

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MIRIAM FLACKS, et al.,)
)
 Charging Parties,) Case No. LA-CE-210-H
)
 v.) PERB Decision No. 842-H
)
 REGENTS OF THE UNIVERSITY OF) September 27, 1990
 CALIFORNIA (DAVIS, LOS ANGELES,)
 SANTA BARBARA AND SAN DIEGO),)
)
 Respondent.)
 _____)

Appearances: Cliff Fried, President, American Federation of State, County, and Municipal Employees Local 3238, Council #10, on behalf of Miriam Flacks, et al.; Edward M. Opton, Jr., Attorney, for Regents of the University of California (Davis, Los Angeles, Santa Barbara and San Diego).

Before Hesse, Chairperson; Craib and Shank, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by the Regents of the University of California (Regents or University) on behalf of four of its campuses (Davis, Los Angeles, Santa Barbara and San Diego) which were charged with failure to give adequate advance notice of a "split payment" of merit increases awarded in fiscal year 1987-88 to certain nonexclusively represented employees, covered by the Administrative and Professional Staff (A&PS) personnel program which was adopted by the Regents effective July 1, 1987.

We have reviewed the entire record, including the exceptions filed by both parties, the responses thereto, and the administrative law judge's (ALJ) proposed decision (attached).

We find the ALJ's findings of fact and conclusions of law to be free of prejudicial error, and adopt the proposed decision as the decision of the Board itself, consistent with the discussion herein.

FACTS

The facts in this case are set forth by the ALJ at length in the proposed decision, but are briefly summarized herein.

On September 28, 1987, the Board issued a complaint alleging the Regents' conduct in providing inadequate advance notice of a "split payment" violated section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA).¹ Miriam Flacks, et al. (Flacks) were employees of four campuses of the University who are represented by, and who normally communicate with their employer through, a nonexclusive representative, the American Federation of State, County and Municipal Employees (AFSCME). Specifically, the charge alleged the University had unilaterally changed its policy pertaining to merit pay by paying increases

¹HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3571 was amended effective January 1, 1990. The amendment does not impact our analysis here. In 1987, and at all times pertinent to this case, Section 3571(a) stated in pertinent part:

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 this chapter.

awarded these employees for fiscal year 1987-88 on a one-fethird/two-thirds "split payment" basis during the year, instead of giving the full amount of the increase payable monthly, beginning on July 1, 1987.

In 1985, the University decided new personnel policies were needed for nonacademic staff and proposed a new program involving merit increases based on evaluated performance. A task force recommended, and the Regents approved in 1986, a four tier system. This case concerns only the third tier, A&PS. A&PS included 12,400 employees in approximately 270 job classifications, ranging from administrative analyst and management services officer I (MSO I) through principal analyst I and MSO III. The A&PS program was to be implemented in July 1987.

For the included employees, the system was to provide a wider range of salaries from top to bottom, but movement would depend upon evaluated performance. The program was to be implemented systemwide, but some campuses were given one year's grace to work out the merit pay aspect of the program. The four campuses listed above were the only ones selected to begin the program July 1, 1987.

An extensive consultation process, which began with initial distribution of the proposed changes and included many meetings with employees on all campuses, was carried out by the personnel staff and considerable feedback was received from employee groups.

The pertinent provisions of the A&PS policy are:

130.4 Merit Review. Within-grade salary advancement is based primarily on merit. The amount of increase awarded to an A&PS employee is influenced by performance as it relates to current pay and assigned responsibilities, the employee's current position within the salary range, relative performance among employees in the review unit, and availability of funds. The funds available are established as a percentage of payroll, which is applicable Universitywide. Merit increases normally are awarded effective July 1 of each year in accordance with guidelines established by the Assistant Vice President--Employee Relations. (Flack's Exhibit No. 1.)

The four campuses varied in the methods by which the new policy was reviewed. The ALJ set forth the evidence at length as to what occurred on each campus, but of primary relevance to the issue here is whether the method of payment, i.e., split or full, was discussed or not discussed with the concerned employees or their representative. On some campuses, the possibility of a split payment was raised and considered, but many witnesses testified they were unaware that a split payment was a possibility. The information generally disseminated was that it appeared the 1987-88 budget would include sufficient funds such that on July 1, 1987, the raises anticipated under the new system would be paid in full.

Although there were rumors and discussion, it appeared that no one would know for certain whether there would be a split payment until the budget was adopted and signed by the Governor "on July 1, 1987." While the possibility of a split payment was discussed at various meetings on all four campuses, the

University made no definite statement regarding the matter until Lubbe Levin, assistant vice-president and director of the systemwide office of employee relations, sent a letter dated May 21, 1987 to all campus personnel managers which stated, in part:

. . . the Governor and the Department of Finance yesterday recommended that the 3 percent range adjustment for UC staff and other State employees, originally scheduled for January 1, 1988, be moved up to July 1, 1987. Thus, it is expected that compensation plans for Executive, MAP, A&PS, and staff personnel for FY 1987-88 will reflect this change.

For employees in merit pay plans, the July 1, 1987 effective date means that the 40/60 split-payment methodology for distribution of salary increases, which had been indicated in earlier guidelines, will not be required.

. . . (Emphasis in orig.)
(University's Exhibit No. 42.)

The letter ended by requesting that the personnel managers "advise managers and employees accordingly." The record is not clear as to what extent this information was disseminated.

The budget which was finally approved on July 7, 1987, did not include funds for nonfaculty compensation for the period of July 1987 through December 1987. Thus, through a formula which combined three different sources of available funding to support the A&PS program beginning July 1, 1987, it was decided to make a split payment on a 40/60 basis between July 1, 1987 and January 1, 1988 to all nonrepresented staff employees, including all those under the new A&PS program.

During the six month period prior to July 1, 1987, University representatives held numerous meetings with AFSCME, Council 10. Specifically, Gregory Kramp (Kramp), deputy director of the University's office of labor relations, met with Nadra Floyd, executive director of Council 10 and other members of Council 10. The matter of split payment possibilities had been discussed, but it is not clear from the record as to whether this was a general discussion or specifically related to nonexclusively represented employees.

In any event, Melvin Terry, a senior analyst for the office of labor relations, sent a letter to Nadra Floyd dated July 8, 1987, which read, in part:

It is the intention of the University that non-represented staff employees receive approximately 4% range adjustments effective January 1, 1988. . . . For those administrative and professional employees on a strictly merit-based compensation program (A&PS), it is the intention of the University to distribute the individual employee's merit increase such that one-third (1/3) of the increase becomes effective July 1, 1987 and that the balance, i.e., the remaining two-thirds (2/3), would become effective January 1, 1988. . . .
(Fried's Exhibit No. 40.)

The letter ended with "Should you have any questions or wish to discuss this matter, please call me" Included with the letter was a press release describing the budget.

Each campus involved informed employees of the split payment in different ways. At Santa Barbara, Assistant Vice Chancellor José Escobedo issued a memo dated July 10, 1987 explaining the split payment procedures. The record does not show how the

information was distributed on the Davis Campus, but an employee at that campus testified she received a memo from her supervisor, dated July 23, 1987, containing the information. At UCLA, Assistant Vice Chancellor George Enoch (Enoch) sent a memo dated July 14, 1987 informing A&PS employees of the split payment. At San Diego, Vice Chancellor Quelda Wilson sent a memo dated July 5, 1987 explaining how the split payment would affect A&PS employees.

On July 27, 1987, Cliff Fried (Fried), an original party to this case, sent letters to the labor relations managers at the Davis, UCLA, Santa Barbara and San Diego campuses, attaching Enoch's memo and requesting immediate rescission of the decision to implement the merit-based pay plan as a part of the A&PS program at each campus. The letter further indicated that if he did not hear from each campus within 10 days, he would file unfair practice charges against the individual campus and the University. On July 28, Fried also sent a letter to Kramp requesting information on the split payment action.

Kramp responded to Fried by letter dated August 6, 1987 stating, in part:

. . . We are puzzled by your demand to meet and discuss regarding 1987-88 pay adjustments for Administrative and Professional Staff (A&PS) employees at this late date, when the initial checks under the plan are about to be issued or already have been.

.

Even though it probably is too late to meet and discuss regarding some of the issues identified in your letters to Managers

Gonzales, Hoover, Lebowich and Melman, other aspects of A&PS policies and implementation for 1987-88 might still be in a stage appropriate for meeting and discussing, either at the systemwide or campus level. If so, please write to me, identifying the particular matters about which you would like to meet and discuss. We can then talk by telephone about a time and place to meet. (Fried Exhibit No. 34.)

Upon receiving the August 6 letter, Fried telephoned Kramp and demanded that the University halt the split payment and "fully implement the full merit increase." Kramp responded: "It's [split payment] already been put into the hopper and we're not going to withdraw it."

On August 13, 1987, Fried filed this case. On August 14, he informed Kramp of that fact.

No individual employee contacted the University after the University's representative sent the July 8, 1987 notification of the split payment to Nadra Floyd, AFSCME's representative, but several employees contacted Fried during July concerning the matter.

The past practice concerning pay matters for nonexclusively represented employees is very sketchy. A split payment occurred for some employees in fiscal year 1983-84, but there is no record of how notice of the payment was given or what discussion took place. AFSCME Council 10 did engage in meet and discuss sessions on behalf of such employees in the past, and Nadra Floyd was the representative of Council 10 for those employees. Talks had occurred after implementation of raises in the past.

ISSUE

The issue is whether the University gave nonexclusively represented employees adequate advance notice of the fact that if the budget for the 1987-88 fiscal year did not include adequate funds to support full merit raises as of July 1, 1987 under the newly proposed A&PS merit based pay program, it would result in a split payment of 40 percent commencing July 1, 1987 and 60 percent paid commencing January 1, 1988.

