STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNIVERSITY COUNCIL - AMERICAN FEDERATION OF TEACHERS,	)	
Charging Party,	)	Case No. SF-CE-340-H
v.	)	PERB Decision No. 1077-H
REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)	December 16, 1994
Respondent.	)	

Appearances: Leonard, Carder, Nathan, Zuckerman, Ross, Chin & Remar by William H. Carder, Attorney, for University Council - American Federation of Teachers; Marcia J. Canning, Attorney, for Regents of the University of California.

Before Blair, Chair; Caffrey and Carlyle, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Regents of the University of California (University) to a PERB administrative law judge's (ALJ) proposed decision (attached hereto). The ALJ found that the memorandum of understanding (MOU) between the University Council - American Federation of Teachers (UC-AFT) and the University was silent regarding merit reviews for post six-year lecturers receiving their third or subsequent three-year appointment. The ALJ then found that the University violated section 3571(a), (b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA)[1] when it

[1]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3571 states, in pertinent part:

unilaterally adopted a policy changing the eligibility requirements of merit reviews for such employees.

To remedy the violation, the ALJ ordered the University to provide the lecturers affected by the policy change an opportunity for merit review unless UC-AFT and the University agreed to modify the policy.

Upon review of the entire record in this case, including the proposed decision, the exceptions filed by the University and UC-AFT's responses thereto, the Board finds the ALJ's findings of fact to be free from prejudicial error, and adopts them as the decision of the Board itself. Consistent with the following discussion, we affirm the ALJ's conclusions of law with the exception of the remedy as discussed below.

> It shall be unlawful for the higher education employer to do any of the following:
>
> (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.
>
> For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

UNIVERSITY'S EXCEPTIONS

In its exceptions to the Board, the University argues that the ALJ erred in finding that the MOU did not address merit reviews for post six-year lecturers receiving their third or subsequent three-year appointment. The University also argues that the ALJ erred in requiring the University to conduct merit reviews for lecturers at the Santa Barbara campus who were adversely affected by the February 7, 1992 policy which dictated that post six-year lecturers under consideration for receiving their third or subsequent three-year appointment would be eligible for merit review only in exceptional circumstances.

The University argues that the ALJ correctly determined that the parties had never reached agreement on merit review for these lecturers. As such, the University finds that the ALJ's remedy requiring that merit reviews be conducted, not only exceeds the requirements of the MOU as the ALJ constructs it, but the remedy is also inconsistent with the logic and findings of the proposed decision.

UC-AFT'S OPPOSITION TO EXCEPTIONS

In response, UC-AFT argues that the ALJ was within her power to order the University to conduct merit reviews of the 13 lecturers. UC-AFT argues that a narrow approach, as argued by the University, would not only result in an injustice to the affected lecturers, but would also undermine the policies of HEERA. Further, UC-AFT asserts that the ALJ's remedy only calls for lecturers to be granted an opportunity to be considered for a

merit salary review increase as opposed to having such an increase automatically granted.

DISCUSSION

After a review of the record, the Board concurs in the ALJ's assessment that the MOU between the parties is silent as to merit reviews for post six-year lecturers who are receiving their third or subsequent three-year appointment. It appears that this topic was never discussed or addressed by either party in any negotiating setting.

However, the Board disagrees with the ALJ's proposed remedy. The ALJ states that ordering all post six-year lecturers who have received their third three-year appointments an opportunity for merit review pursuant to the policy established by the 1991-93 MOU is only providing an opportunity for those lecturers to be considered for a merit increase.

HEERA section 3563.3 empowers PERB 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 Board agrees with the ALJ that it is appropriate to order the University to cease and desist from unilaterally instituting new polices regarding items which are within the scope of representation. Further, the Board finds that the University must make itself available for immediate negotiations with UC-AFT concerning merit reviews for the lecturers at issue

here. However, as stated earlier, the Board finds that since the contract is silent on this matter, the University is not legally-obligated to do more at this point other than to meet and confer. Accordingly, the ALJ's remedy of providing merit review for lecturers is hereby reversed.

ORDER

Based on the findings of fact, conclusions of law and the entire record in this case, the Board finds that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a), (b) and (c).

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

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with the University Council - American Federation of Teachers (UC-AFT) over a merit review policy for unit 18 members who are post six-year lecturers on their third or subsequent three-year appointment at the Santa Barbara campus.

2. Denying UC-AFT its right to represent unit 18 members at the Santa Barbara campus by failing to meet and confer about matters within the scope of representation.

3. Interfering with the right of unit 18 members at the Santa Barbara campus to select an exclusive representative by failing to meet and negotiate about matters within the scope of representation with UC-AFT.

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

1. Immediately rescind the merit review policy adopted for unit 18 employees at the Santa Barbara campus on February 7, 1992, and make itself available for immediate negotiations with UC-AFT concerning merit reviews for unit 18 members who are post six-year lecturers on their third or subsequent three-year appointment at the Santa Barbara campus.

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 are customarily placed, copies of the Notice attached hereto an as Appendix. The Notice must be signed by an authorized agent of the University 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 this Notice is not reduced in size, defaced, altered or covered by any material.

3. Make written notification of the actions taken to comply with this Order to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions. All reports to the Regional Director shall be served concurrently on UC-AFT.

Chair Blair and Member Caffrey joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-340-H, University Council - American Federation of Teachers v. Regents of the University of California, in which all parties had the right to participate, it has been found that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a), (b) and (c).

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

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with the University Council - American Federation of Teachers (UC-AFT) over a merit review policy for unit 18 members who are post six-year lecturers on their third or subsequent three-year appointment at the Santa Barbara campus.

2. Denying UC-AFT its right to represent unit 18 members at the Santa Barbara campus by failing to meet and confer about matters within the scope of representation.

3. Interfering with the right of unit 18 members at the Santa Barbara campus to select an exclusive representative by failing to meet and negotiate about matters within the scope of representation with UC-AFT.

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

1. Immediately rescind the merit review policy adopted for unit 18 employees at the Santa Barbara campus on February 7, 1992, and make itself available for immediate negotiations with UC-AFT concerning merit reviews for unit 18 members who are post six-year lecturers on their third or subsequent three-year appointment at the Santa Barbara campus.

Dated: _____ REGENTS OF THE UNIVERSITY OF CALIFORNIA

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

UNIVERSITY COUNCIL - AMERICAN FEDERATION OF TEACHERS, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Unfair Practice Case No. SF-CE-340-H PROPOSED DECISION **(10/13/93)**

Appearances; Leonard, Carder, Nathan, Zuckerman, Ross, Chin & Remar, by Ann Casper, Attorney for University Council - American Federation of Teachers; Marcia J. Canning, University Counsel, for the Regents of the University of California.

