STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA NURSES ASSOCIATION, Charging Party, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Case No. SF-CE-247-H PERB Decision No. 722-H March 3, 1989

Appearances: Beeson, Tayer, Silbert & Bodine by Kenneth C. Absalom, Attorney, for the California Nurses Association; Susan M. Thomas, Attorney, for The Regents of the University of California.

Before Hesse, Chairperson; Porter and Shank, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Regents of the University of California (University or Respondent) to the proposed decision (attached hereto) of the PERB administrative law judge (ALJ) in an unfair labor practice case filed by the California Nurses Association (CNA). The ALJ found that the University violated the Higher Education Employer Employee Relations Act (HEERA), Government Code section 3571(c),[1]

[1]**HEERA** is codified at Government Code section 3560 et seq. Section 3571(a), (b) and (c) states:

It shall be unlawful for the higher education employer to;

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by

and, derivatively, (a) and (b), by unilaterally converting bargaining unit positions to newly created supervisory positions outside the unit, midway through the collective bargaining agreement, without first going through PERB's unit modification procedures.

The Board, after review of the entire record, finds the ALJ's findings of fact to be free from prejudicial error. We are also in substantial agreement with his conclusions of law, and affirm the ALJ's decision, consistent with the discussion below.

DISCUSSION

The primary issue before PERB is whether the University had an obligation to exhaust the Board's unit modification procedures before excluding the employees in question from the bargaining unit, even assuming that at least some of the excluded employees were supervisors. The ALJ concluded that in disputed cases, a unit modification can be accomplished only through PERB's unit modification procedure. In reaching his conclusion, the ALJ rejected the University's position that it was entitled to unilaterally transfer alleged supervisors into new classifications and engage in a "technical refusal to bargain" as an alternative means of testing the contours of an existing unit.

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this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse of fail to engage in meeting and conferring with an exclusive representative.

In finding that the University's failure to exhaust PERB's unit modification procedure constituted an unfair labor practice, the ALJ relied on HEERA, PERB regulations, and PERB precedent. HEERA, section 3563, gives PERB, inter alia, the following powers and duties:

> (a) To determine in disputed cases, or otherwise approve, appropriate units.
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> . . . . . .
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> (e) To establish by regulation appropriate procedures for review of proposals to change unit determinations.
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> . . . . . .
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> (f) To adopt . . . rules and regulations to carry out the provisions and effectuate the purposes and policies of this chapter.
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> . . . . . .
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> (k) To decide contested matters involving recognition, certification, or decertification of employee organizations.

Pursuant to section 3563(e) and (f), PERB adopted PERB Regulation 32781, which specifically details the procedures that parties must follow to obtain modification of an existing bargaining unit. Regulation 32781 provides,[2] in pertinent part,

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[2]PERB Regulations are codified at the California Code of Regulations, Title 8, Part III, section 31001 et seq. Regulation 32781 was amended effective January 1, 1989. The following language precedes the regulation as quoted in the text:

> Absent agreement of the parties to modify a unit, an exclusive representative, an employer, or both must file a petition for unit modification in accordance with this section. . . .

that:

> Parties who wish to obtain Board approval of a unit modification may file a petition in accordance with a provision of this section.
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> . . . . . .
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> (b) A recognized or certified employee organization, an employer, or both jointly may file with the regional office a petition for change in unit determination:
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> (1) To delete classifications or positions no longer in existence or which by virtue of changes in circumstances are no longer appropriate to the established unit;
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> . . . . . .
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> (4) to clarify the unit where the creation of a new classification or position has created a dispute as to whether the new classification or position is or is not included in the existing unit.

The above-cited provisions of HEERA and the PERB regulation indicate that the filing of a petition for unit modification is the proper mechanism by which PERB can exercise its authority to decide, in disputed cases, whether changed circumstances justify any proposed modification to an existing unit. The applicable regulation does not, as urged by the University, contemplate the use of the technical refusal to bargain to secure PERB review of a disputed unit modification.

PERB decisional law has not sanctioned an employer's refusal to recognize an exclusive bargaining representative based on the employer's unilateral determination that the unit is, for some reason, inappropriate. In the case of Redondo Beach City School District (1980) PERB Decision No. 140, PERB held:

> In the absence of the presentation of newly discovered or previously unavailable evidence or special circumstances relitigation of PERB's unit determination is not warranted. PERB's unit determination is therefore binding precedent....

In the instant case, CNA, following unit determination proceedings entitled In the Matter of Unit Determination For Professional Patient Care Employees of the University of California (1982) PERB Decision No. 248-H; In the Matter of Unit Determination for Professional Patient Care Employees of the University of California (1983) PERB Decision No. 248b-H, was certified as the exclusive bargaining representative for a unit consisting of several registered nurse job titles. Thereafter, the parties entered into collective bargaining agreements covering the job titles found by PERB to be appropriate. To effectuate a change in the unit, the University was obligated to present "newly discovered or previously unavailable evidence or special circumstances" through the PERB unit modification procedure [PERB Regulation 32781(b)(1)].

PERB has not previously been called upon to decide the specific question presented in the instant case. Yet in Mount San Antonio Community College District (1983) PERB Decision No. 334,[3] a case strongly relied upon by the ALJ, PERB disapproved of employers' unilaterally determining which employees or duties are

[3]Mount San Antonio Community College District (1983), supra, is currently before the California Court of Appeal, Second Appellate District (Civ. No. B036249) on an unrelated issue.

to remain part of an established bargaining unit. In reaching its conclusion, PERB noted:

> In the absence of a determination by the Board that a particular employee is supervisory, that employee and that employees duties belong to the bargaining unit. This is true regardless of whether some part of those duties may involve supervisory functions.
> (At fn. 7.)