ALJ'S DISCUSSION

The ALJ held that the University violated section 3571(a) by failing to provide sufficient notice of the possibility of a split payment both to individual nonexclusively represented employees and AFSCME as representative of such employees. She relied upon Regents of University of California v. Public Employment Relations Board (1985) 168 Cal.App.3d 937, 214 Cal.Rptr. 698 (Regents), which defines the University's responsibility under HEERA in dealing with nonexclusively represented employees and the organizations which they select to represent them. In that case, PERB's initial reaction to this problem was overturned. PERB, upon the passage of HEERA, construed HEERA to extend the same rights to employee organizations representing nonexclusively represented employees as such organizations had under the George Brown Act. The George Brown Act specifically allowed such employee organizations the "right to represent their members in their employment relations." The court, in concluding that HEERA intentionally excluded such a

right, also precisely defined what the University's duty toward nonexclusively represented employees should be. Thus, the court stated:

We agree with the University that the findings of fact by the hearing officer, which were adopted by the Board, demonstrate that the University's practices are consistent with the rights granted under HEERA. Under these practices, the University notifies individual employees of proposed changes in employment conditions and, if the employee chooses to have his or her union meet with the employer to discuss the changes, such meetings are held upon request. This approach acknowledges the right of the employee to be represented by the employee organization of his or her choice on "all matters of employer-employee relations" (section 3565), but does not grant to the organization independent rights not bestowed by the Legislature. The rights of the nonexclusive employee organizations, to the extent they exist, are derivative; they are the rights of an agent or representative of the employee, fid. at p. 945.)

The ALJ then held that, although there had been some discussion of the split payment problem during the many meetings held with individual employees to talk about the new merit based personnel system to commence on July 1, 1987, there was no clear indication that a split payment was a distinct possibility or even a probable development. The impression left with those employees who testified as witnesses was that the split payment was not going to happen. The final position, prior to July 1, 1987, clearly indicated in the letter of May 21, 1987 from Lubbe Levin, (quoted above at p. 5), was that a split payment was not going to be necessary. Furthermore, the ALJ found that in a

series of meetings held with AFSCME to discuss the merit pay plan; the split payment matter had not been discussed at all.

In reaching her conclusion, the ALJ also relied on the notification to Nadra Floyd, AFSCME's representative, in the letter of July 8, 1987, that the split payment would be implemented because of final budget action and Kramp's August 6 letter to Fried stating that the split payment was in effect with the issuance of August checks.

The ALJ concluded that most employees found out about the split payment upon receipt of the August checks and that the August 6 letter constituted notice to AFSCME. The ALJ issued a cease and desist order but refused AFSCME's back^pay request to make all employees whole for the six months loss of pay resulting from the split payment because there was insufficient evidence that the University had funds from which they could make such a payment.

Further affirmative relief was awarded by the ALJ in the proposed order as follows:

However, in addition to the cease and desist order, certain affirmative relief is appropriate. The employer is ordered to provide future affected employees with notice of the actual proposed change of policy or course of action, prior to implementation of such change in all policies relating to salary adjustments of A&PS program members at the Davis, Los Angeles, Santa Barbara and the San Diego campuses, and, upon request, provide a reasonable opportunity by a nonexclusive representative of the employees to present its views.
(At p. 50.)

University's Exceptions

1. The University contends the proposed decision postulates a statutory obligation to "meet and discuss" with nonexclusive representative employee organizations.

The University argues the charge should be dismissed on the mistaken assumption that the ALJ held it failed to meet and discuss with nonexclusive representative organizations. This argument is without merit because in Regents, supra, the court held that notice was necessary to individual employees who thus could request representatives to meet and discuss whatever changes were proposed. The ALJ carefully covered both the lack of adequate notice to individual employees and the lack of adequate notice to AFSCME, which, through Council 10, was the nonexclusive representative of such individual employees.

2. The University contends the decision erroneously assumes the split payment in 1987-1988 changed a past practice.

This argument is without merit because the ALJ found that the past practice of the University was to discuss changes resulting from budget authorizations both before and after the final budget was adopted. In this case, the ALJ found the University precluded any real discussion by misleading the employees as to whether a split payment was to occur and then implementing the split payment without further opportunity to meet and discuss the decision.

3. The University contends the decision assumes the obligation to give notice runs to nonexclusively represented

employees alone, not to employees or employee organizations in the alternative.

This exception appears to be a misconstruction of Regents, supra, which says clearly that notice must be given to individual employees first, who may then request their organizational representatives to meet and discuss. Regents held that nonexclusively represented employees' representatives were agents with no independent legal right to represent. This seems clear from the statement in Regents, supra, previously quoted on page 9:

. . . The rights of the nonexclusive employee organizations, to the extent they exist, are derivative; they are the rights of an agent or representative of the employee.
(At p. 945.) (Emphasis added.)

The ALJ specifically adopted this reasoning at page 41 of the proposed decision.

4. The University contends it gave notice to employees of the split payment.

There is no question that in discussing the proposed new merit based pay plan, the University went to considerable lengths to involve individual employees to obtain feedback and acceptance. The possibility of a split payment was discussed on several occasions, but the information was always ambiguous and tentative, until it was announced in the May 21, 1987 letter that a split payment would not occur. When it did occur, the decision was announced as already made, thus precluding further discussion. It is true that the University was caught in a

"catch-22" situation on July 7, 1987 when the budget was adopted without sufficient funds, but it was not impossible to have announced this fact, and have delayed implementing the split payment immediately. Both sides admitted that retroactive payments, would have been possible, although administratively burdensome.

5. The University contends "individual notice" is required by the decision and thus is contrary to law.

The University's argument is that the ALJ misinterpreted Regents, supra, as requiring individual notice of policy and work rule changes. While Regents can certainly be construed to hold that individual notice is required, that case did not involve or discuss what was "adequate individual notice."

Although the Board agrees with the ALJ's finding that the University failed to give adequate notice, we are aware that a potentially difficult and burdensome duty is cast upon the University by Regents. The University in this case made no effort whatsoever, after the budget was finally signed on July 7, 1987, to give advance notice that a split payment was now necessary and, instead, simply notified the employees that the decision had been made. We realize that any situation involving 12,000 or more employees presents a difficult practical problem when they are to be informed of possible changes in working conditions.

The issue of what constitutes adequate notice should be determined by the specific facts and circumstances of each case.

Clearly, the method of notice chosen must be reasonably calculated to apprise the employees of the impending change.² In this case, the employees were never clearly notified, by any means, that the split payment was a distinct possibility. Whatever information was disseminated was too ambiguous to satisfy the University's duty to give notice. The employees were, in fact, left with the impression that the split payment would not occur.

6. The University argues AFSCME waived its right to meet and discuss.

Most of the argument submitted by the University addresses its efforts to meet and discuss the general merit-based pay plan with AFSCME and assumes, since the possibility of a split payment was part of the program, its responsibilities were satisfied. Specifically, it argues that since its letter of July 8, 1987 informing AFSCME of the split concluded with the sentence, "Should you have any questions or wish to discuss the matter, please call," the burden then shifted to AFSCME to request further discussion. The ALJ reasonably concluded the import of the letter to be the adoption of the split payment and any discussion subsequent would be about a decision already made. Even more significant is the finding that most, if not all, of

²We do not identify here precisely what methods of notice might be appropriate in any particular case. In selecting a method of notice, however, employers should consider such factors as reliability of past means of giving notice, the size of the employee group, geographic considerations, and availability of various methods of communication including, but not limited to, U.S. mail, internal mail, bulletin boards, etc.

the employees involved did not know of the split payment decision until they received their August pay checks. The University's argument that the failure to respond to the July 8 and August 7 letters constituted a waiver must fail because the decision to implement the split payment was made and carried out without any prior notice to individual employees. (See Los Angeles Community College District (1982) PERB Decision No. 252.)

Flacks' Exception

Flacks excepts to that portion of the ALJ's decision denying an award of back pay to those employees impacted by the six month delay in receiving payment of the full salary increase.

The ALJ found that the University did not have the 4 percent range adjustment funds in its budget for distribution on or about July 1, 1987. She based her denial of back pay upon the fact that the record contained no evidence to support the charging party's allegation that the University had other existing monies available to use for the shortfall until the 4 percent became available January 1, 1988. Neither did she find sufficient evidence in the record that would support a conclusion that had alternative funds been available, the University would have had the legal right to use such monies for employee salaries.

Nothing cited by Flacks in her exception refutes the ALJ's finding that the University did not have the 4 percent range adjustment funds in its budget for distribution on or about July 1, 1987. Neither does Flacks point to anything in the record to support her allegation that the University had other existing monies available to use for the shortfall until the 4 percent became available January 1, 1988. Thus, even if the

University and the nonexclusive representative had met and discussed the proposed split payment, and even if AFSCME were successful in convincing the University that the split payment was an undesirable method of implementing the merit pay plan, it is highly speculative as to whether the University could have funded the entire increase in July. The fact that the University's "meet and discuss" obligation to the nonexclusive representative includes neither a requirement that the parties reach agreement nor continue to meet until impasse, renders the outcome of any such meeting even more speculative. While the ordinary remedy in unilateral change cases is restoration of the status quo ante, including back pay and interest, this Board has denied back pay where the entitlement thereto is speculative. (State of California (Department of Transportation) (1983) PERB Decision No. 361-S.)

CONCLUSION

Based on the above discussion, we affirm the ALJ's decision and findings that the University did not provide adequate advance notice of the decision to award a split payment merit raise to the employees here involved thus violating section 3571(a) of HEERA, and we also affirm that part of the decision denying an award of back pay for the reasons stated above.