Before W. Jean Thomas, Administrative Law Judge.

INTRODUCTION

This case involves merit reviews for lecturers in bargaining unit 18 at the University of California, Santa Barbara campus. Specifically, the controversy stems from the University's promulgation of a policy on February 7, 1992, precluding merit reviews for post six-year lecturers during their third and subsequent three-year appointments except in "exceptional circumstances."

At issue is the meaning and intent of language in Article XXIII of the 1991-93 Memorandum of Understanding (MOU) pertaining to merit review eligibility for post six-year lecturers. Section C.I of Article XXIII requires that post six-year lecturers have at least one merit review coincident with both their first and second three-year appointments. Also at issue is the

applicability of section F of Article XXIII to merit reviews for post six-year lecturers beyond the two mandated in section C.1.

Charging Party takes the position that Article XXIII is silent regarding merit reviews for post six-year lecturers receiving their third and subsequent three-year appointments. Hence, the February 7, 1992, policy constitutes an unlawful unilateral change and an alteration of past practice.

The Respondent maintains that adoption of the policy was within its authority as contractually agreed to by the parties. This position is based on its interpretation of section C.1, which it argues provides a comprehensive treatment of the subject in clear and unambiguous terms.

PROCEDURAL HISTORY

On March 23, 1992, University Council - American Federation of Teachers (Charging Party or UC-AFT) filed this unfair practice charge against the Regents of the University of California (Respondent or University). The charge alleged that the Respondent violated section 3571(a) of the Higher Employer-Employee Relations Act (HEERA or Act)[1] by unilaterally modifying the terms and conditions of employment contained in the parties MOU for unit members at Respondent's Santa Barbara campus.

On April 29, 1992, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint. It alleged that on February 27, 1992, Respondent

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

changed the policy concerning reviews for merit salary increases for certain post-six year lecturers. The new policy denied reviews on a classwide basis and granted individual employees reviews only in "exceptional circumstances." This change allegedly was in violation of section 3571(a) and (c).[2]

Respondent filed an answer to the complaint on May 20, 1992, denying all material allegations and raising various affirmative defenses.

An informal settlement conference was held on June 30, 1992, but the dispute was not resolved. A formal hearing was conducted by the undersigned October 20, 21, and 22, 1992.[3] Both parties

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[2]Section 3571 states, in pertinent part:

> 3571. UNLAWFUL EMPLOYER PRACTICES
>
> It shall be unlawful for the higher education employer to do any of the following:
>
> (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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

[3]At the close of the hearing, Charging Party was allowed to amend the complaint to conform to proof, changing the date of Respondent's unilateral action from February 27 to February 7, 1992.

Charging Party also renewed its motion to amend the complaint to add an allegation of discrimination as an

filed post-hearing briefs and the matter was submitted for decision on January 21, 1993.

FINDINGS OF FACT

Background

The parties stipulated, and it is found, that Respondent is a higher education employer and the Charging Party is an employee organization within the meaning of section 3562(j). UC-AFT is the exclusive representative of a statewide unit of non-academic instructional employees designated as unit 18. The majority of the members of this unit are lecturers whose primary function is teaching, as opposed to research. Members of this unit have a variety of titles and positions, such as demonstration teacher and supervisor of teacher education, which relate to various special programs of the University.

Unlike the senate or tenure-track faculty, unit 18 members do not share governance with the University administration through the academic senate. Nor are unit 18 members subject to progressive rank or wage-step increases, as are the tenure-track faculty. Thus, the only avenue for salary advancement for these employees is through the periodic cost of living provisions applicable to all University faculty and merit increases.

UC-AFT and the University negotiated their initial MOU, effective July 1, 1986.

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independent violation of section 3571(a). The motion was denied. The denial was based on the same grounds set forth in a written denial by the undersigned on July 22, 1992, of the same motion.

Prior to this agreement, members of the unit were employed by the University pursuant to individual employment contracts ranging in length from one-quarter or semester to, at most, two years. One of the major changes negotiated in the 1986 MOU was a measure of job security for unit members who have completed six years with the University. If such members pass a rigorous review at the six-year mark, they are thereafter entitled to three-year appointments, provided that there is a continuing instructional need for their positions and that they continue to be accessed "excellent" at each three-year mark.

The Merit Article of the MOU

The subject of merit was of substantial concern to both parties when they negotiated the first MOU. That MOU included a separate merit article. A separate merit article in a MOU was relatively unique among MOUs within the University system in 1986 and 1987.

During the 1987 reopener negotiations, the merit article was renegotiated and substantially revised. UC-AFT was intent on guaranteeing regular merit reviews and salary increases. The University wanted to maintain the maximum degree of discretion for the individual campuses regarding appointments and merit reviews.

In the July 1, 1987, to June 30, 1990 MOU, the parties agreed to merit language which read, in relevant part, as follows:

Article XXIII. MERIT

A. For those faculty/instructors in the unit who are eligible for merit increases, such increases are based on academic attainment, experience and performance, and are not automatic.

B. Decisions to grant or not grant a merit increase, and the amount and effective date of such increase, if granted, are at the sole discretion of the University.

C. Faculty/instructors in the unit will be subject to merit reviews as follows:

1. A faculty/instructor in the unit, unless covered by Section C.3., will be subject to at least one merit review coincident with or during the first post, six-year three-year appointment which commences on or after July 1, 1988. A merit review will also be conducted coincident with or during the second post six-year three-year appointment, provided that the faculty-instructor in the unit is still being considered for reappointment pursuant to Article VII. Consideration for merit reviews in addition to those above will be at the sole discretion of the University.[4] (Underlining added.)

. . . . . .

D. The UC-AFT shall be provided copies of campus procedures for merit review as they exist or as they are developed. The nature of such procedures shall be at the sole discretion of the University. Existing procedures shall be forwarded to the UC-AFT by January 1, 1988.

. . . . . .

[4]This dispute stems from the different interpretations that the parties have given to the text underlined, supra.

Except for minor modifications, which are irrelevant to this case,[5] the language of Article XXIII has remained relatively unchanged. In the current MOU, section C.1 reads:

> C. Faculty/instructors in the unit will be subject to merit reviews as follows:
>
> 1. A faculty/instructor in the unit, unless covered by Section C.3., will be subject to at least one merit review coincident with or during the first and second post six-year three-year appointments, provided that the faculty/ instructor in the unit is still being considered for reappointment pursuant to Article VII. Any faculty/instructor in the unit who is not granted a review pursuant to this Section may seek resolution through the designated University Official at the campus as listed in Appendix H. Consideration for merit reviews in addition to those above will be at the sole discretion of the University.