In the instant case, the University both unilaterally reassigned unit employees to non-unit positions and, by virtue of that reassignment, also transferred unit work outside the existing unit. The University's withdrawal of recognition from CNA, vis-a-vis the approximately 140 employees that were transferred into the supervisory classifications, clearly constituted a midterm modification of an existing unit.

In similar circumstances, the National Labor Relations Board (NLRB) has held that a midterm withdrawal of recognition is an unfair labor practice, even if the disputed classification would otherwise be excluded either under a statutory exclusion, or under exclusionary language contained in the recognition clause of a collective bargaining agreement.[4]

The NLRB has dismissed unit clarification petitions filed midway through a collective bargaining agreement, even where the

[4]While PERB is not bound by the NLRB or federal court cases interpreting the NLRA, it may take cognizance of federal precedent in interpreting provisions of the HEERA where the provisions are similar to language in the NLRA. (See, e.g. California State University Hayward (1987) PERB Decision No. 607-H.)

basis of the petition is the alleged supervisory status of the classifications in question. (See *e.g.*, Arthur C. Logan Memorial Hospital (1977) 231 NLRB No. 119 [96 LRRM 1063] ; Northwest Publications Inc. (1972) 200 NLRB No. 20 [81 LRRM 1448]; Wallace Murray Corp. (1971) 192 NLRB No. 160 [78 LRRM 1046].)

In Arizona Electric Power Coop. (1980) 250 NLRB No. 110 [104 LRRM 1464] , the NLRB held that an employer violated the NLRA by removing employees from the bargaining unit, even though at least one such employee was in fact a statutory supervisor. Citing Arthur C. Logan Memorial Hospital, supra, the NLRB reasoned:

> Since we have dismissed midterm petitions to exclude alleged supervisors on the ground that to entertain them would be disruptive of established bargaining relationships, it would be anomalous were we here to permit Respondent to engage in the far more disruptive practice of unilaterally modifying the scope of a unit during the life of a contract covering that unit. 104 LRRM at 1446.

In so holding, the NLRB reaffirmed its established rule that:

> . . . integrity of a bargaining unit cannot be unilaterally attacked, and that once a unit is certified it may be changed only by mutual agreement of the parties or by Board action. Id.

In the case of Carolina Telephone and Telegraph Co. (1981) 258 NLRB No. 189 [108 LRRM 1185] , an employer, had executed a collective bargaining agreement with a unit which included stenographic clerks. The employer had full knowledge of the nature of the clerk's duties. During midterm of the agreement, the employer withdrew recognition from the union as

representative of said employees. Citing Arizona Electric, supra, the NLRB concluded that the unilateral modification of the scope of the unit during midterm of the parties collective bargaining unit constituted a violation of the duty to bargain and an interference with employee rights.

The NLRB has also specifically held that a unit may be clarified only by filing a petition for unit clarification pursuant to the NLRB's rules and regulations. In rejecting an employer's contention that it could unilaterally withdraw recognition from the union for employees who were allegedly guards under the NLRA, the NLRB noted:

> We find it unnecessary to determine whether the three individuals classified as operators are guards under the Act because even if they are, the Respondent would not be justified in withdrawing recognition from the Union. Guards are excluded in the unit description, and if the Respondent believes, that certain individuals should be excluded because of their guard status, the proper procedure for determining the issue is unit clarification, not withdrawal of recognition. See Board's Rules and Regulations, Secs. 102.60(b) and 102.61(d).

(ACL Corporation d/b/a Atlanta Hilton (1986) 278 NLRB No. 76 [122 LRRM 1012, 1013 at fn. 1] .)

Based upon the rationale set forth in the cases above, we reject the University's contention that the ALJ should have made specific factual findings as to whether each of the employees transferred out of the unit was or was not a supervisor. Contrary to the University's implication, the University's filing of a unit modification petition after it had implemented the

transfer and the resulting settlement agreement certainly have no relevance as to the propriety of its earlier actions. The ALJ properly considered the settlement agreement as the basis for his determination that, in terms of a remedy, restoration of the status quo ante would not be in the best interest of the parties.

The University cites NLRB and Agricultural Labor Relations Board (ALRB) decisions in support of its contention that an employer may engage in a "technical refusal to bargain" as an alternative means of challenging the composition of a certified unit covered by an existing collective bargaining agreement. (J.R. Norton Co. v. ALRB (1979) 26 Cal.3d. 1; Boire v. Greyhound Corp. (1964) 376 US 473.) The cases cited by Respondent are inapposite. The NLRB and ALRB have condoned the use of a "technical refusal to bargain" only as a means of attacking initial certification proceedings, immediately following the completion of a representation election. In the instant case, the University's unilateral withdrawal of recognition of CNA as collective bargaining representative for approximately 140 nurses occurred during the life of an existing collective bargaining agreement.

In summary, PERB statutes and regulations, as well as decisional law under the NLRA, clearly support the ALJ's conclusion that in disputed cases the only method available to an employer seeking to convert bargaining unit positions to newly created supervisory positions is through the filing of a timely unit modification petition.