ORDER

Based upon the foregoing findings of fact, conclusions of law, and the entire record in this matter, and pursuant to section 3563.3 of HEERA, it is hereby ordered that the Regents of the University of California and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with the right of employees to representation by arriving at a determination of policy or course of action to alter the method of payment of merit salary adjustments for employees in the A&PS program at the Davis, Los Angeles, Santa Barbara and San Diego campuses without first giving reasonable notice to the affected employees and, upon timely request, discussing that subject with a nonexclusive representative of the employees.

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

1. In the future, provide affected employees with reasonable notice of the actual proposed change in policy or practice prior to implementation of any change in the policy or practice related to salary adjustments at the aforementioned campuses and, upon request, provide a reasonable opportunity by a nonexclusive representative of the employees to present its views.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

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

Chairperson Hesse and Member Craib 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. LA-CE-210-H, Miriam Flacks, et al. v. Regents of the University of California (Davis, Los Angeles, Santa Barbara, and San Diego), 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) by changing the method for the payment of the 1987-88 merit salary increases for the Administrative and Professional Staff (A&PS) program employees at the Davis, Los Angeles, Santa Barbara and San Diego campuses.

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

A. CEASE AND DESIST FROM:

1. Interfering with the right of employees to representation by arriving at a determination of policy or course of action to alter the method of payment of merit salary adjustments for employees in the A&PS program at the Davis, Los Angeles, Santa Barbara and San Diego campuses without first giving reasonable notice to the affected employees and, upon timely request, discussing that subject with a nonexclusive representative of the employees.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE HIGHER EDUCATION EMPLOYER-EMPLOYEE RELATIONS ACT:

1. In the future, provide affected employees with reasonable notice of the actual proposed change in policy or practice prior to implementation of any change in the policy or practice related to salary adjustments at the aforementioned campuses and, upon request, provide a reasonable opportunity by a nonexclusive representative of the employees to present its views.

Dated: _____ REGENTS OF THE UNIVERSITY OF CALIFORNIA

By _____
Authorized Representative

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



MIRIAM FLACKS, et al.,)
)
 Charging Party,)
) Unfair Practice Case
) No. LA-CE-210-H
 v.)
) PROPOSED DECISION
 REGENTS OF THE UNIVERSITY OF) (8/22/89)
 CALIFORNIA (DAVIS, LOS ANGELES,)
 SANTA BARBARA AND SAN DIEGO),)
)
)
 Respondent.)
 _____)

Appearances: Cliff Fried and Peter Goodman, Local 3238, American Federation of State, County, and Municipal Employees, AFL-CIO, Council 10, on behalf of the Charging Parties; Edward M. Opton, Jr., Attorney, for the Regents of the University of California.

Before W. Jean Thomas, Administrative Law Judge.

I. INTRODUCTION

This case involves allegations that the Regents of the University of California (hereafter Respondent or University) modified the merit pay policy for certain employees covered by the Administrative and Professional Staff (A&PS) personnel program by giving them a "split payment" of the merit increases awarded them in fiscal year 1987-88. This action allegedly occurred without affording advance notice to the affected employees and an opportunity for the employees, or their nonexclusive representative, to meet and discuss the decision with the Respondent prior to its implementation. The action giving rise to this controversy occurred at four University campuses -- Davis, Los Angeles, Santa Barbara and San Diego.

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

The Respondent insists that, contrary to the charge, University spokespersons discussed the possibility of a split payment with employees far in advance of its eventual implementation in July 1987. It is further asserted that the split payment issue apparently was not a concern to employees during that period since no comments or complaints regarding it were presented to the Respondent or lodged with the nonexclusive representative. Finally, it is contended that the top official of that organization, American Federation of State, County, and Municipal Employees, was notified about the possibility of a split payment during the spring of 1987 and never expressed any interest in discussing the topic with University representatives.

II. PROCEDURAL HISTORY

On August 13, 1987, Cliff Fried, on behalf of himself and all American Federation of State, County and Municipal Employee (hereafter AFSCME) members at the University of California (UC) Davis, Los Angeles, Santa Barbara and San Diego campuses (hereafter Charging Parties) filed an unfair practice charge against the Respondent. The charge alleged that the University unilaterally changed its policy pertaining to merit pay by paying the increases awarded to certain employees for fiscal year 1987-88 on a one-third/two-thirds "split payment" basis during the year instead of giving the full amount of the increase payable monthly beginning on July 1, 1987. This change allegedly was implemented without providing notice to the affected employees and an opportunity for them to contact their nonexclusive

employee organization to request that the University meet and discuss this decision prior to implementation. The Charging Parties assert that this conduct violated section 3571(a) of the Higher Education Employment Relations Act (hereafter HEERA or Act).¹

On September 28, 1987, the Office of the General Counsel of the Public Employment Relations Board (hereafter PERB or Board) issued a complaint based on the conduct alleged in the charge. The complaint alleges that the Respondent's conduct described above constitutes interference with the Charging Parties' HEERA rights and a violation of section 3571(a).²

The University filed its answer to the complaint on October 26, 1987, admitting certain facts, denying allegations of unlawful conduct and raising several affirmative defenses.

An informal conference, held on October 22, 1987, failed to resolve the dispute. An evidentiary hearing was thereafter conducted before the undersigned on January 25-29 and May 23-25 and 27, 1988.³ Post-hearing briefs were filed on October 18, 1988, and the case was submitted for proposed decision.

¹**HEERA** is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references in this proposed decision are to the Government Code.

²The charge was amended on October 15, 1987, to add Miriam Flacks, et al., as specifically-named individual charging parties at the Davis, Santa Barbara, and San Diego campuses.

³During the hearing, Fried withdrew as a named charging party in this case.

III. FINDINGS OF FACT

A. Background

In 1985 the University decided that new personnel policies were needed for specified categories of its nonexclusively represented nonacademic staff. At that time the University's personnel programs for nonacademic staff included the staff personnel program (SPP), the management program, and various collective bargaining agreements covering the bargaining units of exclusively represented employees.

Traditionally, employees covered by the SPP are eligible for two types of annual salary increases -- merit increases and salary range adjustments. The merit increases, which range from 0% to 7 1/2% depending upon performance, are within range increases awarded to employees on either January 1 or July 1 of each year. Employees typically receive their merit increases on whichever of these two dates is closest to the date of hire anniversary. The salary range adjustment is an automatic general increase fixed percentage which is applied to all salary ranges of a particular group of employees.

Funds for the merit increases may come from three sources: (1) a separate allocation from the State; (2) an agreement between the state and the University to lower the University's budgetary savings target to provide funds for staff merit increases; and (3) the collection of campus turnover savings. The range adjustment funds come from the State via a specific allocation for staff salary increases in the annual State Budget

Act enacted each year by the Governor and the Legislature. The state budget ordinarily provides monies for range adjustments as of July 1 of each year.

In determining that the existing programs needed to be updated and modified, the University felt that it was preferable to have a system in which there was a stronger tie between the employee's performance and the amount of pay received for such performance. Thus in February 1985, Senior Vice President for Administration, Ronald W. Brady, established a steering committee, known as the Brady committee, to work on developing new programs. Brady also brought in an outside consulting firm to review the University's classification and compensation systems for managers and professional staff.

The consultants and the committee eventually developed reports which recommended a number of changes in the existing programs. In early 1986 the Regents approved these recommendations and the University commenced development of a new four-tier personnel system in which the top three tiers were merit-based pay programs.

As a part of this process, a new task force was established to develop specific personnel programs to implement the recommendations. This task force worked during February and March 1986 under the leadership of Lubbe Levin, assistant vice president and director of the systemwide office of employee relations.

This task force recommended that the top tier of the new personnel system, the Executive Program, be composed of the 18 top management positions in the University system, including some positions that had been in the management program under the old system. The next tier, called the Management and Professional Program (MAP), included administrators from the former management program and some of the highest level managers and professional staff from the SPP. The third tier of the new program, called Administrative and Professional Staff Program (A&PS), was to include most of the top 25 percent of those employees who previously had been covered by the SPP. The A&PS program would eventually include 12,400 employees in approximately 270 job classifications. The level of positions ranged from administrative analyst and management services officer (MSO I) through principal analyst I and MSO III. A wide variety of administrative and professional specialties is represented in this group. The fourth tier of the new system would be the existing SPP.

The executive program and MAP were finalized and implemented in July 1986. The A&PS program was scheduled for systemwide implementation in July 1987.

As envisioned by the University, the most important features of the A&PS program were: (1) wider salary ranges; (2) six grades within each salary range to make it less likely for employees to "top out" at the maximum of their ranges; and (3) the merit-based

salary plan to provide potential for greater salary increases for top performers.

The merit-pay concept proposed for the A&PS program was the same merit salary plan used to compensate the staff covered by the management personnel program in existence prior to July 1986. Additionally, since 1981 several hundred employees in mid-manager classifications at the Los Angeles campus were members of the SPP, but received only merit-based compensation. The UC Los Angeles (UCLA) program which started as a pilot program, is referred to as the "old merit-based pay program."

To determine how much money is available for merit increases each year, the University establishes a "control figure." This figure is expressed as a percentage amount and is composed of the range adjustment funding and the available merit funds. The control figure represents the amount of funds in the salary pool that the University is making available to cover merit increases in each of the merit-based pay programs and also the average merit increase granted to each employee in such programs. The control figure varies from year to year depending upon the availability of funds.

The shift to the merit-pay system under the A&PS program entailed a significant change in the method by which salary increases would be developed for those SPP employees who were to be members of the new program. Instead of receiving automatic range adjustments and, if eligible, merit increases, A&PS employees would receive only annual merit salary increases.

These increases would be funded by the pooling of the range adjustment funds allocable to this group of employees and the monies traditionally used to fund their merit increases. The new program would offer a wider range of increases, specifically, between 0% and 15% or more.