Other pertinent provisions of Article XXIII read as follows:

> D. The UC-AFT shall be provided copies of applicable campus procedures as they are developed. Any changes to existing procedures shall be provided to the UC-AFT within a month of finalization. A faculty/instructor in the unit may request a copy of the applicable campus merit review procedure(s). The nature of such procedures shall be at the sole discretion of the University.
>
> E. No later than November 15 of each year, each campus will provide the UC-AFT with a list of faculty/ instructors in the unit who were

[5]Article XXIII was amended during the 1989 reopener negotiations.

reviewed for merit during the previous academic year. The information will include the campus, the faculty/instructor in the unit's name, department, whether the individual was granted a merit increase or not, and the amount of any such increase.[6]

F. The provisions of this Article are not intended to preclude consideration for merit review for the members of this bargaining unit.

G. The provisions of this Article are not subject to Article XXIII. Grievance Procedure or Article XXIV. Arbitration.

Relevant Bargaining History Regarding the Merit Article

Because the parties disagree about the interpretation and applicability of certain sections of Article XXIII to merit reviews for post six-year lecturers on third and subsequent three-year appointments, it is appropriate to consider evidence about the negotiations that led to the development of these contractual provisions.

Between 1987 and 1991 the parties had three sets of negotiations that included bargaining over the provisions of Article XXIII. The following findings of fact about this history are based on a voluminous amount of testimony and documentary evidence.

The 1987 Negotiations

UC-AFT's initial proposal of April 7, 1987, was concerned with guaranteeing regular (biannual) merit reviews and minimum

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Sections E and F in the 1987-90 MOU were relettered as sections F and G in the 1991-93 MOU.

percentage increases for unit members in post six-year appointments and securing the establishment of review procedures[7] for pre six-year appointees. UC-AFT also proposed that Article XXIII be subject to the contractual grievance/arbitration procedure.

In its initial proposal of May 1, 1987, the University responded to UC-AFT by agreeing to a merit review for post six-year lecturers. During this session, Sarah Jo Gilpin-Bishop (Gilpin-Bishop), director of systemwide labor relations and chief negotiator for all negotiations with UC-AFT, stated that the University's commitment to the review was a major concession from its "sole discretion" language in the 1986 MOU. The University specifically proposed the following language for section C.1: "A lecturer or a senior lecturer in the unit on a post six-year three-year appointment normally will be subject to a merit review prior to a subsequent appointment." Gilpin-Bishop explained that the use of the term "normally," would give the University flexibility to do "accelerations, decelerations, deferrals and caps" with merits, and also preserve the variances in campuses' review practices, i.e., every two or every three years.

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[7]According to Eric Schroeder, a member of the UC-AFT bargaining team in 1987 and 1989, UC-AFT understood the term "procedures" to mean the following:

> A. By "procedures," we meant written -- the written regulations for merit, in other words, what would be required of people for merit, the time lines for this, what documents they would have to provide for such a review. I think that's it. (Hearing Transcript, Vol. I, p. 13 0.)

The University's May 1 proposal also divided members of the unit into three distinct groups -- post six-year, pre six-year and-non-lecturers. Even though it was agreeing to merit reviews for post six-year three-year appointees, the University was still concerned about maintaining its "sole discretion" about the timing of such merit reviews and the amount of merit increases, if granted. The University also opposed application of the grievance/arbitration procedure to Article XXIII.

Early in these negotiations, the parties reached agreement over the language of sections A and B which eventually appeared in the 1987 MOU.

After further exchange of proposals, at the May 21, 1987, session, the University presented a substantially revised proposal containing the language in sections C.1, C.2, and C.3. The proposed language for section C.1 replaced the word "normally" with the phrase "at least one." The University felt that this phrase provided a better "time frame" for conducting merit reviews for employees during each three-year appointment. This language would guarantee lecturers on post six-year appointments at least one merit review sometime during the period of both the first and the second three-year appointments.

The University also proposed an implementation date of July 1, 1988, for the commencement of the mandatory merit reviews. During the May 21 session, Gilpin-Bishop explained that this date was necessary to accommodate the fact that some post six-year lecturers had already received their first three-year

appointments, effective July 1, 1987, without having had a merit review. A definite implementation date was needed to insure that all unit members would be treated alike.

She also explained, to UC-AFT's surprise, that there was no established systemwide practice for the timing of merit reviews. Some campuses did reviews on a two-year cycle and others, on a three-year cycle. Some campuses did separate reviews for merit, while others did it with the post six-year review for appointment.

In presenting the proposed language in section C.1 which reads, "Consideration for merit reviews in addition to those above will be at the sole discretion of the University," Gilpin-Bishop explained that some campuses would be doing additional reviews beyond the two mandated by the language in the first part of C.1. This language would cover those campuses on two-year cycles and those who wished to review, even though the faculty/instructor did not receive a reappointment.

UC-AFT, according to Schroeder, also understood the words "in addition to" represented an accommodation to those campuses that wanted to continue on two-year review cycles and might do more reviews than the two mandated by section C.1. In this context "sole discretion" implied that the University's judgment would be the deciding factor in such circumstances.

In its May 22, 1987, counterproposal, UC-AFT proposed only one change in the language of C.1 -- namely that the date for commencing the mandatory reviews would be July 1, 1987, instead

of July 1, 1988. UC-AFT also proposed the addition of sections C.4 and C.5 which contained language to insure that members currently being reviewed for merit would not be denied access to this review process solely on the basis of their unit membership. UC-AFT also wanted to maintain its unit members' future access to regular merit reviews and increases under existing practices not covered by the terms of section C.1. Additionally, UC-AFT sought in section D to have each campus establish, by January 1988, merit review "policies" and "procedures," the nature of which would be at the University's sole discretion.

The University's May 22 counterproposal for the implementation date for the first mandatory review was again July 1, 1988. It also counterproposed UC-AFT's language for section D with language to provide UC-AFT with campus merit review "procedures" as developed. The word "policy" was deleted from the University's counterproposal. Gilpin-Bishop testified that this change was not considered significant because the parties used the terms "policies" and "procedures" interchangeably in negotiations. The May 22 counterproposal to UC-AFT's proposed sections C.4 and C.5 created a section E to address the union's concerns about unit members' continued access to merit reviews. This language read:

> The provisions of this Article are not intended to preclude consideration for merit review for the members of this bargaining unit.