The ALJ declined to reach the issue of whether the University breached any obligation to negotiate about the actions it took. The University, in its exceptions, charges that the ALJ failed to find an issue of an asserted obligation to bargain, ruled on the issue he claims does not exist, and based his remedy on that ruling. Respondent misconstrues the decision. The ALJ found, and correctly so, that whether or not the University did or did not satisfy any asserted obligation to bargain is irrelevant to the outcome of this case. The University's midterm withdrawal of recognition of CNA as the collective bargaining representative for the alleged supervisory employees constitutes a refusal or failure to engage in meeting and conferring with an exclusive representative, a denial of the rights of CNA to represent its members and an interference with employee rights.[5] The ALJ correctly found a violation of section 3571(c) and, derivatively, (b) . We also find that the facts of this case support the allegations in the complaint of independent violations of (a) and (b) . Consistent with our decision in Tahoe-Truckee Unified School District (1988) PERB Decision No. 688, we do not affirm the ALJ's finding of a derivative violation of (a) based solely on the finding of a (c) violation.

[5]NLRB decisional law has recognized the unilateral modification of the scope of the unit during the midterm of the parties' collective bargaining agreement as both a violation of the duty to bargain collectively and an interference with employee rights. (Arizona Electric Power Coop., supra; Carolina Telephone and Telegraph Co., supra.)

The University's exception to the make-whole remedy awarded by the ALJ is primarily based on its argument that it violated no law by engaging in a technical refusal to bargain. Having rejected the "technical refusal to bargain" defense, the ALJ properly ordered a make-whole remedy based on his conclusion that the University's actions constituted an unlawful refusal to bargain under HEERA.[6]

ORDER

Upon the foregoing decision and the entire record in this case, and pursuant to section 3563.3 of the Higher Education Employer-Employee Relations Act, the Board orders that the Regents of the University of California and its representatives shall:

1. CEASE AND DESIST FROM:

(1) Refusing to negotiate in good faith with the California Nurses Association, the exclusive representative of a unit of registered nurses, by unilaterally: (a) converting bargaining unit classifications to supervisory classifications and (b) transferring bargaining unit work out of the unit.

(2) Interfering with the rights of employees to be represented by their exclusive representative by the conduct described in paragraph number (1) above; and

[6]In similar factual circumstances, the NLRB has found a make-whole remedy appropriate to redress any losses suffered by the employees affected by the unfair labor practice. (Carolina Telephone and Telegraph Co., supra.)

(3) Denying the California Nurses Association the right to represent its members by the conduct described in paragraph number (1) above.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(1) Make employees whole for any losses suffered as a result of the conduct described in paragraph number one (1) above for the period beginning with the effective date of the unlawful conduct to September 30, 1987.

(2) Within thirty five (35) days following the date this Decision is no longer subject to reconsideration, sign and post copies of the attached Notice marked "Appendix" in conspicuous places where notices to employees are customarily posted at the San Francisco, Davis and UCLA campuses. Such posting shall be maintained for thirty (30) consecutive workdays. Copies of this Notice must be signed by an authorized agent of the University, indicating the University will comply with the terms of this Order. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other materials.

(3) Written notification of the actions taken to comply with this Order shall be given to the San Francisco Regional Director of the Public Employment Relations Board in accordance with his or her instructions, and shall be served concurrently on the charging party.

Chairperson Hesse and Member Porter joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-247-H, in which all parties had the right to participate, it has been found that the Regents of the University of California violated Government Code section 3571(a),(b),(c) .

As a result of this conduct we have been ordered to post this Notice, and will abide by the following. We will:

1. CEASE AND DESIST FROM:

(1) Refusing to negotiate in good faith with the California Nurses Association, the exclusive representative of a unit of registered nurses, by unilaterally: (a) converting bargaining unit classifications to supervisory classifications and (b) transferring bargaining unit work out of the unit.

(2) Interfering with the rights of employees to be represented by their exclusive representative by the conduct described in paragraph number (1) above; and

(3) Denying the California Nurses Association the right to represent its members by the conduct described in paragraph number (1) above.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(1) Make employees whole for any losses suffered as a result of the conduct described in paragraph number one (1) above for the period beginning with the effective date of the unlawful conduct to September 30, 1987.

Dated: Regents of the University of California

By_____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA NURSES ASSOCIATION, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, **Respondent.**	)	Unfair Practice Case No. SF-CE-247-H PROPOSED DECISION (1/11/88)

Appearances: Beeson, Tayer, Silbert & Bodine, by Kenneth C. Absalom, Attorney, for the California Nurses Association; Susan Thomas, Attorney, for The Regents of the University of California.

Before; Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

This unfair practice charge was filed by the California Nurses Association (hereafter CNA, Association or charging party) against the Regents of the University of California (hereafter University or respondent) on October 22, 1986. The charge, as amended, alleges that the University unilaterally removed approximately 140 positions from a certified bargaining unit, thus modifying the unit. This conduct, it is alleged, violated the Higher Education Employer-Employee Relations Act (hereafter HEERA or Act), section 3571(c).[1]

[1]The ERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references in

The Public Employment Relations Board (hereafter PERB or Board) General Counsel issued a complaint on November 21, 1986. The University filed its answer on December 17, 1986, denying that it violated the Act and offering several affirmative defenses. Denials and defenses will be dealt with below as necessary. The settlement conference on December 22, 1986 did not resolve the dispute.

After a prehearing conference on March 6, 1987, the University filed a unit modification petition (SF-UM-399) asserting that the positions in question are supervisory and therefore not appropriate for inclusion in the unit. The cases were consolidated for formal hearing, and, on April 17, 1987, the parties were directed by the undersigned to submit declarations in support of their respective arguments concerning the supervisory status of the disputed positions. It was intended that the evidence submitted in the form of declarations be received in lieu of conducting a formal hearing in the unit modification petition. See In The Matter of: Unit Determination for Employees Of The Regents Of The University Of California (Exclusionary Phase) (1982) PERB Order No.-Ad. 114c-H; In The Matter of: Unit Determination For Professional Patient Care Employees Of The University Of

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this decision are to the Government Code. Section 3571(c) provides that it shall be unlawful for a higher education employer to:

> Refuse or fail to engage in meeting and conferring with an exclusive representative.