Under SPP, only an approximate 45% of the employees in the program were eligible for merit increases, as the others had reached the top salary of their classification ranges. Eleven percent of those not receiving merit increases were ineligible for other reasons (e.g., probationary or casual status). Under the A&PS program, there was a widening of the salary ranges at both the top and bottom of the ranges. This process, which created ranges 50 percent in length, would result in new employees starting at lower salaries and enabled veteran employees, who had "topped out" at the maximum of their salary range, to become eligible again for merit increases.

B. Development of the A&PS Personnel Program

The development of the policies that eventually became the basis for the A&PS personnel program began sometime in August 1986 and continued until June 1987. The final version of the program was adopted at that time. This activity was spearheaded by the office of the president and involved systemwide consultation and review by all levels of management and employees. This process included dissemination of information to prospectively affected employees and the receipt of input throughout the various stages of the development of the policies.

The initial activity involved the identification of those areas of the SPP policies that were deemed appropriate for inclusion in the A&PS program. The office of the president developed an outline and some general concepts which were sent to the administrative vice-chancellors and personnel managers at all the campuses for review and consultation. The initial campus review process identified policy options most likely to receive serious consideration by managers and the staff during the development of the A&PS program.

In December 1986, a task force for the A&PS program was established by assistant vice-president Levin to develop the major concepts and parameters for the proposed program. This task force included two representatives from each of the nine University campuses. The preliminary outline of concepts distributed by this task force to the campuses, and thereafter put together by the task force as the initial draft of the program, covered compensation and other personnel policies. Following distribution of the initial draft to the campuses and the receipt of comments about it from the campuses, a task force report was prepared that covered the major aspects of the proposed program. This task force report was reviewed and approved by the top University administration in late January 1987.

The next step of the consultation process included distribution of the draft policies to all campuses to inform prospective A&PS members about the program and solicit their

input. The University's intent was to have a formal review of the policies by all employees in positions slated for inclusion in the A&PS program. The initial period for formal policy review was scheduled from mid-March to mid-April 1987.

By the end of April 1987, Levin's office had received a substantial amount of feedback from the campuses. As a result, Levin was made aware that many employees wanted additional time to review the draft policies.

Employee reactions to the draft policies were quite diverse. Some employees were concerned about whether or not they would be evaluated fairly by their supervisors. Other employees liked the expanded vacation benefits and their increased earning potential as set forth in the proposed policies. Some employees expressed concern about whether there would be enough money budgeted for wage increases based solely on merit and also concern about whether the money would be distributed fairly. A number of employees felt that they had not had enough time to evaluate the program to develop informed responses to it. Formalized statements were prepared by various employee groups setting forth their opposition to implementation of the program. Petitions were circulated at some of the campuses asking that implementation of the merit pay component of the program be delayed for one year.

As a result of the requests for more review time, Levin extended the deadline approximately one month. The deadline was later extended to early June 1987.

In April 1987, several campuses requested an additional year to prepare for the merit pay aspect of the proposed A&PS program. In early April 1987, Senior Vice President Brady met with employees at the Riverside campus about the proposed A&PS policies. During this meeting he received firsthand input from employees about their perceived need for training and education regarding the merit compensation plan before its implementation. Thereafter, at the April 1987 systemwide meeting of administrative vice chancellors, Brady approved an exception for those campuses that wanted to postpone implementation of the merit pay aspect of the program.

As a result of this action, only four campuses -- Davis, Los Angeles, Santa Barbara, and San Diego -- and the president's office itself opted to go forward with implementation of the new merit salary policies in July 1987.

Except for the postponement until July 1, 1988, of the salary provisions, all other policies of the A&PS program were fully implemented on a systemwide basis on July 1, 1987.

The pertinent provisions of A&PS personnel policy section 130 that deal with merit pay are as follows:

MERIT PAY

130.4 Merit Review. Within-grade salary advancement is based primarily on merit. The amount of increase awarded to an A&PS employee is influenced by performance as it relates to current pay and assigned responsibilities, the employee's current position within the salary range, relative performance among employees in the review unit, and availability of funds. The funds available are established as a percentage of

payroll, which is applicable Universitywide. Merit increases normally are awarded effective July 1 of each year in accordance with guidelines established by the Assistant Vice President--Employee Relations.

The four implementing campuses set up their own methods by which the A&PS formal policy review was accomplished. This process varied from campus to campus. Some campuses set up special committees to review the drafts and included employees on these committees. Other campuses established plans for ensuring that copies of the policies were distributed to all departments and that department administrators sought input from their respective staff. The manner in which the consultation process occurred at each of the four campuses is set forth below.

1. Davis

At the Davis campus, the dissemination of information about the A&PS program was handled primarily through a policy review committee known as the Professional Staff Advisory Group (PSAG). The PSAG was chaired by Dennis Shimek, the associate vice-chancellor of staff affairs. Shimek is responsible for all staff personnel programs. The PSAG was to establish guidelines and schedules for implementing the A&PS program at Davis. It was also to provide the training for the managers and supervisors of A&PS members. The PSAG membership was made up mainly of staff in MAP positions, but several members were in proposed A&PS positions.

Between October and December 1986, approximately 40 meetings were held throughout the campus with prospective A&PS program

members. These meetings occurred during the initial campus review of early policy options that would be considered in the development of the A&PS program. The merit pay issue was a major item of discussion at these meetings. Staff input at this stage of the review process was used by the Davis administration to help formulate the position of the Davis campus in the early development of the A&PS policies.

Later, in February, March and April 1987, additional meetings were held after the initial draft of the A&PS policies were received from Levin's office. Information about the policies was distributed from the campus personnel office through the PSAG.

Shimek believes that the prospective A&PS members were informed about the likelihood of the split payment of the merit increases because (1) he had so instructed the PSAG members to inform the A&PS supervisors of such possibility, and (2) PSAG members and staff from his office had reported to him that the employees had been informed. Additionally, Shimek personally attended informational meetings where the issue was discussed.

Shimek's testimony was challenged by a witness for the Charging Party. Mary Miranda, an A&PS program member in the department of food science and technology, testified that she never heard about the possibility of the split payment in the merit increase until she received the written notice from her department chairman on July 23, 1987, informing her about the split payment of her 1987-88 merit increase. Miranda, however,

admitted that she never attended any of the informational meetings held at the Davis campus. She relied primarily on information provided to her by another employee in her department.

Of the prospective 2,000-2,500 A&PS program members at Davis, approximately 1,500-2,000 attended one or more of the informational meetings between October 1986 and May 1987.

At the majority of these informational meetings held in early April 1987, employees were told that the University had information that the Governor's anticipated budget would identify funds for a three percent range adjustment in January 1, 1988. The range adjustment funds were to be combined with the University's regular merit funds for an annualized merit salary increase on July 1, 1987. The individual employee's allocation of these funds would depend on the number of eligible employees in the A&PS group. As of the spring of 1987, it was rumored that 40% of the total awarded merit increase would be paid starting July 1, 1987, and the remaining 60% of the increase would be received beginning January 1, 1988. The merit pool control figure at the time was 5.2%.

Even though the A&PS program members were informed of the possibility of a split payment of the merit increases for fiscal year 1987-88, they were also told that the University did not consider this information to be definite because of the fluctuating State budget picture in April 1987. Most of the attendees at the April meetings did not voice much concern about

the anticipated 40/60% split. They expressed more concern about the job-relatedness of the performance evaluations and adequate preparation of the supervisors for their participation in the merit review process.

Throughout the formal policy review period, Shimek's office continued to compile staff input for the Davis administration's use in determining the campus' formal position about various elements of the A&PS program. One of the vehicles used to elicit staff participation was the campus employee newsletter.

2. Los Angeles (UCLA)

At the UCLA campus an information packet, similar to that given to the Santa Barbara employees, was distributed to prospective A&PS members on or about March 24, 1987. Thereafter nine informational meetings were held in late March and early April 1987 concerning the proposed A&PS policies. Six of these meetings were conducted by George Enoch, assistant vice chancellor, staff personnel. Three meetings were conducted by the medical center personnel director. Copies of the proposed A&PS policies were also distributed at each of the nine meetings.

The first meeting was held March 26, 1987. The primary concerns raised by several attendees at that meeting related to (1) the amount of funding that would be available for the merit increases, (2) how it would be applied, particularly with regard to the performance evaluations, and (3) how the accuracy and the fairness of the evaluations themselves would be insured.

Enoch believed, during the time that the meetings were being conducted, that the range adjustment funding would be available to the University on July 1 and therefore there would be no split payment of the merit increases. Because of his experience with the fluctuating budget situation, including earlier information that the range adjustment funds would not be available until January 1, 1988, Enoch was nonetheless "not sure" there would be no split payment. However, he assumed that all merit increase funding would be available by July 1, 1987. Because of this belief, he had not planned to discuss what would happen should the full merit increases not be available by July 1.

However, at the first meeting, an attendee questioned whether the merit raises were going to be "split." Enoch responded that although the State budget was not yet set and things could change, current information indicated that the funding would be available by July 1. He further explained that should the funds not be available until a later time, 40% of the anticipated increase would be paid at the beginning of the fiscal year and the remaining 60% of the increase would be awarded the following January. Although Enoch did not think a split payment was likely, following the first meeting he added this information to his topic outline because he viewed it as important enough to discuss at subsequent meetings.

Enoch was not able to recall whether he actually discussed the possibility of a split payment at all six meetings that he

conducted, but he did remember bringing up the subject at some of those meetings.

The record does not reveal whether the 40/60% split payment possibility was discussed at the three medical center meetings. However, the personnel director who conducted the meetings borrowed Enoch's notes for her presentation, and such notation was contained therein.

Approximately 1,300 out of 3,200 potential A&PS program members attended the nine informational meetings conducted at the Los Angeles campus. The verbal input offered by those attendees and the written responses submitted to Enoch's office were considered by the administration in formulating UCLA's response to Levin's office.

