth of a nonexclusive employee representative's right to represent its members in their employment

University to meet and consult.

Dismissal of Grievances

The charging party has alleged that the University refused to discuss the merits of grievances in violation of section 3571(a) and (b) of the Act. The grievances referred to are the April 26, 1979 grievance dismissed by Vice President Kennelly on May 8, and the January 4, 1980 grievance dismissed by Vice President Kennelly on January 16. Both grievances concern the University's failure to meet and confer.

In order to find a violation of section 3571(a) or 3571(b), the employer's action must either have interfered with some right granted to the employees (for a 3571(a) charge) or the employee organization (for a 3571(b) charge), or have been motivated by unlawful intent. Oceanside-Carlsbad, supra. The charging party argues that section 3567 grants employees and employee organizations the right to have grievances processed.

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relations. Even though that case was decided under the EERA it was based, in part, on an interpretation of statutory language basically paralleling that contained in the SEERA with which we are here concerned. While we have chosen in this case, decided under SEERA, not to follow the San Dieguito holding, the state employer was not unreasonable in relying on the assumption that this board would follow San Dieguito.

While reliance on EERA precedent alone may not be a sufficient defense, we find that this factor coupled with the specific circumstances in this case warrant a finding that the actions of the state employer were not unreasonable and did not violate its obligations under the SEERA.

That section reads:

> Any employee or group of employees may at any time, either individually or through a representative of their own choosing, present grievances to the employer and have such grievances adjusted, without the intervention of the exclusive representative; provided, the adjustment is reached prior to arbitration pursuant to section 3589, and the adjustment is not inconsistent with the terms of a written memorandum then in effect. The employer shall not agree to resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution, and has been given the opportunity to file a response.

This section is nearly identical to the second paragraph of section 3543 of the Educational Employment Relations Act,[17] and also section 9(a) of the Labor Management Relations

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[17]California Government Code section 3543, second paragraph, reads:

> Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

Act.[18] In Baldwin Park Unified School District (4/4/79) PERB Decision No. 92, the Board affirmed (in relevant part) a hearing officer's dismissal, with leave to amend, of a charge, finding that section 3543 grants employees only the right to present grievances, not the right to have their grievances processed or considered. The hearing officer had followed the interpretation of the parallel section in the Labor-Management Relations Act by federal courts, where it is settled that its purpose is:

> To permit employees to present grievances and to authorize the employer to entertain them without opening itself to liability for dealing directly with employees in derogation of the duty to bargain only with the exclusive bargaining representative . . . .

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[18]29 U.S.C. 151 et seq. Section 9(a) reads, in relevant part:

> Any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment.

Emporium Capwell Co. v. WACO (1975) 420 U.S. 50, at p. 61, fn. 12 [88 LRRM 2660, 2665]. See also Black-Clawson Co. v. Machinists (2d Cir. 1962) 313 F.2d 179 [52 LRRM 2038]; Republic Steel v. Maddox (1965) 379 U.S. 650, [58 LRRM 2193].

The respondent here did not attempt to deny employees or the Union their right to present grievances. The first grievance was dismissed because it was allegedly not within the scope of the grievance procedure. The second grievance was dismissed for the same reason, and additionally because this unfair labor practice charge was pending, covering the identical issue raised in the grievance. Whether the decision that these grievances are within the scope of the grievance procedure is correct is not a matter the Board may consider.[19]

The charging party has not presented sufficient evidence to prove that the denial of these grievances was in reprisal for protected activity. There is nothing in the record to suggest that the dismissals were other than a good faith application of University policy.

Since there is no right to have grievances processed in the Act, there is not even "slight harm" to employee rights under the Oceanside-Carlsbad test. Nor is there proof of unlawful intent which would independently constitute an unfair

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[19]Section 3563.2(b) precludes the Board from enforcing any contract between the parties.

practice. Therefore it is found that the respondent has not violated section 3571(a) or (b) of the Act by its dismissal of the two mentioned grievances.

REMEDY

The remedy for a violation of section 3571(a) should be "designed to restore, so far as possible, the status quo which would have obtained but for the wrongful act." Santa Clara Unified School District (9/26/79) PERB Decision No. 104, quoting from NLRB v. Rutter-Rex Mfg. Co., Inc. (1969) 396 U.S. 258 [24 L.Ed.2d 405, 72 LRRM 2881] reh. den. 397 U.S. 929 [25 L.Ed2d 109]. Restoration of the status quo ante in the present case would require a return to the previous timekeeping system. However, since the implementation of time clocks and stricter timekeeping procedures are legitimate changes in operations absent the unlawful motivation found here, it would be unfair to "freeze" the University's options indefinitely. On the other hand, without a return to the status quo ante, a bare order to cease and desist would do little to remedy the possible chilling effect on the exercise of employee rights resulting from the University's action.

The charging party has suggested that the previous system be restored, and that the University not require employees to use time clocks for approximately the same period that they were required to use time clocks. While agreeing with the concept of returning to the status quo ante with a "hiatus"

period during which the University may not change its timekeeping operations, it is found that a more appropriate cut-off point for such a hiatus period is the date the results of the representation election for these employees is certified, or ninety calendar days, whichever comes first. This would avoid any effect such a change of operations could have on the election. Once the results of the election are certified, the status of the contending organizations will be clarified. If an exclusive representative is certified, timekeeping policy could immediately be a subject of meeting and conferring.[20] If the employees choose no representation, or if ninety days passes with no election, the University would be free to change its timekeeping policy, but only after meeting and discussing the matter with the nonexclusive representatives (provided any action taken in this regard is not in retaliation for protected activity). See Professional Engineers, supra. The return to the status quo ante for a

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[20]This decision assumes, without deciding, that the subject of timekeeping policy and procedure is within the scope of the obligation to meet and confer or consult, an assumption never challenged by the respondent in this case. The subject has been found negotiable under the NLRA, which has a broad scope provision. Nathan Littauer Hospital Association (1977) 229 NLRB 1122 [95 LRRM 1296]. See also Murphy Diesel Co. (1970) 184 NLRB 757 [76 LRRM 1469], enf'd (7th Cir. 1971) 454 F.2d 303. But see Rust Craft Broadcasting, Inc. (1976) 225 NLRB 327 [92 LRRM 1576].

substantially shorter period than requested by the charging party will adequately demonstrate to all parties and all affected employees that the statutorily prescribed procedures must be followed while not unduly impeding change.