California (1983) PERB Decision No. 248b-H. While this process was underway, the parties met on September 30, 1987 and reached agreement on the unit modification petition. The agreement called for withdrawal of the petition.

The briefing schedule in the unfair practice charge was completed on December 11, 1987 and the case was submitted.

FACTUAL FINDINGS

The parties have stipulated to the relevant facts. The following is a summary of that stipulation.

The University is an employer within the meaning of section 3562(h). The Association is an employee organization within the meaning of section 3562(g), and the exclusive representative within the meaning of section 3562(j) of a bargaining unit consisting of nurses working at University hospitals and student health centers.

There has been a collective bargaining agreement in effect since 1984. The current agreement covers the period from January 12, 1987 to October 31, 1988. All agreements include the following recognition clause.

> A. The University hereby recognizes the Association as the sole and exclusive representative for the purpose of collective bargaining for all nurses in the classifications listed below, excluding those classifications and/or nurses designated as managerial, supervisory, or confidential as defined in the Higher Education Employer-Employee Relations Act and all UC student nurses whose employment is contingent upon their status as students.

B. The term "nurse", "employee" or "employees" as used in this Agreement shall refer to nurses mentioned above who are within the bargaining unit covered by this Agreement.

C. Any new registered nurse classification shall be subject to meeting and conferring to determine bargaining unit status. If the parties are unable to agree upon inclusion or exclusion, either party may pursue PERB procedures.

In December 1984 the University began discussing with representatives of the Association its intention to designate certain bargaining unit nurses as supervisors and to place them in newly created supervisory classifications. In a January 29, 1985 letter John Ortega, Association Assistant Director, Economic and General Welfare Program, informed Gayle Cieszkiewicz, University Labor Relations Coordinator, that he was prepared to meet prior to any unilateral designations by the University to identify positions/individuals claimed to be supervisory and to seek agreement on those to be excluded. Ortega acknowledged that he had been told during discussions with University representatives at meetings on December 14, 1984 and January 28, 1985 that "the University claims a right to designate supervisors and managerial employees, but since issuance of PERB Decision No. 248-b-H dated March 31, 1983 the University has not exercised that right." The decision referred to by Ortega established the nurses unit which is the subject of this case.

That same day (January 28) Ortega was informed by Jeanne Bargmann, University Labor Relations Representative, that the

University had created new supervisory classes for registered nurses. Bargmann provided the Association with a copy of the new supervisory classifications, title codes and salary ranges at that time, and invited a response from the Association.

On February 5, 1985 Ortega notified the University that the Association wished to meet and confer concerning the University's new supervisory classifications. On February 7, 1985 Bargmann responded that the only purpose of her earlier letter was to notify the Association of the creation of the supervisory classes.

On March 4, 1985 Cieszkiewicz, on behalf of the University, refused Ortega's request to meet and confer. In an attempt to clarify what she believed to be a misunderstanding about the University's position, Cieszkiewicz advised the Association that the University acknowledged no obligation to meet and confer on this subject. Cieszkiewicz wrote that she was eager to reach a mutual understanding of the names of the individuals who, although performing supervisory duties, were in titles named in the recognition clause of the collective bargaining agreement. She made it clear, however, that the University had no intention to negotiate about its decision. Cieszkiewicz wrote:

> Thus, HEERA preserves the University's managerial prerogative to fill vacant supervisory positions and to create and fill new supervisory positions as operations needs change. Indeed, we see no requirement in HEERA to give notice to or meet and confer with CNA prior to treating a supervisor as a supervisor.

The parties, nevertheless, met on April 8, 1985 in an effort to "finalize as many of the outstanding University supervisory exclusions as possible." At that meeting Ortega agreed that the individuals excluded by the Board in PERB Decision No. 248b-H were still out of the unit and asked for additional information as to the other positions. Cieszkiewicz agreed to supply the Association with some additional information prior to taking final action.

On August 20, 1985 Cieszkiewicz notified Association representative Jessie Bostelle that the University intended to move those individuals named on lists supplied to the Association into appropriate supervisory classifications "as soon as possible, but not later that October 1, 1985."[2] It appears that the lists provided at this time included only those positions which had been excluded earlier by PERB Decision No. 248b-H. Cieszkiewicz also informed Bostelle that she was willing to meet to discuss other outstanding supervisory issues covered earlier with Ortega. However, no action was taken.

On February 17, 1986 Cieszkiewicz notified Bostelle that 144 bargaining unit employees who, in the University's view, were performing supervisory work would be designated as supervisors by March 1, 1986. Cieszkiewicz made the significance of this action clear. She wrote:

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[2]It appears that Bostelle had by this time replaced Ortega as Assistant Director.

> As we have discussed on more than one occasion, the University has identified a number of individuals who perform supervisory work but who are incorrectly classified and/or designated as employees. These individuals are located at the San Francisco, Los Angeles, and Davis locations, only. It is believed that their current classification and designation as "employees covered by the Agreement" is inappropriate, and that the movement of these individuals into supervisory titles and classifications is imperative.
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> Because this action will move the individuals named in the enclosed set of documents out of the unit, and because the number of individuals which require redesignation to supervisory status is notable, I am providing you with notice of the actions before they are implemented.