Input from the staff was also considered by the UCLA task force in making its recommendations to the systemwide administration. This task force consisted of approximately 30 individuals who represented various staff organizations and interest groups at UCLA. This task force did not include representatives of the recognized employee organizations.

Thereafter, during May and June, prospective A&PS group employees received updates from the administration pertaining to how various components of the program would be implemented. On June 11, 1987, Enoch notified all campus vice chancellors that, based on the expected State funding for range adjustments, the merit pool control factor for increases to be awarded on July 1, 1987, would be 5.2% and that all previously published A&PS salary

ranges would be increased by 5% effective July 1, 1987. Enoch advised these administrators to commence implementation of the merit salary award process in their respective areas, using the guidelines set forth in his June 11 memo.

3. Santa Barbara

At the Santa Barbara campus, the personnel office sent out a general summary of the A&PS policies to all prospective A&PS program members on March 17, 1987. These employees were given the following documents for review and comment: (1) an A&PS policies summary; (2) the proposed 1987-88 A&PS salary structure (based on an expected 5% equity adjustment increase); (3) an executive summary of the proposed A&PS policies from Levin's office; and (4) a list of proposed staff titles to be included in the program showing the proposed A&PS salary grade assignments.

Steven Hollander, Santa Barbara's compensation and benefits manager, personnel services, conducted six meetings from mid-March to early May 1987 to inform such employees about the new program. About 350 out of 430 prospective A&PS employees attended these meetings. When Hollander explained the program, he included information about the possibility of a split payment of the merit pay increases expected in July 1987. Hollander informed attendees at these meetings that the Governor's office was saying that the State-funded portion of the merit increases, i.e., the range adjustment monies, would not be provided to the University until January 1, 1988. However, the University's

budgeted portion of such increases would provide for 40% of the expected merit increase on July 1.

Hollander knew there would possibly be a split in the payment of the merit salary increases. This split would probably be on a 40/60% basis. Nonetheless, he told the employees that the University's predictions were tentative since the State budget picture could change.

On May 15, Jose Escobedo, assistant vice chancellor, personnel services, notified all prospective A&PS members that implementation of the merit pay portion of the program would occur on July 1, 1987. He also provided them with a copy of the temporary guidelines to be used in determining the individual employee's increases. The guidelines stated that the A&PS merit salary increases for the 1987-88 fiscal year would be implemented in two increments: July 1, 1987 - 40% of any approved merit pay increases, and January 1, 1988 - the remaining 60% of any approved merit pay increase.

Shortly thereafter, in a memo addressed to "all staff employees" dated May 27, 1987, Escobedo informed them that as the result of the 3% range adjustment to be given by the State to staff employees effective July 1, 1987, the anticipated 40/60% split for the A&PS and MAP merit increases had been eliminated. Thus, the merit salary increases for those two personnel programs would be awarded in their entirety in July 1987.

4. San Diego

In early 1987, employees at the San Diego campus were notified by the administration that the four quarterly personnel meetings, called "personnel briefing sessions," to be held in late February and early March 1987 would include discussions about the status of the development of the A&PS program.

These meetings were conducted by Quelda Wilson, assistant vice chancellor, staff personnel. At these meetings, Wilson explained the role of the San Diego campus advisory committee in the initial development of the proposed A&PS policies. She also explained the University's plan for accomplishing formal review of the proposed policies by all levels of the administration and the staff.

In this regard, Wilson informed the approximately 200 attendees at the four sessions that the University expected to distribute the policies to the campuses in March 1987 for input from interested employees. For those who desired to review the full text of the proposed policies, Wilson stated that copies would be available in all campus libraries. However, individual employee copies were not available. The employees were informed that the San Diego campus advisory committee would formulate the campus' response to the systemwide administration on the basis of input that the employees provided through the review process. At that time San Diego expected that approximately 1,500 employees would be included in the A&PS program.

Wilson also informed the employees about the key features of the A&PS program, including the merit pay plan. Based on what Wilson had heard from the University administration about the State budgetary developments, she told the attendees that the Governor was going to allocate 3% for the range adjustment increases, but that these funds would not be available until January 1, 1988. Since the State portion of the merit increase monies were expected to be delayed until January 1, the University would have to split the merit pay increases. It was anticipated that 40% of any merit increase approved for the 1987-88 fiscal year would be awarded in July 1987 and the remaining 60% awarded in January 1988.

On March 20, 1987, prospective A&PS program members were notified by Wilson's office that formal review of the proposed policies would soon commence. Along with this notice, employees were given a summary of the proposed policies, and a listing of membership of the campus advisory committee that would develop the campus' formal response to the proposed policies.

In early April 1987, employees were notified that the four spring personnel briefing sessions would be devoted entirely to a presentation about the new A&PS personnel program, and that there would be a question and answer period during each of the meetings.

In late April 1987, Wilson conducted the four personnel briefing sessions. Additionally, Wilson made A&PS program presentations at 15 departmental or group meetings held from

early March to early May 1987. Wilson was invited by the staff to appear at these meetings. At all 19 of these meetings, Wilson used the same outline to explain the A&PS program. That outline included information about the University's anticipated split payment of the 1987-88 merit salary increases and the reasons for such action.

A total of approximately 1,300 employees attended all 19 meetings. This number reflects about one-half of the total number of employees eventually designated to the A&PS program at that campus.

On May 24, 1987, Wilson issued guidelines to the campus administration for implementation of the A&PS merit pay plan for the 1987-88 fiscal year. She advised the administrators that the payment would be on a split payment schedule with 40% of the approved increase to be paid to the employees on July 1, 1987, and the remaining 60% to be paid on January 1, 1988. She further informed them that the merit pool funds control amount to be applied by each of the departments in calculating the increases was 5.2%.

A few days later, on May 28, 1987, Wilson advised the administration that based on the State's revised revenue estimates, the Governor was proposing additional funding for staff salary increases. Thus the full increases approved for prospective A&PS incumbents would be paid on July 1, 1987, and the previously planned split payment formula would not be implemented.

C. The University's Systemwide Notification About The Split Payment Decision Just Prior to July 1, 1987

During the months preceding the enactment of the 1987-88 final budget act, the University's information changed several times concerning intentions of the Governor and the State Legislature as to the amount and timing of funds for University staff salary increases. In January 1987, University sources in Sacramento reported that the University could expect monies for a 3% range adjustment effective January 1988. However, by the end of March, it learned that funding for full salary increases in July 1987 was likely.

Beginning in mid-April 1987, the information from Sacramento filtering back to the University and to AFSCME changed several times in the course of one month. According to Gary Kramp, deputy director, labor relations, "virtually every day there was a different message that the AFSCME chief negotiator [Nadra Floyd] received and that I received as far as what we might have available for wage increases and when."

By mid-May, the situation seemed more definite. In a letter dated May 21, 1987, from Lubbe Levin, assistant vice president and director of the systemwide office of employee relations, to all campus personnel managers, she informed them of the following:

. . . the Governor and the Department of Finance yesterday recommended that the 3% range adjustment for UC staff and other State employees, originally scheduled for January 1, 1988, be moved up to July 1, 1987. Thus it is expected that compensation plans for Executive, MAP, and A&PS and staff personnel

for fiscal year 1987-88 will reflect this change.

For employees in merit pay plans, the July 1, 1987 effective date means that the 40/60 split payment methodology for distribution of salary increases, which had been indicated in earlier guidelines will not be required.
. . . (emphasis in orig.)

This letter ended by requesting that the personnel managers "advise managers and employees accordingly."

Shortly after this letter was issued, the University learned that the Legislature was recommending that a 6% range adjustment be granted as of January 1988. Subsequently, in June, Vice President Brady reported to Levin and others in the University administration that his sources in Sacramento were reporting that the Governor was considering reducing the Legislature's recommendation of 6% to 3%, to be granted as of July 1987. Levin testified that during this period no final decisions were being made by top University administration about what the control figure would be for merit-based programs in fiscal year 1987-88. She further testified:

There was no way to make a decision with so many changes going on in Sacramento . . . [b]ecause things [budget decisions] were continuing to shift between July [1987] and January [1988], we could not make decisions as to the timing when the merit-based pay increases would be paid to the affected employees.

Despite Levin's testimony, the record shows that many employees at the four implementing campuses were being told that in all likelihood the full merit pay increases would be given on July 1, 1987.

During the spring of 1987, Kramp was negotiating with Floyd for a collective bargaining agreement covering the bargaining units exclusively represented by AFSCME. During the period in which these negotiations were taking place, Kramp and Floyd occasionally discussed the information that each of them had received, regarding the evolving budget situation in Sacramento, during breaks in the negotiation sessions. Sometime in mid-spring, during one of the two or three conversations that Kramp and Floyd had about this topic, Kramp mentioned to Floyd that if the State budget provided for University staff salary increases effective as of January 1988, this would require split payment of salary increases. However, it is found that this conversation pertained primarily to the impact of such an action on the exclusively represented units. There is insufficient evidence to support a finding that these conversations also pertained to prospective A&PS program members.

D. Notification About the Split Payment Decision After July 1, 1987

On July 7, 1987, the Governor approved the State budget, and the final Budget Act was enacted. The Budget Act provided that non-faculty compensation for employees of the University "be budgeted at \$12 million," described in the statute as:

sufficient to provide, subject to collective bargaining, up to 4% general compensation increase package commencing January 1, 1988, plus cost of estimated health and dental benefit rate increases.

No funds were provided for the period July 1987 through December 1987.

When the University received the final budget information, it concluded there were no other available funds that could be used to bridge the time gap between July 1987 and January 1988. The president's office therefore decided to provide that portion of the merit increases supported by funds immediately available in the University's budget and to distribute, as the balance of the merit increases in January 1988, the funds allocated in the State Budget Act for range adjustments. This decision affected all nonrepresented staff, including employees in the executive program, MAP, A&PS, and SPP.