In explaining the choice of the words "preclude consideration," Gilpin-Bishop said that this language was intended to preserve

the University's "sole discretion" to do merit reviews beyond the contract minimum being agreed to by the parties. UC-AFT accepted the University's language and creation of section E.

It also conceded the deletion of the term "policies" from the language of section D without any apparent objection. After other minor language changes, the parties reached a tentative agreement on May 22, 1987. The terms agreed to became the provisions of Article XXIII in the 1987 MOU.[8]

During these negotiations, the parties also executed a side letter agreement. The agreement addressed the treatment of those individuals who had already received their first post six-year three-year appointment, effective July 1, 1987, but did not receive a salary adjustment or merit review in conjunction with this reappointment. These individuals were guaranteed a merit review during this first three-year appointment period to insure that they were treated the same as everyone else.

The 1989 Negotiations

The parties' reopener negotiations for 1989 commenced during the winter of 1988.

In its initial merit proposal of December 13, 1988, UC-AFT proposed biannual reviews for pre six-year lecturers as well as those on post six-year appointments. Again it sought minimum percentage merit increases for both pre and post six-year faculty. It also wanted to insure that both UC-AFT and unit

[8]See text, supra. pages 6-7.

members received current information on a timely basis regarding the applicable campus procedures for such reviews.

At the first negotiating session, on January 19, 1989, the University rejected all proposals for merit increases as too costly. Its initial counterproposal of January 19, proposed no change in terms of Article XXIII except in section D.

The 1989 negotiations did not result in any substantive changes in the language of sections A, B, or C. Besides minor word changes, including the elimination of the July 1, 1988, implementation date which was no longer needed, section C.1 was modified to include language providing a means for post six-year appointees who were denied a review to seek resolution through a designated official at each campus. This language, as finally adopted, remained unchanged in the 1991-93 MOU.

At the January 27 session, the University did propose the addition of a new section E which read:

> E. No later than January 1 of each year, each campus will provide the UC-AFT with a list of faculty/instructors in the unit who were reviewed for merit during the previous academic year. The information will include the campus, the faculty/instructor in the unit's name, department, whether the individual was granted a merit increase or not, and the amount of such increase.

This proposal addressed UC-AFT's concern about receiving information regarding the University's systemwide implementation of the merit review process. When the parties agreed to this addition, they changed the January date to February. Sections E and F in the 1987 MOU were relettered as sections F and G.

The parties reached a tentative agreement regarding the merit article on January 27, 1989.

The 1991 Negotiations

UC-AFT's initial proposal of December 19, 1990, again sought minimum percentage merit increases for both pre and post six-year appointees. It also proposed three-year appointments for pre six-year faculty with established times for mandatory merit reviews.

The University's initial counterproposal of January 17, 1991, rejected the idea of additional guaranteed reviews beyond those already provided for in the MOU.

It also rejected mandatory merit increases for any unit members. The University proposed no change in the terms of the merit article, except for a later date (December 1 instead of February 1) in section E to provide UC-AFT with merit information. Gilpin-Bishop explained during the January 17 negotiating session that a later date would enable the University to compile more complete information.

After an exchange of additional proposals, the parties reached a tentative agreement on February 1, 1991, with no changes in Article XXIII except for the date change (November 15) in section E.[9]

[9]See the text of section E, supra, page 8.

Merit Review of Unit 18 Members at the Santa Barbara Campus

The Practice Prior to 1986

Prior to 1986, there was no campuswide policy or procedure at the Santa Barbara campus governing how and when merit reviews of employees in unit 18 were conducted. The authority to review and award increases was delegated to the college deans and provosts by the campus vice chancellor for academic affairs, with the understanding that the vice chancellor could revoke this delegation at any time. Some departments declined to do any merit reviews. Others did reviews on a regular basis and granted merit increases to some, but not all, lecturers. Thus, lecturers were reviewed for merit on an individualized, department-by-department basis.

Merit Review Under the MOU

The 1987 amendments to the merit article did not change the Santa Barbara campus' policy or procedures for merit review of lecturers, except for those reviews mandated by section C.1 of Article XXIII for post six-year appointees. Even with the mandated reviews, individual departments retained discretion regarding the timing of such reviews during the period of the first three-year appointment.

In 1987, there were post six-year lecturers in the Writing Program who were eligible for merit reviews during the 1987-88 academic year under the program's new biannual review practice. The campus administration decided not to authorize merit reviews for those employees in the 1987-88 academic year because they

would be eligible for reviews in the 1988-89 academic year coincident with their first three-year appointments.

In academic year 1988-89, the College of Letters and Science (CLS) was the largest college at the Santa Barbara campus. It consisted of approximately 30 departments. In the fall of 1988, one of the college deans sent a memo to his department heads stating that, other than those merit reviews required by the MOU, there would be no reviews for pre six-year lecturers for that academic year.

A June 20, 1988, memorandum to campus deans and provosts from Robert Michaelson (Michaelson), then acting vice chancellor for academic affairs, indicated that the administration was delegating the authority to the college level for appointments and merit increases for certain temporary lecturer classifications. Michaelson reiterated that there was no campus policy for merit eligibility for these classifications and that the campus was not contemplating developing one at that time. Additionally, he was retaining authority to establish any future campus policies concerning appointments and merit eligibility. Michaelson's memo went on to state that merit reviews were at the discretion of the departments except for those required by the MOU for post six-year appointees.

In response to an inquiry in early 1989 about the unit 18 merit policy, Julius Zelmanowitz (Zelmanowitz), associate vice chancellor for academic personnel, advised Richard Shavelson,

dean of the Graduate School of Education, in a February 9, 1989, memorandum as follows:

> 1. For pre-sixth year merits, "normal practice" is a department's own practice with respect to merits, subject to review outside the department. This is an area where the University has sole discretion.
>
> 2. For post-sixth year appointments, prior practice is no longer the determining factor, since the MOU merit policy supersedes all prior policy. MOU Article XXIII.C.1 and current policy (contained in the 12/12/88 policy Lecturer Reviews: Sixth-Year and Subsequent Reviews and soon to be issued for inclusion in the Red Binder) require that a merit review be conducted coincident with the initial post-sixth year review and the reappointment review for the second post-sixth year appointment.[10]
>
> 3. Our view is that, for post-sixth year appointments, any merit recommendations beyond those required by the MOU are at the sole discretion of the University, and would be regarded as exceptional actions (or accelerations).
>
> 4. In general, for Unit 18 faculty, merit recommendations in excess of approximately 5% (or two increments on the Standard Table of Pay Rates) are regarded as accelerations.