At that time, the University provided information concerning its decision, including names and work locations of individuals designated for the change, and responsibilities that the University regarded as supervisory. In addition, the University provided (by campus) the number of FTE-designated rank-and-file nurses, the number of FTE positions designated as supervisory, and the resulting supervisor/employee ratio. Cieszkiewicz in her letter invited the Association to express any concerns it had about the upcoming change in classification of employees.

The Association requested additional time to respond to the University's February 17 letter.[3] The University delayed implementation and refrained from reclassifying the 144 individuals on March 1, 1986.

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[3]This request was made by Rose Ann DeMoro, who apparently had replaced Bostelle.

On March 10, 1986 the Association advised the University that it took exception to the exclusions. DeMoro wrote that in the past the positions had not been viewed as supervisory and there had been no changes in responsibilities that would warrant the new classifications. DeMoro asked Cieszkiewicz if the University had additional information which would support its position. On March 21, 1986 the University advised the Association that it already had provided sufficient information, and asked for more specific reasons for the Association's disagreement. The March 21 letter also indicated a willingness to meet in a final effort to resolve the matter. Cieszkiewicz wrote: "As we discussed, we are prepared to meet in a final effort to obtain the information necessary to resolve this matter to our mutual satisfaction." Meetings were set up between the parties at each affected location - San Francisco, Los Angeles, and Davis.

On July 21, 1986, following the meetings referenced above, the University notified the Association that employees at the San Francisco and Davis campuses were to be converted from bargaining unit titles to supervisory titles, effective August 1, 1986. The letter of July 21 confirmed earlier conversations between Cieszkiewicz and DeMoro, and advised DeMoro that unit employees at UCLA would not be converted to the supervisory titles at that time. The University also promised to let the Association know when UCLA intended to undertake the conversions.

On August 8, 1986 the University again contacted the Association to provide follow-up information concerning the names of individuals at the San Francisco and Davis campuses whose titles had been converted on August 1. At the time the University moved individuals into the new supervisory positions, the Association had not consented to any such reclassifications.

Since the individuals were moved into the new supervisory positions, the University has not recognized the Association as their exclusive representative. For example, these individuals were compensated in accordance with the collective bargaining agreement until they were moved into the new supervisory positions. The compensation for those individuals now differs from that of bargaining unit employees in certain respects, as do other terms and conditions of their employment which have been unilaterally established. In addition, the University's action resulted in at least some work being removed from the unit. See footnote 8, supra.

On October 22, 1986 the Association filed this unfair practice charge concerning the University's conversion of employees to the supervisory classifications.

On November 19, 1986 the University sent a letter to the Association confirming earlier conversations wherein the University had advised the Association of its intent to reclassify certain clinical nurses at UCLA to supervisory

titles effective December 1, 1986.

On March 9, 1987 the University filed a unit modification petition. The unfair practice charge was amended to include the reclassifications at UCLA.

ISSUES

At the outset it is important to note what this case is not about. First, CNA does not contend that the University could not have lawfully created new supervisory job titles outside the bargaining unit and recruited interested candidates for such newly created vacancies, provided the integrity of the bargaining unit was not threatened. CNA claims no right to represent supervisors. Second, in its present procedural posture, this case does not involve the question of whether the employees in question were in fact statutory supervisors. In case number SF-UM-399 the parties entered into a settlement agreement in September 1987 which fully resolved the exclusionary issues; no administrative determination was made as to whether the employees in question were supervisors. For the purpose of the present proceeding, however, it is assumed that at least some of the employees perform supervisory duties under the Act.

The principal question presented, then, is a narrow one: whether the University had an obligation to exhaust the Board's unit modification procedures before excluding the employees in question from the bargaining unit, even assuming at least some

of the employees were supervisors under the Act." Also, statute of limitations and waiver issues are presented by the University's affirmative defenses.

DISCUSSION AND CONCLUSIONS

A. The Reclassification

It is undisputed that the University unilaterally reclassified employees formerly in the bargaining unit to supervisory positions outside the unit. The University contends it should be free to remove employees from the unit when, in its view, they have begun to perform supervisory duties. Its primary line of defense is that the Act, Board regulations and applicable case law, taken together, authorize an employer in such circumstances to engage in a so-called "technical refusal to bargain." The Association, on the other hand, adopts the position that an employer may not remove an employee from a bargaining unit without either an agreement with the exclusive representative or an order pursuant to the Board's unit modification procedures. The first question to be

[4]The University argues that this case presents a separate but related issue concerning its obligation to negotiate about the actions it took herein. I do not view the case as presenting such an issue. The narrow issue, as I see it, is framed above. Even if the refusal to negotiate the issue was reached, however, it would not change the outcome of the decision. There is no dispute that, as a general rule, the parties are free to negotiate about exclusionary issues. As more fully explained later, even if the University satisfied (or did not satisfy) any requirement it had to negotiate, absent an agreement with CNA, the University was not free at the end of the process to unilaterally convert the positions.

addressed, therefore, is what procedural vehicles are available to an employer when it believes that employees, previously placed in a bargaining unit by a Board decision, are no longer appropriately in the unit because the employer has formed the opinion they perform supervisory duties.

HEERA section 3563, which defines the powers and duties of the Board, states that the Board shall have the following powers and duties:

> (a) To determine in disputed cases, or otherwise approve appropriate units.
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> * • • •
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> (e) To establish by regulation appropriate procedures for review of proposals to change unit determinations.
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> • • • •
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> (k) To decide contested matters involving recognition, certification, or decertification of employee organizations.

The Board, under section 3563(f), has adopted regulations to carry out these provisions and effectuate the purposes and policies of the Act. PERB Regulation 32781 (Cal. Admin. Code title 8, Part III, sec. 32781) sets out the procedures to be followed by parties that wish to obtain Board approval of a bargaining unit modification in various circumstances. At least two parts of this section are relevant to the present dispute.[5] They are as follows:

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[5]The University's unit modification petition (SF-UM-399), filed after this unfair practice charge, relied in part on the two provisions noted.