Melvin Terry, senior analyst, office of labor relations, sent a letter to Floyd, dated July 8, 1987, informing AFSCME of the University's decision. The letter stated, in pertinent part, as follows:

It is the intention of the University that non-represented staff employees receive approximately 4% range adjustments effective January 1, 1988. . . . For those administrative and professional employee's on a strictly merit-based compensation program (A&PS), it is the intention of the University to distribute the individual employees merit increase such that one-third (1/3) of the increase becomes effective July 1, 1987, and that the balance i.e., the remaining two-thirds (2/3), would become effective January 1, 1988. . . .

The letter closed by stating "should you have any questions or wish to discuss this matter, please call me. . . ." Attached to the letter was a press release issued by the University on July 8, 1987, describing the details of the final budget.

The dissemination of this information to affected A&PS members was handled by the individual campuses and varied from location to location.

At Santa Barbara, Assistant Vice Chancellor Escobedo issued a memo to all A&PS members, dated July 10, 1987, which explained the split payment procedure.

The record does not reveal how the Davis administration distributed this information. However, as noted earlier, Mary Miranda, a Davis employee, received a memo from her supervisor dated July 23, 1987, which announced the split payment of her merit salary increase and explained the process used by Miranda's department to determine the salary increase recommendations for its A&PS employee group.

At UCLA, Assistant Vice Chancellor Enoch sent a memo on July 14, 1987, informing A&PS members about the actual amount of range adjustment funds received for nonrepresented classified staff. This memo also contained guidelines for implementation of the split payment distribution of the merit increases commencing on July 1, 1987.

Individual UCLA employees received notification of the actual amount of their specific increases and the timing of the distribution of their merit pay increases in memos sent by their immediate supervisors. These notices were received anywhere from July 14 to August 13, 1987.

At the San Diego campus, Vice Chancellor Wilson distributed a memo, dated July 5, 1987, which described in some detail the

final State budget allocations for salary increases and the affect that the January 1988 4% range adjustment increase would have on the salaries of the nonrepresented employees. This memo also explained specifically how the split payment procedure would apply to members of the A&PS, MAP and executive programs.

Ed Abresch, an A&PS member at San Diego, received personal notice regarding his salary increase and the method of payment from his department chairman, on or about July 17, 1987. This notice showed the rates of Abresch's increase as of July 1, 1987, and January 1, 1988.

E. The University's Contacts With AFSCME Regarding the A&PS Program

AFSCME Council 10 is the exclusive representative of three separate systemwide bargaining units of University employees. It is also the nonexclusive representative of numerous other nonacademic University employees. As a nonexclusive representative, AFSCME has an open unit committee that deals with the concerns of non-exclusively represented members of AFSCME on a statewide basis.

The University's office of labor relations is responsible for meeting and negotiating with employee organizations regarding matters related to wages, hours, and other terms and conditions of employment. As stated earlier, Gregory Kramp is the deputy director of that office. One of Kramp's responsibilities involves meeting with AFSCME concerning those employees whom it represents both exclusively and nonexclusively.

In December 1986, AFSCME requested to meet with the University to discuss the A&PS program. This meeting was sought on behalf of its nonexclusively-represented members who were prospective A&PS program members. A meeting was subsequently held on January 12, 1987. The representatives for AFSCME at this meeting were Nadra Floyd, the executive director of Council 10, Peter Goodman and Libby Sayre. Goodman was the AFSCME statewide open unit committee representative. Representing the University were Gregory Kramp, Tanya Grey, Margaret Rader, and Harry McGuire.

At the January 12 meeting, one of AFSCME's chief concerns was the funding for the merit-based pay plan. In order to clarify this idea, Kramp explained how the "old merit-based pay plan" had operated at UCLA. Many of the incumbents in classifications covered by the "old merit-based pay plan" were prospective members of the new A&PS program.⁴

Rader described the State budgetary process, and the fact that the final salary increase figures are not known until sometime around July 1 each year.

At the time of this meeting, the AFSCME representatives had not yet received nor reviewed copies of the proposed A&PS program policies, since the draft policies were not yet completed. Before the meeting concluded, AFSCME requested copies of the

⁴The "old merit-based pay plan" continued in operation until June 1987 when it was replaced by the A&PS personnel program.

draft policies and all other information that the University had concerning the A&PS program.

A copy of the draft policies that were being used for the Universitywide formal review process was sent to AFSCME in early March 1987. About a week after this document was provided, AFSCME requested a second meet and discuss session.

This meeting took place on April 9 at the systemwide office of labor relations in Berkeley. The same individuals who had participated in the January 12 meeting attended this meeting. The discussion at this meeting focused on more specific A&PS issues than those raised at the January 12 meeting. AFSCME inquired about a number of different items in the proposed policies which the union felt had both positive and negative features. During this meeting, AFSCME also complained that the University had not provided prospectively affected employees with sufficient notice and access to copies of the proposed policies, to allow them to adequately inform themselves about the program. This factor, AFSCME contended, hindered meaningful input.

AFSCME also objected to any implementation of the merit-based pay plan as a part of the A&PS program. AFSCME's specific objections to this concept was based on the belief there would not be an equitable distribution of the funds among the employees to be covered by this program. In addition, Sayre was concerned that the salaries of some individuals might be lowered under the new system. The University assured Sayre that the program would be fully-funded and that no current employee's salary would be

decreased. However, new employees hired under the A&PS program might start at a lower salary range than they would have under the SPP program.

AFSCME also complained about the grievance procedure and the affirmative action policies proposed for the new program. Sayre specifically expressed a concern about proposed grievance language that she considered ambiguous.

In response to this latter complaint, the University revised the wording in that portion of the policy. This revision was carried into the final version of the grievance policy.

The April 9 meeting ended with no definite commitment by either side that AFSCME and the University would subsequently meet again to discuss the A&PS program.

A local campus meet and discuss session was held at UCLA on April 10, 1987. AFSCME was represented at this meeting by Michael Cardoza and Goodman. Cardoza and Goodman were both Local 3238 job stewards at UCLA. The University was represented by Gary Lebowich, the UCLA labor relations manager, Merle Kaufman and an unidentified analyst from Enoch's office.

AFSCME requested this meeting to demand that the University postpone implementation of the entire A&PS program. During the meeting, Goodman threatened to file unfair practice charges against the University unless systemwide implementation of the

program was delayed.⁵ In addition to discussing postponement, the parties briefly discussed specific issues related to certain policies, such as affirmative action, the grievance procedure, overtime, merit pay, and funding in general. No additional meeting was scheduled between AFSCME and the University on this subject. However, AFSCME stated that the organization would get back to the UCLA management about the program.

No University representative ever discussed with AFSCME the possibility of a split payment of the A&PS merit increases at the January 12, April 9 or 10, 1987, meetings.

Cliff Fried, the president of AFSCME Local 3238, also requested a meet and discuss session with the Santa Barbara campus administration. Fried also asked for a mailing list and other data relating to Santa Barbara campus employees who were potentially affected by the proposed A&PS program.

Fried's letters, dated April 3 and April 4, 1987, were responded to by Vice Chancellor Escobedo on April 9. Escobedo's

⁵In connection with AFSCME's complaint about lack of notice to employees about the policies and the demand for postponement of the program, fifteen almost identical unfair practice charges -- designated as Case Nos. LA-CE-187-H through LA-CE-203-H and LA-CE-208-H -- were filed between April 16 and May 26, 1987, by individual employees. These charges alleged that the University's failure to provide (1) sufficient notice of the proposed A&PS policy changes, and (2) copies of the actual policies themselves for employee comment prior to the date set for implementation of the new program, constituted a violation of section 3571(a).

The charging parties and the respondent university ultimately reached a settlement of these charges in September 1987. All charges were withdrawn and the cases were closed by PERB on October 6, 1987.

letter informed Fried that the University's meet and discuss activities with AFSCME regarding the proposed A&PS policies were being conducted on a systemwide basis. Escobedo further noted in the letter that a meet and discuss session had already been held with AFSCME on January 12 and a second meeting was scheduled for April 9. Finally; Escobedo advised Fried that the University's office of the president had responded to Floyd regarding AFSCME's requests for staff information. Escobedo sent a copy of his letter to the Santa Barbara campus labor and employee relations office, to Kramp and to Arthur Lightfoot, the AFSCME Santa Barbara campus representative.

AFSCME did not respond to Escobedo's letter. On May 12, 1987, David Gonzales, the Santa Barbara campus labor relations manager, sent a letter to Lightfoot, advising him that Santa Barbara planned to fully implement the A&PS program on July 1, 1987. AFSCME was invited to contact Gonzales if the union wanted to meet and discuss Santa Barbara's plans for implementation. AFSCME did not respond to this offer.

After the April 10, 1987, meet and discuss session, there were no further meetings between AFSCME and the University for the specific purpose of discussing the A&PS program. The University did respond to AFSCME's April 10 request that the entire A&PS program be postponed. Kramp wrote a letter to Floyd, dated May 11, 1987, in which he explained that the issue of deferment of the entire A&PS program had been "thoroughly considered and discussed" by the University. However, the

University had decided to implement the program Universitywide on July 1, 1987. Kramp's letter went on to state that five of the campuses had decided to defer implementation of the full merit pay aspect of the program until July 1, 1988. His letter ended by stating:

[I]n the event you wish to meet further to discuss implementation of the Administrative and Professional Staff Policies, please contact me no later than May 29, 1987.

Copies of this letter were sent to Goodman and Sayre.

Goodman responded to Kramp's May 11 letter on June 17, 1987.

In his letter Goodman reiterated the union's position that the entire A&PS program should be postponed for a year. He did not, however, request another meet and discuss session.