The University will also be ordered to cease and desist from retaliation against employers in plant operations for protected activities of such employees, and to post copies of the attached notice at locations on campus where notices to employees are customarily placed. Posting will also provide affected employees with notice that the University has acted in an unlawful manner and is being required to cease and desist from such unlawful activity. It effectuates the purposes of EERA that affected employees be informed of the resolution of the controversy. See CSEA Chapter 658 v. Placerville Union High School District (9/18/78) PERB Decision No. 69. A posting requirement has been upheld in a California case involving the Agricultural Labor Relations Act, Pandol and Sons v. ALRB (1979) 98 Cal.App.3d 580, 587. Posting orders of the NLRB also have been upheld by the United States Supreme Court, NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415]; Pennsylvania Greyhound Lines, Inc. v. NLRB (1938) 303 U.S. 261 [2 LRRM 600].

It was also brought out at the hearing that at least one employee, Chris Brewster, had to pay a parking ticket because

of the requirement that employees punch in at a central location at a time when their parking permits were not valid. The University should either void or reimburse the cost of this and any other parking ticket received by an employee as a direct result of being required to punch in at a central location.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code section 3563.3, it is hereby ORDERED that the California State University, Hayward and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against employees or otherwise interfering, restraining or coercing employees because of the exercise of rights guaranteed by the HEERA, by requiring employees to use time clocks and observe new timekeeping policies.

2. Enforcing such timekeeping policies or disciplining employees for failing to observe such policies in retaliation for the exercise of rights guaranteed by the HEERA.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION DESIGNED TO EFFECTUATE THE PURPOSES OF THE HEERA:

1. Return to the previous timekeeping policy and procedure which existed prior to July 16, 1979 in the plant operations department. The University shall not again change such policy until the results of the pending election to determine

representation for the plant operations employees is certified, or ninety calendar days from the date this proposed decision becomes final, whichever is sooner. At that time the University may implement such changes in timekeeping policy and procedure that it deems proper, provided such changes are not designed to retaliate against, or interfere with, employees because of the exercise of rights guaranteed by the HEERA, and provided that the University meets its duty to meet and confer with any exclusive representative or to meet and consult with a nonexclusive representative prior to adopting or implementing such policy.

2. Either void or reimburse the costs of any parking ticket received by an employee as a direct result of complying with the requirement of punching in at a central location between July 16, 1979, and the date this proposed decision becomes final.

3. Within five days of the date this proposed decision becomes final, post, at all work locations on campus where notices to employees customarily are placed copies of the notice attached as an appendix hereto. Such posting shall be maintained for a period of 30 workdays. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by other material.

4. Immediately upon completion of the posting period, notify the San Francisco Regional Director of the

Public Employment Relations Board, in writing, of the action taken to comply with this order.

For the reason discussed in the foregoing opinion, all other allegations included in unfair practice charge SF-CE-3-H are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on September 11, 1980 unless a party files a timely statement of exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Executive Assistant to the Board at the headquarters office of the Public Employment Relations Board in Sacramento before the close of business (5:00 p.m.) on September 11, 1980 in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrent with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.

Dated: August 22, 1980

MICHAEL J. TONSING
Hearing Officer

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-3-H, College and University Employees/Service Employees International Union (CAUSE-SEIU), AFL/CIO v. California State University, Hayward, in which both parties had the right to participate, it has been found that California State University, Hayward violated the Higher Education Employer-Employee Relations Act, Government Code section 3571(a). As a result of this conduct, we have been ordered to post this notice. We will abide by the following:

A. CEASE AND DESIST FROM:

1. Retaliating against employees or otherwise interfering, restraining or coercing employees because of the exercise of rights guaranteed by the HEERA, by requiring employees to use time clocks and observe new timekeeping policies.

2. Enforcing such timekeeping policies or disciplining employees for failing to observe such policies in retaliation for the exercise of rights guaranteed by the HEERA.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS NECESSARY TO EFFECTUATE THE POLICIES OF THE HIGHER EDUCATION EMPLOYER-EMPLOYEE RELATIONS ACT:

1. Return to the previous timekeeping policy and procedure which existed prior to July 16, 1979 in the plant operations

department. The University shall not again change such policy until the results of the pending election to determine representation for the plant operations employees is certified, or ninety calendar days from the date this proposed decision becomes final, whichever is sooner. At that time the University may implement such changes in timekeeping policy and procedure that it deems proper, provided such changes are not designed to retaliate against, or interfere with, employees because of the exercise of rights guaranteed by the HEERA, and provided that the University meets its duty to meet and confer with any exclusive representative or to meet and consult with a nonexclusive representative prior to adopting or implementing such policy.

2. Either void or reimburse the costs of any parking ticket received by an employee as a direct result of complying with the requirement of punching in at a central location between July 16, 1979, and the date this proposed decision becomes final.

Dated: _____

California State University, Hayward

By _____

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 WORKDAYS FROM THE DATE OF THIS POSTING AND MUST NOT BE DEFACED, ALTERED, OR COVERED BY ANY MATERIAL.