> Parties who wish to obtain Board approval of a unit modification may file a petition in accordance with a provisions of this section.
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> . . .
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> A recognized or certified employee organization, an employer, or both jointly may file with the regional office a petition for change in unit determination:
>
> (1) To delete classifications or positions no longer in existence or which by virtue of changes in circumstances are no longer appropriate to the established unit;
>
> . . .
>
> (4) To clarify the unit where the creation of a new classification or position has created a dispute as to whether the new classification or position as or is not included in the existing unit.

The University argues that the Board's regulations, drafted in permissive terms, provide only one alternative to a so-called technical refusal to bargain, the traditional method of testing exclusionary issues found in section 3564(a) of the Act.[6] The University points out that a comparison of the prior unit modification regulations, which by its terms had represented the exclusive forum for modifying a unit, with the current permissive regulatory scheme supports this argument. For a variety of policy considerations, the University contends it should be free to pursue a technical refusal to bargain approach to exclusionary issues without being subject to an

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[6]Section 3564(a) provides in relevant part that

> No employer or employee organization shall

unfair practice charge. It makes no sense, the University reasons, to require an employer to recognize an exclusive representative of supervisory employees (assuming the employees in question are supervisors) while awaiting the outcome of a unit modification petition.

As the Association points out in its brief, there are reasons which argue against affording an employer the option of a technical refusal to bargain under circumstances such as those presented here. In fact, the Board addressed this issue under similar circumstances in Mount San Antonio Community College District (1983) PERB Decision No. 334, where a school District unilaterally: created non-bargaining unit positions and transferred work previously performed by unit employees to employees who filled the new position. Relying on Alum Rock Union Elementary School District (1983) PERB Decision No. 322, the Board concluded that

> "'where management seeks to create a new classification to perform a function not previously performed . . . by employees ... it need not negotiate the decision.' However, . . . "those aspects of the creation . . . of a classification which merely transfer existing functions and duties from one classification to another involve no overriding managerial prerogative,' and are,

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> have the right to judicial review of a unit determination except. . . . (2) when the issue is raised as a defense to an unfair practice complaint.

See also Dixie Elementary School District (1983) PERB Decision No. 298; El Monte Union High School District (1982) PERB Decision No. 220.

therefore, negotiable. Thus, where the assignment of duties to employees would transfer work previously performed by bargaining unit members out of the bargaining unit, the employer is obligated to negotiate." Mt. San Antonio Community College District, supra, p. 8-9; see also Kendall College (1977) 228 NLRB 1083, [95 LRRM 1094].

The dissent in Mount San Antonio adopted the argument put forth by the University in this proceeding; that is, an employer has no obligation to negotiate about removing work, which in its view is supervisory. In response, the majority stated:

> We find no statutory or case authority whatsoever to support this theory. The performance of "supervisory duties" is only relevant to a determination of whether an employee should properly be excluded from the bargaining unit as a "supervisory employee" within the meaning of subsection 3540.l(m). In the absence of a determination by the Board that a particular employee is supervisory, that employee and that employee's duties belong to the bargaining unit. This is true regardless of whether some part of those duties may involve supervisory functions.
>
> Under the theory set forth in the dissent, management could effectively circumvent the statutory unit modification procedure, while shifting the burden to the union to prove that management had acted improperly. Thus, if management were to unilaterally remove so-called "supervisory duties" from the bargaining unit, the union's only recourse would be to file an unfair practice charge, alleging that management unlawfully transferred bargaining unit work out of the unit. The burden of proof would fall on the Union to establish that the particular duties transferred were "non-supervisory." In contrast, under the unit modification procedure, when management seeks to exclude an employee from the bargaining unit as supervisory, the burden of proof rests on the employer to establish that an employee possessed sufficient indicia of supervisory status.

. . . . .

> Finally, we note that, in this case, management and the Association mutually agreed that these employees and their duties should be in the bargaining unit. . . . Under the theory offered by the dissent, management may piecemeal, and without bargaining, undo what it has agreed to respect. We can hardly conceive of a system less conducive to cooperative labor relations. Mt. San Antonio Community College District, supra. Fn. 7, pp. 9-10. (Emphasis in original.)

These principles control the outcome of this dispute. The Mt. San Antonio rationale is as applicable to Board-certified bargaining units as it is to units established by consent of the parties.

The University has argued that it makes no sense to require an employer to recognize an exclusive representative for the purpose of bargaining about supervisory employees (assuming the employees in question are supervisory) while awaiting the outcome of a unit modification procedure. The University's argument simply sets forth one possible alternative to the present procedure contemplated by Mount San Antonio Community College District. It is, however, noted that the present unit modification exhaustion requirement, like the technical refusal to bargain, has worked satisfactorily in the past. See e.g., Antioch Unified School District (1984) PERB Decision No. 415; Atascadero Unified School District (1981) PERB Decision No. 191. And, as evidenced by the settlement in SF-UM-399, it is clear that the unit modification procedure, which may be invoked during the life of a collective bargaining agreement, can still work as rapidly and as efficiently as the unfair

practice procedure.