In June 1989, David Sprecher (Sprecher), provost for the CLS, determined that the college again did not have the budget to grant merit increases for pre six-year unit 18 faculty. Sprecher sent a memorandum to his department heads, dated June 6, 1989, notifying them that no merit requests would be funded unless a

[10]Prior to 1986 the campus had no specific policies pertaining to lecturers aside from those in the University's academic personnel manual. After 1986, the campus created a section in its local policies and procedures manual, known as the "red binder," specifically for lecturers.

department or program could do so from its own funds without reducing an instructional program. UC-AFT was notified of this decision through the campus' labor relations office.

It is undisputed that between July 1, 1987, and the beginning of the 1991-92 academic year, the Santa Barbara administration conducted at least one merit review coincident with both the first and second three-year appointments given to eligible post six-year lecturers. The record does not reveal how many, if any, of these employees actually received merit salary increases. Also unknown is whether any post six-year lecturers on three-year appointments received merit reviews in addition to the two mandated by the MOU during the first and second three-year appointments.

UC-AFT/University Meetings in 1988-89 Regarding Merit Reviews at Santa Barbara

On occasion, UC-AFT and the University met away from the the negotiating arena to discuss merit reviews for unit members at the Santa Barbara campus.

In response to the fall 1988 decision by the CLS to deny merit reviews, Margaret Bouraad-Nash (Bouraad-Nash), president of the local UC-AFT chapter, sent a memo to David Gonzales (Gonzales), the Santa Barbara campus labor relations manager, in mid-September 1988, protesting the action and requesting information about the current campus policy on merit increases. The parties subsequently agreed to meet about the matter.

In late October 1988, Zelmanowitz, Sprecher and Gonzales met with Bouraad-Nash and Rhonda Levine, another UC-AFT

representative, regarding the merit issue. Bouraad-Nash requested that the administration develop a campuswide policy to regularize merit reviews for pre six-year lecturers, the majority of lecturers at the Santa Barbara campus.

Zelmanowitz indicated that the administration was willing to consider the advisability of such a policy. Later the idea was "put on hold" because of the campus administration's concern about its budget ramifications. Additionally, because UC-AFT reopened the merit article at the 1989 systemwide reopener negotiations shortly after the meeting, the local campus decided to await the outcome of the negotiations.

At the request of UC-AFT, another meeting was held in May 1989, to discuss a number of issues, including creation of a campuswide merit review policy for its pre six-year lecturers. The University again refused to develop such a policy, stating that the ongoing systemwide bargaining over merit preempted any local level consideration of the matter. Despite UC-AFT's disagreement with the University's position, no campus policy was established.

The February 7, 1992, Post Six-year Lecturer Merit Policy

Prior to academic year 1992-93, no member of unit 18 was eligible for a third or subsequent post six-year appointment. However, during the 1991-92 academic year, approximately 13 lecturers at the Santa Barbara campus were eligible to commence

review for reappointment in the 1992-93[11] academic year for their third post six-year contracts.

In the fall of 1991, several departments contacted Zelmanowitz' office about their obligation, if any, to conduct merit reviews in conjunction with the reviews of those Santa Barbara lecturers who were eligible for a third post six-year reappointments. Realizing that there was no campus policy covering this matter, in November or December 1991, Zelmanowitz initiated steps to develop a policy. Following consultation with the deans and provosts of the various campus schools and colleges, Zelmanowitz prepared a proposed merit review policy for post six-year lecturers. This proposal was sent to the campus academic senate on January 16, 1992, for its review and response. It read, in relevant part, as follows:

> In consultation with the Deans and Provosts, it is proposed to exercise the University's discretion at UCSB in the following manner. Lecturers under consideration for a third (or subsequent) post six-year appointment will be eligible for merit review only in exceptional circumstances. In such cases, the Dean or Provost may grant a department permission to conduct a merit review.
>
> The reasons for this proposal include the following:
>
> (1) The temporary FTE which are used for lecturer appointments are not funded for merit increases. Post six-year lecturer salaries exceed budgeted salary levels in all

[11]Article VII (Appointments), section C.l.c. states that:

> Review for subsequent three-year appointments will normally occur during the second year of each three-year appointment.

> Schools and Colleges at UCSB. At the moment, 3.35 FTE. are being used to fund the merits of post six-year lecturers, over and above the 36.11 FTE occupied by these lecturers (see attached data sheet). This is an unfunded, and growing liability.
>
> (2) Merit review entitlement for employees represented by a bargaining agent are most appropriately negotiated at the bargaining table.

Zelmanowitz requested a quick response from the academic senate so that he could advise the various departments.

A copy of the proposal was also sent to Gonzales for transmittal to the local UC-AFT chapter. On January 21, 1992, Gonzales sent a copy of the proposed policy to Maria Marotti-Ceder (Marotti-Ceder), the local chapter president.

Marotti-Ceder sent a letter to Gonzales on January 29, 1992, with a copy to Zelmanowitz, asserting that the University had a legal obligation to raise the issue of merit policy with UC-AFT at the bargaining table or it would risk a violation of law. Neither Gonzales nor Zelmanowitz responded to the letter.

On February 7, 1992, Zelmanowitz issued a memorandum to deans and provosts announcing adoption of the proposed policy for post six-year merit reviews. The policy, which was effective immediately, read, in pertinent part, as follows:

> Unit 18 lecturers under consideration for a third or subsequent post sixth-year appointment will be eligible for merit review only in exceptional circumstances. Exceptional circumstances must involve factors that go beyond the "excellent performance" criterion for reappointment (MOU Article VII.C.l.a.2). When such circumstances are present and funding for a potential merit increase is available in the

> School or College, the Dean or Provost may grant a department permission to conduct a merit review. The personnel file for such a merit review must include full documentation of the exceptional nature of the case.

Gonzales sent a copy of the adopted policy to Marotti-Ceder on February 11, 1992.

In response to this action, Edward Purcell (Purcell), UC-AFT's labor consultant, sent a letter to Zelmanowitz on February 21, 1992, formally demanding to bargain merit issues related to post six-year lecturers and threatening to file an unfair practice charge if the University refused to bargain and/or withdraw the February 7 policy.