Kramp responded to Goodman on June 30, 1987. In that letter, Kramp stated that the University's position remained as stated in his May 11 letter to Floyd. Kramp's letter ended by inviting further questions or comments from AFSCME. Neither Goodman nor any other AFSCME representative contacted Kramp about the A&PS program after receipt of the June 30 letter.

Following the University's July 8, 1987, notice to AFSCME about the decision to split payment of the merit increases, the University received no communication from AFSCME about this issue until Fried sent letters to the labor relations managers at Davis, UCLA, Santa Barbara, and San Diego. These letters, dated July 27, 1987, included, as an attachment, the July 14, 1987, memo issued by Enoch to administrators at UCLA. The July 27 letters requested immediate recession of the decision to

implement the merit-based pay plan as a part of the A&PS program at each of the respective campuses. The letters further stated that if Fried did not hear from each of the addresses within ten calendar days, AFSCME would file an unfair practice charge against the individual campuses and the entire University system.

Fried sent copies of his July 27 letters to Kramp, Floyd, and Goodman. Fried also sent a letter to Kramp on July 28, requesting specific information about the split payment action. Copies of this letter were sent to Goodman, Floyd, and Lebowich. Kramp responded to the July 27 and 28 letters on August 6, 1987.

His letter stated, in pertinent part:

. . . We are puzzled by your demand to meet and discuss regarding 1987-88 pay adjustments for administrative and professional staff employees at this late date, when the initial checks under the plan are about to be issued or already have been. . . .

Even though it is probably too late to meet and discuss regarding some of the issues identified in your letters to Managers Gonzales, Hoover, Lebowich and Melman, other aspects of A&PS policies and implementations for 1987-88 might still be in a stage appropriate for meeting and discussing, either at the systemwide or campus level. If so, please write to me, identifying the particular matters about which you would like to meet and discuss. We can then talk by telephone about a time and place to meet.

In a separate letter to Fried, Lebowich responded on August 7, 1987, to Fried's request for information in his July 28 letter to Kramp. Lebowich included some of the requested information with his letter and agreed to provide other documents when Fried's request was further clarified. Lebowich's letter went on

to state that the concept of the split payment had been discussed during informational meetings with employees at the UCLA campus, and that employees "had more than reasonable opportunity to contact AFSCME to represent them in the matter prior to this late date." The letter ended by indicating that the University remained willing to meet and discuss aspects of the A&PS program with employees and/or their representatives.

AFSCME did not respond to Lebowich's letter. However, shortly after receiving Kramp's August 6 letter, Fried telephoned Kramp and demanded that the University halt implementation of the split payment and "fully implement the full merit increase." Kramp responded: "[i]t's [split payment] already been put into the hopper and we're not going to withdraw it."

After filing the instant charge on August 13, 1987, Fried wrote a letter to Kramp on August 14 stating that "we want each and every employee eligible under A&PS to receive the full merit awarded to them on July 1, 1987." The August 14 letter also informed Kramp that an unfair practice charge had been filed against the University.

After the University's notification to affected employees in July and August 1987 about the split payment of their merit increases, no employee individually contacted the University administration concerning this decision. Fried, however, was contacted in mid-July 1987 by several UCLA A&PS members who requested AFSCME's assistance in this matter.

F. The University's Past Practice Regarding Implementation of Merit Salary Increases for Nonexclusively Represented Staff

Prior to July 1, 1987, the only University employees eligible for annual salary increases based solely upon merit were those employees covered by the management program and the UCLA employees who were included in the "old merit-based pay plan."

In fiscal year 1983-84, the State Budget Act provided for range adjustment funding in January 1, 1984, instead of July 1, 1983. Thus employees covered under the merit-based personnel programs at that time received only that portion of their salary increases provided by the University's merit funding sources on July 1. They did not receive the portion of their merit increases provided by the State budget range adjustment monies until January 1984.

The record does not indicate whether the employees affected by this action received prior notice of the University's decision to pay their merit salary increases on a split payment basis. Nor is there any evidence about whether the affected employees requested, on their own behalf or through a nonexclusive representative, the opportunity to meet and discuss this decision with the University prior to its implementation.

During the past several years, AFSCME Council 10 has engaged in meet and discuss sessions with the University concerning, among other things, annual wage increases for certain nonexclusively represented nonacademic University staff. Council 10 is an umbrella organization comprised of separate locals at

each of the University campuses. The open unit committee, referred to previously, is included within the Council 10 structure. Fried was the open unit committee representative until approximately two and one-half years before the hearing in this matter. In July 1987, Goodman was the elected open unit committee representative. Floyd was the Council 10 representative designated to receive all correspondence from the University relating to nonexclusively-represented employees.

AFSCME has typically submitted requests to meet and discuss wage increase and related issues with the University in the spring or perhaps earlier each year. Subsequently, the University would review AFSCME's recommendations and both the University and AFSCME would independently make recommendations to the Legislature and the Governor regarding wage increases for nonacademic staff employees of the University.

Because the State budget is not finalized until sometime around July 1 of each year, AFSCME and the University frequently would not discuss key aspects of compensation for these particular employees until after this time. Even though the University has normally implemented salary changes authorized by the State budget as soon thereafter as possible, talks between AFSCME and the University would continue during the time that the University was implementing such increases. This practice has occurred even though implementation began with the employees' August 1 pay warrant.

The parties followed this practice in the course of their meet and confer discussions for salary increases in fiscal year 1983-84. There is no evidence of their practice in subsequent years, prior to their activities related to the A&PS program.

IV. ISSUE

Whether the University violated section 3571(a) when it implemented a change in the timing of the payment of merit increases to eligible A&PS program employees for fiscal year 1987-88?

V. DISCUSSION

Section 3571(a) of the Act prohibits interference with or discrimination against an employee for engaging in conduct protected by the HEERA including:

. . . 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
(Sec. 3565)

In determining the representational rights of employees and their nonexclusive representatives, prior to 1985 PERB had interpreted HEERA to require that a higher education employer was obligated to provide nonexclusive representatives with prior notice and an opportunity to "meet and discuss" proposed changes in wages, benefits, and other matters of fundamental concerns to

the employment relationship prior to the time that the employer reached a decision on such matters.⁶

This precedent was overturned by a California appellate court decision which concluded that HEERA does not require the University to notify and discuss matters within the scope of representation with nonexclusive representatives. Regents of the University of California v. PERB (1985) 168 Cal.App.3d 937 [214 Cal.Rptr. 698], (Review of Regents of the University of California (Lawrence Livermore National Laboratory)), *infra.* fn. 6 PERB Decision No. 212-H. PERB has since applied this interpretation of the statute in affirming the dismissal of an unfair practice charge filed by a nonexclusive organization in Regents of the University of California (1985) PERB Decision No. 531-H.

In reaching its conclusion about the rights of nonexclusive organizations, the court found that although HEERA does not grant nonexclusive employee organizations a representational right to be notified by the employer of proposed changes in work conditions,

. . . [t]he nonexclusive employee organization may continue to represent its members in many ways, but the initiative for representation must come from the employee. The employee has a right to be represented,

⁶See California State University (Sacramento) (1982) PERB Decision No. 211-H; Regents of the University of California (Lawrence Livermore National Laboratory) (1982) PERB Decision No. 212-H; California State University (Hayward) (1982) PERB Decision No. 231-H; Regents of the University of California (UCLA Blood Bank) (1982) PERB Decision No. 267-H; Regents of the University of California (1983) PERB Decision No. 359-H.

but the organization does not have an independent right to represent.

. . . [T]he rights of the nonexclusive employee organization to the extent they exist, are derivative: they are the rights of an agent or representative of the employee Regents of the University of California, supra, at p. 945.

The Court continued by interpreting section 3565 to require the University to notify:

. . . individual employees of proposed changes in employment conditions and, if the employee chooses to have his or her union meet with the employer to discuss the changes, such meetings are [to be] held upon request. (Ibid.)

Failure of the employer to provide this type of notice and an opportunity for input constitutes a violation of section 3571(a) of HEERA.

Thus, in analyzing an allegation of interference with the employee's representational rights by a nonexclusive employee organization, in this setting the employee's protected right includes: (1) the right to notice of a proposed change in a fundamental work condition in advance of implementation; (2) a reasonable amount of time between the notice and implementation of the change to allow the employees, if desired, to contact their nonexclusive representative; and (3) the employer's good faith conduct in listening to and considering any proposals made in a timely manner by employees themselves or by a nonexclusive representative prior to implementation of the change.

Questions of whether the employer provides a reasonable time for the employee's interests to be represented and whether the

employer evaluates in good faith any input given, are questions of fact to be determined by considering the proffered evidence as a whole.

In the present case, the Charging Parties contend that the University did not give affected A&PS members notice of the decision to split the payment of the 1987-88 merit salary increases until a time when a final decision had already been reached and implementation of the change was about to commence. It is asserted that this conduct therefore violated the statutory right of nonexclusively-represented employees to be represented by the employee organization of their choice on a fundamental matter of employer-employee relations.

The University counters this argument by maintaining that notices of a possible split payment of merit salary increases were given to affected employees and AFSCME, their nonexclusive representative, both prior to and immediately after the University received its budget allocations from the State. Additionally, AFSCME's non-response to its July 8, 1987 letter amounts to a waiver of the right to meet and discuss the protested conduct.

Considering the evidence as a whole, the University's timeliness argument must be rejected. Before the University was informed about the final State budgetary allocations on July 7, the affected employees were not given individual notice that the University proposed to split the payment of their merit increases

due on July 1, 1987, if the range adjustment monies expected from the State were not received in July 1987.

The record shows that the University did inform most prospective A&PS members in the mid and late spring of 1987 that, depending upon the final State budgetary allocations, there was a possibility of a split payment of their merit increases based on an award of 40% of the expected increase in July 1, 1987, and the remaining 60% (or the balance) of the increase beginning in January 1988. This information was provided through a variety of sources during the period in April, May and early June when the employees were given an opportunity for formal review of the proposed policies for the A&PS program.