It is true, as the University points out, that prior regulations required all unit modifications be accomplished through the regulatory process set up precisely for that purpose. While the current regulation does not require that all unit modifications be made thereunder, it does not go so far as to permit a technical refusal to bargain about unit questions expressly contemplated by the regulation. If the Board had contemplated processing unit modification issues as technical refusals to bargain (i.e., in the unfair practice arena) it could have done so. The current regulation simply permits parties to agree on unit modifications, but in the absence of an agreement the regulation remains the appropriate vehicle for effecting such changes.[7] This is especially true in a case such as this, where the University's actions were taken allegedly as a result of changed circumstances and the creation of new classifications, situations expressly contemplated by the regulation. If the clear language of the regulation and Mount San Antonio are to have any meaning, the University's position must be rejected.

Therefore, it is concluded that, absent an agreement, an

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[7]See Healdsburg Union School District (1984) PERB Decision No. 375, p. 49-50, where the Board found nonnegotiable a proposal which would have included in the contract a procedure for unit modification. Under this decision it appears that PERB approval of a unit modification may be necessary even when the parties agree, if the agreement is to withstand scrutiny in a later Board proceeding.

employer may not convert bargaining unit positions to supervisory positions without first going through the appropriate unit modification procedure; nor may an employer remove work from a bargaining unit without negotiating with the exclusive representative.

In this case the University unilaterally reclassified bargaining unit employees to newly created non-bargaining unit positions, and in the process simultaneously removed employees as well as work from the unit.[8] In doing so, the University acted contrary to the unit modification regulations and principles set forth in Mount San Antonio. In the absence of an agreement with the Association, the University was not free to convert bargaining unit positions to supervisory positions except through the unit modification process.[9]

B. The University's Affirmative Defenses;

1. The Statute of Limitations

The University first argues that this unfair practice

Official notice is taken of the record in SF-UM-399. Antelope Valley Community College District (1979) PERB Decision No. 97. Although the University claims this is not a case involving transfer of work out of the unit, declarations filed by the University in SF-UM-399 indicate that at least some bargaining unit work was transferred out of the unit. See e.g., Declarations of Priscilla Slaven, Sylvia (Kelly) White, Ann Caudell, Malou Blanco Yarosh, Robin Rosemark, Lorraine Sharpe, and Tracy Weintraub.

[9]Based on this conclusion, there is no need to address the University's argument that because Board regulations permit mid-term unit modification petitions a mid-term technical refusal to bargain should likewise be permitted.

charge is time-barred.[10] It points out that CNA could have filed an unfair practice charge which would have survived scrutiny under the statute of limitations on at least four occasions between December 1984 and October 1986, but failed on each occasion to do so.[11]

The University's statute of limitations defense appears to be aimed primarily at the issue concerning its obligation to negotiate. However, that issue is not considered in this decision. (See fn. 4, supra.) The central issue presented here is different. It concerns the University's failure to use the unit modification procedures before removing positions (and work) from the unit. For the following reasons, that issue is not time-barred.

Although the University made clear at the outset that it refused to negotiate, the use of the unit modification procedure had not been a serious topic of discussion prior to the time the University actually implemented the change. In

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[10]Section 3563.2 provides 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."

[11]The four occasions are: (1) on January 29, 1985 when Bargmann informed Ortega that the University had created new supervisory classes for registered nurses; (2) on March 4, 1985, when Cieszkiewicz informed CNA that the University recognized no obligation to meet and confer about its action; (3) on February 17, 1986 when Cieszkiewicz informed CNA that the University intended to reclassify bargaining unit employees by March 1; and (4) on March 21, 1986 when the University offered CNA a final round of meetings but at the same time indicated its intention to proceed with its decision.

fact, since there is not a single reference in the record to the use of the unit modification procedure, it cannot be concluded that CNA had "actual or constructive" notice of the University's resistance to this procedure prior to the implementation date. Victor Valley Community College District (1986) PERB Decision No. 570. Therefore, the violation concerning use of the unit modification procedure occurred when the talks failed and the University implemented the change. The statute of limitations began to run at that time. El Dorado Union High School District (1984) PERB Decision No. 382. Under these circumstances, it cannot be said that the charge concerning the unit modification procedure is "inescapably grounded" in events beyond the six-month period. Local Lodge. No. 1424. IAM v. N.L.R.B.. supra. 3 62 U.S. 411, 421.

2. Waiver

The University advances a two-pronged waiver argument. First, the University contends that the broadly worded management rights clause in the collective bargaining agreement gives it the sole authority "to determine and modify job classifications and job descriptions." Second, the University asserts that it is free to create positions outside the bargaining unit; when it informed CNA that it intended to reclassify unit employees to these positions CNA did nothing, thus waiving any rights it had by inaction.

As a general rule, contract terms will not justify a

unilateral management act on a negotiable subject unless the contract expressly or by necessary implication confers such a right. Los Angeles Community College District (1982) PERB Decision No. 252, p. 10. The contract clause giving the University the prerogative to "determine and modify job classifications" does not expressly or by necessary implication address the more specific areas of removal of positions or work from bargaining. Contract language which covers a subject (e.g. layoffs) in general terms will not, without more, support a waiver of a more specific aspect (e.g. effects of layoffs) of the broader subject. Placentia Unified School District (1986) PERB Decision No. 595.

Moreover, another clause in the contract appears to be in conflict with the management rights provision. Paragraph three of the recognition article states that a new classification "shall" be subject to meeting and conferring. It also provides that, in the absence of an agreement regarding the inclusion or exclusion of new classifications, either party may pursue PERB procedures.[12] Faced with this language, it cannot be concluded that the "clear and unmistakable" waiver standard has been met by the University. Placentia Unified School District, supra.

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[12]No evidence of bargaining history was presented regarding these contract provisions. Thus, there is no evidence that the subject was "fully discussed" or "consciously explored" and CNA "consciously yielded" its interest in the matter. Los Angeles Community College District, supra.