Jeffrey Frumkin (Frumkin), the University's systemwide assistant director of labor relations-staff services, responded to Purcell by letter on March 12, 1992. Frumkin's letter stated that the University was refusing to bargain about the policy. His letter also asserted that pursuant to the parties' 1989 reopener negotiations, section D of Article XXIII contained a specific waiver of any obligation by the University to bargain over any changes to campus merit review procedures.

UC-AFT subsequently filed the instant unfair practice charge on March 23, 1992.

At the hearing, Zelmanowitz described the February 7, 1992, document as a combination of policy and procedure. He acknowledged that, as a policy, it actually establishes two criteria for merit review eligibility: the existence of (1) "exceptional circumstances," and (2) funding for potential merit

increases in the school or college. This criteria is distinguished from the contractual standard of "excellent performance" used in evaluating post six-year lecturers for three-year appointments. Zelmanowitz also admitted that the policy creates more restrictive eligibility requirements for merit reviews than the classwide standard applied by the MOU for the first and second three-year reappointments.

The February 7 policy did not define the meaning of "exceptional circumstances" because, as Zelmanowitz explained, the administration could not anticipate all the kinds of circumstances that might arise.[12]

Other Relevant MOU Provisions

The waiver provisions of the 1991-93 MOU are found in Article XXXVIII which reads:

> ARTICLE XXXVIII. WAIVER
>
> A. The University and the UC-AFT acknowledge that during the negotiations which resulted in this Memorandum of Understanding, each had the right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Memorandum of Understanding and that this Memorandum of Understanding constitutes the agreement arrived at by the parties.

[12]One example of an "exceptional circumstance" was given. It was described as a situation where an exceptionally valuable lecturer was being recruited by an outside campus. The merit review process could be used to meet the outside offer and hopefully retain the employee at the Santa Barbara campus.

B. The rights granted and the procedures set forth under the Academic Personnel Manual and other University policies and procedures will no longer apply to faculty/instructors in the unit covered by this Memorandum of Understanding except as specifically set forth below or elsewhere in this Memorandum of Understanding. Although the memorandum constitutes the agreement between the parties, the parties agree that the applicable parts of the Academic Personnel Manual and other University policies and procedures regarding the areas listed below will continue to apply to members of this unit:

Patent and Copyright
Indemnity
Additional Compensation
Special Services to Individuals and Organizations
Outside Professional Activities
Disclosure of Financial Interests

Any changes in the above policies will be subject to the meet and discuss process and will not be subject to the meet and confer process unless the change affects only the members of this unit.

C. Except as otherwise provided for in this Memorandum of Understanding, or upon mutual consent of the parties to seek written amendment thereto, the University and the UC-AFT, for the life of this Memorandum of Understanding, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to or covered in this Memorandum of Understanding, or with respect to any subject or matter not specifically referred to or covered by this Memorandum of Understanding, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Memorandum of Understanding.

ISSUE

Whether the University's adoption of the February 7, 1992, policy regarding merit reviews for six-year lecturers violated section 3571(c) and derivatively, section 3571(a) and (b)?

DISCUSSION

Section 3570 of HEERA imposes a duty upon higher education employers to meet and confer with exclusive representatives of employees on all matters within the scope of representation. This duty is analogous to the duty to bargain imposed upon public school employers under the Educational Employee Relations Act and upon private sector employers by the National Labor Relations Act.[13]

In Regents of the University of California v. Statewide University Police Association (1985) PERB Decision No. 520-H, the Board reiterated its standards of analysis for alleged violations of HEERA's meet and confer provision. Accordingly, in determining whether a party's conduct constitutes an unfair practice, the Board uses both a "per se" and a "totality of the conduct" test, depending on the conduct involved and its effect on the negotiating process.

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[13]The Educational Employer Relations Act is codified at section 3540 et seq. The National Labor Relations Act (NLRA) is codified at 29 U.S.C. section 151 et seq. The construction of provisions of the NLRA is useful guidance in interpreting parallel provisions of collective bargaining statutes administered by the PERB. (See San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893]; Firefighter's Union v. City of Vallejo (1974) 12 Cal.3d 608 [117 Cal.Rptr. 507].)

An employer's unilateral change in terms and conditions of employment within the scope of representation, is, absent a valid defense, a per se refusal to negotiate. (Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94.)

Established policy relating to terms and conditions of employment may be embodied in a collective bargaining agreement (Grant Joint Union High School District (1982) PERB Decision No. 196) or, where a contract is silent or ambiguous, it may be determined from past practice or bargaining history (Rio Hondo Community College District (1982) PERB Decision No. 279).

In determining whether the University violated HEERA section 3571 as alleged, the foregoing principles will be kept in mind.

The Unilateral Change Allegation

To establish a unilateral change, the charging party must show that: (1) the employer breached or altered the parties' written agreement or established practice; (2) such action was taken without giving the exclusive representative notice or opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract but amounts to a change of policy (i.e., has a generalized affect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (Grant Joint Union High School District, supra; Glendora Unified School District (1991) PERB Decision No. 876.)

Positions of the Parties

UC-AFT maintains that prior to February 7, 1992, the established policy for access to merit reviews for post six-year lecturers on three-year appointments was embodied in the language of section C.1 of Article XXIII. This section mandates at least one merit review for such lecturers during the period of their first and second three-year appointments. However, UC-AFT argues, the language of this section is silent regarding merit reviews for these employees during third and subsequent three-year appointments. Consequently, the adoption and implementation of the February 7, 1992, policy by the Santa Barbara administration, precluding access to merit reviews of such, lecturers, except in "exceptional circumstances," was an unlawful unilateral action. This action was taken, without notice to UC-AFT and an opportunity to meet and confer, in violation of section 3571(c).

UC-AFT further asserts that neither the express language of section C.1 nor the parties' bargaining history gives the University "sole discretion" to determine when, if at all, additional reviews will be conducted for the affected employees.

The University takes the position that the language of Article XXIII clearly gives it the authority to take the action that is the focus of this dispute. This article, it asserts, is so comprehensive and clear on its face that the bargaining history need not be considered to interpret its meaning. The University construes the last sentence of section C.1 as reserving to it the unfettered right to determine the policy

about any merit reviews for post six-year lecturers beyond the two mandated by section C.1.

When read alone, the last sentence of section C.1 is arguably susceptible to the interpretation offered by the University. However, when read within the context of the entire section, the language arguably has a different meaning. The use of extrinsic evidence is thus proper to ascertain the meaning of words "in addition to those above" found in the last sentence.