However, as the budget picture changed in late May 1987, Vice President Levin advised campus personnel managers on May 21, 1987, that the 40/60 split payment process would not be required. Although the State budget deliberations continued to change the funding picture for the University in late May and June, the A&PS members at the four implementing campuses were not given a contingency plan for payment of their expected increases, in the event that all the funds were not available in July. Instead, the employees were informed by their campus administrators that their full merit awards for the 1987-88 year would be received effective July 1, 1987. Thus, as of July 1, 1987, employees in the A&PS program were expecting payment of the full amount of their approved individual merit increases.

Likewise, the University did not inform AFSCME prior to July 1, 1987, of the possibility that A&PS members might receive their annual merit increases on a split payment basis if the State range adjustment funding for fiscal year 1987-88 was delayed. Despite the fact that AFSCME and the University formally met to discuss the A&PS policies on three occasions between January and July 1, 1987, this facet of the budget situation was not mentioned during any of the meetings. Even when specifically questioned by AFSCME representative Sayre about the source of the funding for the merit pay aspect of the program during the April 9 meeting, the University representatives assured Sayre that the program would be fully funded. No contingencies on the funding were ever acknowledged.

While it is undisputed that Kramp informally mentioned this possibility to Floyd sometime in the spring of 1987, it was found that this statement was made in the context of the parties' negotiations over matters pertaining to the employees exclusively represented by AFSCME, and not regarding those employees who were to be included in the A&PS program.

When the University finally received its academic compensation allocation from the State on July 7, 1987, the University was presented with two changes from what it had anticipated. The increase for merit funding was changed from 3 to 4 percent. And the monies to be used for merit increases was budgeted for January 1, 1988, instead of July 1, 1987.

Thereafter, when the University decided to modify the timing of the distribution of merit increases to individual A&PS members because of these events, AFSCME received its notice when the decision was firmly in place. Evidence of the University's inflexibility on this point is particularly shown through Kramp's August 6 response to Fried, whereby the University refused to meet and discuss this decision with AFSCME. Although the University was willing to meet and discuss other aspects of the program with AFSCME, the University took the position on August 6 that it was too late to confer about the pay adjustment issue.

The University's response to AFSCME is especially significant because the timing of the notification to the affected employees themselves varied from campus to campus. Some notices were sent as late as August 13, 1987.

Implementation of the University's decision regarding the salary increases occurred with the issuance of the August 1987 pay warrants. For many of the employees, notice of the decision was received shortly before, or almost simultaneously with, implementation of the change. It is therefore concluded that most of the employees affected by the employer's decision about the merit salary increases did not have a reasonable amount of time between the notice and implementation of the change to allow them to exercise the representational rights recognized by the court in Regents of the University of California v. PERB, supra, 168 Cal.App.3d 937.

The University also argues that the implementation of the split payment of merit increases did not constitute a change in past practice or policy with respect to the A&PS program members. For support of this position, it relies on the language of the merit review policy found in section 130.4, supra at pp. 11-12, which became effective on July 1, 1987. This policy states that "merit increases normally are awarded effective July 1 of each year" Respondent asserts that the qualifying adjective, "normally" contemplates that deviations from the typical July 1 timing are a possibility. The University further contends that its conduct with respect to the timing of the payment of the merit salary increases was directly in response to the State's modified funding, and was wholly consistent with its past practice regarding the granting of such increases.

While there is some merit to the argument concerning the section 130.4 language, in this instance, there is no evidence that the University provided the affected employees with prior notice that in the event full funding for the merit increases was not received from the State, the University would invoke the language of section 130.4 as its basis for deviating from full payment of the individual merit awards on July 1, 1987. Nor, as noted earlier, was AFSCME so informed of this possibility. For these reasons, this argument is not convincing.

Finally, the University contends that it provided AFSCME with notice of the split payment immediately after the decision was made, and that AFSCME's failure to request a meet and discuss

session on the issue constitutes a waiver. This argument fails for lack of any factual support. AFSCME's attempt to meet with the University after July 1 to discuss the merit pay issue has been discussed above. After deciding on a course of action, the University refused to meet and discuss its pay plan with AFSCME.

In Professional Engineers in California Government (PECG) (1980) PERB Decision No. 118-S, PERB set forth the employer's meet and discuss requirements with respect to nonexclusive representatives. Under the PECG principle, the employer must meet and discuss in good faith, but, unlike the employer's duty to meet and negotiate with an exclusive representative, good faith requires neither an obligation to reach an agreement nor to continue to meet until impasse. Regents of the University, California. UCLA, supra, PERB Decision No. 267-H.

In State of California (Department of Corrections) (1980) PERB Decision No. 127-S, the employer met with a nonexclusive representative after developing a plan of action, but prior to implementation of the plan. Evidence of the employer's willingness to review its decision included postponement of the effective date of change until after the employer had met with the nonexclusive representative. In fact, under some circumstances, merely providing the nonexclusive representative with an opportunity to present its alternative with supporting rationale to the proposed change satisfies the obligation. See State of California (Franchise Tax Board) (1982) PERB Decision No. 229-S.

Even if, arguably, the University gave timely notice to A&PS members about the decision to modify the timing for the payment of their merit increases for fiscal year 1987-88, it is clear that the University's conduct in refusing to meet with AFSCME prior to implementation of that decision, interfered with the employees' rights to be represented by their nonexclusive representative.

CONCLUSION

The University violated section 3571(a) of HEERA when it unilaterally altered the timing for the payment of the 1987-88 merit salary increases of A&PS program members at the Davis, Los Angeles, Santa Barbara and San Diego campuses without providing notice to the affected employees and an opportunity for input by the employees' themselves or their nonexclusive representative prior to the implementation of its decision.

REMEDY

Section 3563.3 provides:

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

The usual remedy for an interference violation is a cease and desist order. It is appropriate here that the Respondent be ordered to cease and desist from interfering with the right of employees to representation by arriving at a determination of policy or course of action to alter the method of paying merit

salary increases to A&PS program members at the Davis, Los Angeles, Santa Barbara and San Diego campuses without first giving notice to interested employees and, upon timely request, discussing that subject with a nonexclusive representative of the employees.

The Charging Parties also seek a back pay award to make all employees affected by this decision whole for loss of pay which resulted from the six-month delay in receiving payment of the full percentage of the 1987-88 fiscal year salary increase that was approved for each eligible A&PS member.

However, for the reasons set forth below, it is not appropriate in this instance to order a back pay award. The A&PS program members had a legitimate expectation that they would receive a merit salary increase for the 1987-88 fiscal year, the actual amount of which was to be determined on an individual basis through the merit review process. The amount of the merit pool fund from which those increases were to be funded was based on the employer's projected income. It is thus unclear from the evidence exactly how much money would be available for the increases until the funds were finally allocated by the State.

Once the State monies were allocated, it is clear that the University did not have the 4% range adjustment funds in its budget for distribution on or about July 1, 1987. Although the Charging Parties allege the University had other existing monies available to use for the shortfall in the A&PS program merit pool until the 4% monies became available January 1, 1988, no evidence

was presented to prove this allegation. It is thus unclear that the University had other sources of revenue available for salary purposes during the period in question, and that even if such funds were available, the University had the legal right to use such monies for employee salaries.

However, in addition to the cease and desist order, certain affirmative relief is appropriate. The employer is ordered to provide future affected employees with notice of the actual proposed change of policy or course of action, prior to implementation of such change in all policies relating to salary adjustments of A&PS program members at the Davis, Los Angeles, Santa Barbara and the San Diego campuses, and, upon request, provide a reasonable opportunity by a nonexclusive representative of the employees to present its views.

It is also appropriate that the Respondent be required to post a notice incorporating the terms of the Order. The posting should be at the headquarters office and in conspicuous places at locations at the Davis, Los Angeles, Santa Barbara and the San Diego campuses where notices to A&PS program members are customarily posted. The notice must be signed by an authorized agent of the Regents of the University of California 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 Regents of the University of California have acted in an unlawful manner and are being required to cease and desist from this activity and to take certain affirmative action.

It effectuates the purposes of the HEERA that employees be informed of the resolution of the controversy and will announce the Regents of the University of California'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 Bd. (1979) 98 Cal.App.3d 580, 587[159 Cal.Rptr. 584]; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law, and the entire record in this matter, pursuant to section 3563.3 of the HEERA, it is hereby ordered that the Regents of the University of California and its representatives shall:

1. CEASE AND DESIST from interfering with the right of employees to representation by arriving at a determination of policy or course of action to alter the method of payment of merit salary adjustments for employees in the A&PS program at the Davis, Los Angeles, Santa Barbara and San Diego campuses without first giving notice to the affected employees and, upon timely request, discuss that subject with a nonexclusive representative of the employees.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICY OF THE HIGHER EDUCATION EMPLOYER-EMPLOYEE RELATIONS ACT:

(a) In the future, provide affected employees with notice of the actual proposed change in policy or course of action prior to implementation of any change in the policy or practice related

to salary adjustments at the aforementioned campuses and, upon request, provide a reasonable opportunity by a nonexclusive representative of the employees to present its views.

(b) Within ten (10) workdays of service of a final decision in this matter, post copies of the Notice, attached hereto as an Appendix, at its headquarters office and in conspicuous places at locations at the Davis, Los Angeles, Santa Barbara and San Diego campuses where notices to employees in the A&PS program are customarily posted. The Notice must be signed by an authorized agent of the Regents of the University of California indicating that the University will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

(c) Upon issuance of a final decision, written notification of the actions taken to comply with the Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions.

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a 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, 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, 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, sections 32300, 32305 and 32140.

Dated: August 22, 1989

W. JEAN THOMAS
Administrative Law Judge