Nor can it be concluded that CNA waived any rights by inaction. There is no dispute that a union may waive negotiating rights by inaction. Los Angeles Community College District, supra; Modesto City and High School Districts (1986) PERB Decision No. 566. CNA did not do so in this case. From December 1984 to the time the University implemented the changes, the parties engaged in an on-going dialogue. Meetings were held, information exchanged and the changes postponed by the University. This activity was consistent with that called for in the collective bargaining agreement; that is, the contract directed the parties to attempt to agree on unit status for new classifications. In the event agreement could not be reached, either party was free to "pursue PERB procedures." Agreement was not reached and the University implemented the changes. Within six months CNA filed the instant unfair practice in protest. Under these circumstances, there was no waiver by inaction. Even if CNA slept on its rights (or simply decided to not negotiate) Mount San Antonio compels the conclusion that the unit modification procedure must be used when a party claims a bargaining unit position is no longer appropriately placed in the unit.[13]

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[13]In Mount San Antonio, supra, footnote 7, the Board voiced concern about which party should have the burden of proof in exclusionary issues such as those presented here. As the University points out in its brief, this concern may be unnecessary. The burden of proof is the same, whether exclusionary issues are raised by the employer in a unit

CONCLUSION

It has been concluded that the University unlawfully modified the existing unit by unilaterally converting bargaining unit positions to supervisory positions outside the unit without first going through the Board's unit modification procedures. By the same conduct, the University simultaneously transferred some bargaining unit work out of the unit. It is therefore concluded that the University violated section 3571(c) and, derivatively, sections 3571(a) and (b). All other aspects of unfair practice charge SF-CE-247-H are dismissed.

REMEDY

Under section 3563(h) the Board is given the remedial authority

> [T]o investigate unfair practice charges or alleged violations of this chapter, and to take such action and make such determinations in respect of such charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.

In this case it has been found that the University unlawfully modified the existing bargaining unit by unilaterally converting existing unit positions to supervisory positions

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modification petition, or by the employer as part of an affirmative defense in the context of a technical refusal to bargain unfair practice charge. For this reason, the resolution of the central issue presented here would seem to have little, if any, practical value. The issue is not, however, moot. See Napa County Office of Education (1983) PERB Decision No. 282, (and cases cited therein), where an exclusive representative abandoned its unfair practice charge in favor of pursuing a unit modification petition.

outside the unit without first going through the Board's unit modification procedures. By the same conduct, the University simultaneously transferred at least a small amount of bargaining unit work out of the unit. The ordinary remedy in a case such as this to order the respondent to: (1) cease and desist from such unlawful conduct; (2) restore the status quo ante which existed prior to the time of the unlawful conduct; and (3) make employees whole for any losses suffered as a result of the unlawful conduct. See Mount San Antonio Community College District, supra.

In this case the University will be ordered to cease and desist from the unlawful conduct described herein. In view of the parties written settlement in Case No. SF-UM-399, there is no need to order the parties to return to the status quo ante. Such a remedial order, under these circumstances, would be disruptive to the relationship of the parties and thus not effectuate the purposes of the Act. Lastly the University will be ordered to make employees whole for the losses suffered as a result of the unlawful conduct described herein. Employees shall be made whole for such losses for the period beginning with the date of the unlawful conduct (when the changes were actually implemented) to September 30, 1987, the date the parties agreed to the settlement in Case No. SF-UM-399. Delano Union Elementary School District (1982) PERB Decision No. 213a; Rio Hondo Community College District (1983) PERB Decision No. 279a; Pittsburg Unified School District (1984) PERB

Decision No. 318a. Disputes which arise in the effectuation of this remedy shall be resolved under a Board-supervised compliance proceeding.

It also is appropriate that the University be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the University, indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the Employer has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the HEERA that employees be informed of the resolution of the controversy and will announce the employer's readiness to comply with the ordered remedy. See Placerville Union School District (1978) PERB Decision No. 69; Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3563(h) it is hereby ordered that the Regents of the University of California and its representatives shall:

1. CEASE AND DESIST FROM:

(1) Refusing to negotiate in good faith with the California Nurses Association, the exclusive representative of a unit of registered nurses, by unilaterally: (a) converting

bargaining unit classifications to supervisory classifications and (b) transferring bargaining unit work out of the unit, without first obtaining mutual agreement or an appropriate order under unit modification procedures established by the Public Employment Relations Board.

(2) Interfering with the rights of employees to be represented by their exclusive representative by the conduct described in paragraph number (1) above; and

(3) Denying the California Nurses Association the right to represent its members by the conduct described in paragraph number (1) above.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(1) Make employees whole for any losses suffered as a result of the conduct described in paragraph number one (1) above for the period beginning with the effective date of the unlawful conduct to September 30, 1987.

(2) Within seven (7) workdays of service of a final decision in this matter sign and post copies of the attached Notice marked "Appendix" in conspicuous places where notices to employees are customarily posted at the San Francisco, Davis and UCLA campuses. Such posting shall be maintained for thirty (30) consecutive workdays. Copies of this Notice must be signed by an authorized agent of the University, indicating the University will comply with the terms of this Order. Reasonable steps shall be taken to insure that the Notice is

not reduced in size, altered, defaced or covered by any other materials.

(3) Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the San Francisco Regional Director of the Public Employment Relations Board.

(4) Within thirty (30) workdays from a final decision in this matter, notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the charging party.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a timely statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code title 8, part III, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last

day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing ..." See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300, 32305, and 32140.

Dated: January 11, 1988

Fred D'Orazio
Administrative Law Judge