Under well-established rules of contract interpretation, extrinsic evidence is properly considered when the contract language is ambiguous, and it may be received only to establish a meaning to which the language of the contract is reasonably susceptible. (Murphy Estate (1978) 82 Cal.App.3d 304 [147 Cal.Rptr. 258]; Murphy Slough Assn. v. Avila (1972) 27 Cal.App.3d 349 [104 Cal.Rptr. 136].) In using extrinsic evidence:

> A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable and lawful.

(Cal. Civ. Code section 1636; 1 Witkin Summary of Cal Law (9th Ed. 1987) Contracts, sec. 684; Stevenson v. Oceanic Bank (1990) 223 Cal.App.3d 306 [272 Cal.Rptr. 757].)

The 1987 parties' bargaining history is most revealing about the parties' intent and understanding regarding the language of section C.1. These negotiations culminated in the language that is now the subject of this dispute, most notably, the last sentence of section C.1. The language of this sentence was not changed during the 1989 or 1991 negotiations.

This evidence shows that when the University introduced the substantially revised language of C.1 on May 1, 1987, its proposal replaced the word "normally" with the phrase "at least one." Gilpin-Bishop proposed this phrase to give campuses a better "time frame" for conducting merit reviews during the period of both the first and second three-year appointments. The University wanted this language to preserve the flexibility for campuses to review on either two- or three-year cycles or to review even if faculty members received non-appointments. This was also recognized the fact that some campuses might do "acceleration, decelerations or deferrals" of merit reviews during these three-year appointment periods.

When the parties agreed to the language of the last sentence of section C.1, which reads "Consideration of merit reviews in addition to those above will be at the sole discretion of the University," both sides understood that this sentence was inserted to modify or amplify the phrase "at least one" in the first sentence with respect to reviews conducted during the time of the periods of the first and second three-year appointments.

There is no indication that the parties ever discussed, contemplated, or agreed that these five words would also give the University sole discretion to determine merit review eligibility for post six-year lecturers during their third or subsequent three-year appointments. If the University intended that the "sole discretion" language of the last sentence of this section would apply to periods beyond the first and second three-year

appointments, this intent was not communicated to UC-AFT during the 1987 negotiations or any subsequent negotiations.

In light of the evidence presented, it is determined that the contract is more reasonably susceptible to the interpretation offered by UC-AFT than that proffered by the University.[14] It is therefore concluded that the parties intended the language of section C.1 to apply only to merit reviews given to post six-year lecturers during their first and second three-year appointments. The MOU language, as well as their bargaining history, is silent with respect to their intent about merit reviews during the third or subsequent three-year appointments.

Past Practice

UC-AFT also attacks the University's February 7, 1992, policy on the grounds that it represented an alteration of past practice. In the absence of an express provision in the MOU allowing the University to unilaterally establish a merit review policy for post six-year lecturers on their third three-year appointment, UC-AFT asserts that it is appropriate to consider Santa Barbara's departmental practices before the 1986 MOU went into effect.

In support of this theory, UC-AFT points to Article XXIII, section F of the current MOU as representing a "de facto

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[14]UC-AFT urges that, pursuant to California Civil Code section 1654, the language of the contract should be interpreted most strongly against the party who causes the uncertainty to exist (i.e., the University). However, this principle is applied only where other rules of construction fail to resolve the uncertainty, which is not the case here.

guarantee" that the University would maintain at least traditional access to merit reviews for all lecturers not mandated to receive reviews under section C.1.[15] It is argued that this presumptively includes those not on first and second post six-year three-year appointments, i.e., those unit members on their third post six-year three-year appointment.

Section F contains vague language. The 1987 bargaining that resulted in this language is not really helpful in gleaning the intent of the parties about this provision.

When UC-AFT proposed the addition of sections C.4 and C.5, it attempted to insure unit members access to future merit reviews and increases under existing practices not covered by the mandates of section C.1. The University countered with the language found in section F. It appears that the parties' intended this provision to apply to unit members other than those on post six-year appointments. There is no indication that the parties agreed that section F would also apply to post six-year lecturers on third or subsequent three-year appointments.

Even though extrinsic evidence was admitted concerning the negotiations over the language of section F, this evidence does not support the interpretation of the contract urged by UC-AFT that it provides a "de facto guarantee" to post six-year lecturers beyond the mandates of section C.1. UC-AFT has not carried its burden with this argument, and it is therefore rejected.

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[15]See text, supra. at page 8.

There is also another reason for rejecting UC-AFT's argument regarding an alteration of a past practice. Those lecturers in the group designated as "post six-year lecturers" were a creation of the 1986 MOU. It was not until 1987 that the MOU provided for two guaranteed merit reviews for this group. It is undisputed that, prior to February 1992, no post six-year lecturer, including those employed at the Santa Barbara campus, was eligible for a third post six-year, three-year appointment. Consequently, the prevailing practices with respect to merit reviews for this group of lecturers are whatever may have developed, consistent with the provisions of the MOU after 1986. Past practice prior to 1986 is not relevant with respect to post six-year lecturers. (Lake Elsinore School District (1986) PERB Decision No. 563.)

Effect of the Policy

It has been concluded that the University unilaterally promulgated a policy on February 7, 1992, which changed the merit review eligibility requirements for post six-year lecturers coincident with their third three-year appointment. The University contends that it attempted to consult with UC-AFT, consistent with its practice of consulting with the campus community over policy development, prior to adopting the subject policy; but concedes that it refused to meet and confer with UC-AFT, despite a protest from the union that the policy was negotiable. The change in merit review eligibility requirements is not merely an isolated breach of the contract. It amounts to

a change of policy having a generalized effect or continuing impact upon the affected bargaining unit members terms and conditions of employment at the Santa Barbara campus. Since this change in policy concerns a matter within the scope of representation, i.e., the opportunity for salary increases, it is concluded that the University was obligated to meet and confer with UC-AFT prior to adopting the February 7, 1992 policy.

Absent some viable defense, the University's refusal to meet and confer with UC-AFT regarding its decision to change the eligibility requirements for merit reviews for post six-year lecturers on their third three-year appointments constitutes a violation of section 3571(c).

Waiver Defense

The University asserts that UC-AFT waived its right to meet and confer regarding the aforementioned subject. That waiver, it alleges, is evidenced by the bargaining history, the MOU language ultimately ratified by the parties, and conduct of the parties demonstrating acquiescence during the years since 1987.

Specifically, the University argues that the language of Article XXIII gives it broad discretion regarding merit reviews, except for the two reviews guaranteed by section C.1. The University also relies on the language of Article XXXVIII which contains the waiver provisions. (See text, supra, at pp. 25-27.) The effect of Article XXIII, in conjunction with Article XXXVIII, it is argued, is a clear contractual waiver of

UC-AFT's present right to bargain over the eligibility of post six-year lecturers for additional merit reviews.

UC-AFT takes the position that it never waived its right to meet and confer over this matter.

Waiver is an affirmative defense which the asserting party has the burden of proving. It is well settled that in order to find a waiver, PERB requires clear and unmistakable evidence that a party has relinquished its rights to bargain. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74.)

With respect to contract terms serving as evidence of a waiver, in Los Angeles Community College District (1982) PERB Decision No. 252, the Board held:

> [C]ontract terms will not justify a unilateral management act on a mandatory subject of bargaining unless the contract expressly or by necessary implication confers such right. New York Mirror (1965) 151 NLRB 834 [58 LRRM 1456, 1457]. Id. at p.10.

Here, the MOU between UC-AFT and the University does not justify unilateral action. While inclusion of the comprehensive provisions of Article XXIII permits an inference that the subject of merit reviews was exhausted in negotiations, the "clear and unmistakable" standard requires that evidence of a waiver be conclusive.

Despite the University's contention, the language of section C.1 of Article XXIII does not contain express terms evincing a clear and unmistakable waiver by the union of the right to bargain over the eligibility for merit reviews for post six-year lecturers on their third three-year appointment. Nor can it be

inferred from the "sole discretion" phrase of this provision that such a right is conferred on the University.

Nor does the zipper clause, i.e., Article XXXVIII, confer that right. It makes no specific reference to merit reviews. The plain language of that article gives both parties the right to refuse to bargain changes in all subjects or matters referred to or covered in the MOU for the duration of the agreement. This includes matters "not specifically referred to or covered" by the MOU "even though . . . within the knowledge or contemplation of either of those parties" during the negotiations for the MOU.

In Los Rios Community College District (1988) PERB Decision No. 684, the Board analyzed the effect of a zipper clause essentially the same as the one involved here. The Board concluded that in practical terms, the clause fixed for the life of the agreement those terms and conditions of employment established by past practice, as well as those established by the express terms of the contract. Thus, unspecified terms and conditions of employment covering negotiable subjects become the status quo for the life of that agreement.

In this case, the subject of merit reviews during the third and subsequent appointments of post six-year lecturers is not specifically referred to or covered by the MOU. Under the terms of the zipper clause the University was free to refuse to bargain changes in the eligibility requirement for merit review beyond those established by the MOU. However, it was not free to alter

the requirements even though they are not detailed in the MOU. (Compton Unified School District (1989) PERB Decision No. 784.)

In Los Angeles Community College District, supra, the Board addressed the use of bargaining history as evidence of a waiver of a statutory right. Citing cases decided in the private sector, the Board held:

> Under the National Labor Relations Act (NLRA or Act), union conduct in negotiations will make out a waiver only if a subject was "fully discussed" or "consciously explored" and the union "consciously yielded" its interest in the matter. Press Co. (1958) 121 NLRB 976. . . . The fact that a union drops a contract proposal during the course of negotiations does not mean it has waived its bargaining rights and ceded the matter to management prerogative. Beacon Piece Dyeing and Finishing Co (1958) 121 NLRB 953. Where, during negotiations, a union attempts to improve upon or, as in this case, to codify the status quo in the contract and fails to do so, the status quo remains as it was before the proposal was offered. The union has lost its opportunity to codify the matter, it has failed to make the matter subject to the contract's enforcement procedures or to gain any other benefit that might have accrued to it if its effort had succeeded. . . . But the union has not relinquished its statutory right to reject a management attempt to unilaterally change the status quo without first negotiating with the union. In a sentence, by dropping its demand, the union loses what it sought to gain, but it does not thereby grant management the right to subsequently institute any unilateral change it chooses. A contrary rule would both discourage a union from making proposals and management from agreeing to any proposals made, seriously impeding the collective bargaining process. Beacon Piece, supra. Id. at pp. 12-13.

In this case, through three successive sets of negotiations over the merit article, UC-AFT attempted unsuccessfully to secure

mandatory biannual merit reviews for post six-year lecturers. Although the parties made changes in the merit article, including section C.1, in 1989 and 1991, there is no evidence that the parties discussed a change in the scope of the last sentence of section C.1 and that UC-AFT "consciously yielded" its interest in continued access to merit reviews for post six-year lecturers. Accordingly, no waiver is found on the basis of the parties' bargaining history.

The remaining waiver defense is characterized by what the University describes as "acquiescence by the parties." On this point the University argues that UC-AFT, through its actions since 1987 in bargaining and in meetings with management officials at the Santa Barbara campus, demonstrated its belief that the University had sole discretion to develop or change merit review practices of lecturers beyond the two merit reviews mandated by section C.1 of Article XXIII. Thus, it created an implied waiver by accepting the University's position and "acquiescing" with changes made in merit review eligibility in 1987, 1988, and 1989.

This argument is not only confusing, but also unconvincing. It ignores the fact that UC-AFT's meetings with the Santa Barbara campus administration in 1988 and 1989 concerned the development of campuswide policy for pre six-year, not post six-year, lecturers. Since the University's policies and practices regarding pre six-year lecturers is not an issue, UC-AFT's actions with respect to this group of employees is irrelevant.

Prior to February 7, 1992, there is no evidence that the University made a change in the policy governing merit reviews for post six-year lecturers from 1987 forward. Clearly, UC-AFT did not acquiesce in the University's unilateral action of February 1992. Shortly after UC-AFT received notice, in January 1992, of the University's proposed action, it demanded to negotiate the subject and was refused. This argument is thus totally without merit.

For the reasons discussed above, it is concluded that the Respondent has failed to prove that UC-AFT waived its bargaining rights under any of the theories asserted.

Lacking evidence of a viable defense, it is concluded that the University violated section 3571(c) by unilaterally adopting a merit review policy for post six-year lecturers at the Santa Barbara campus during their third three-year appointment without providing UC-AFT with notice and an opportunity to meet and confer about the subject. This same action changed terms and conditions of employment for the affected employees in violation of section 3571(a). This unilateral action was taken in disregard of UC-AFT's protest and with indifference to its right and duty to represent the rights of its affected unit members. Therefore, it also violated section 3571(b).

Request to Amend Complaint

In its post hearing brief, UC-AFT renewed its request to amend the complaint to add an allegation that the University's adoption of the February 7, 1992, merit review policy amounted to

an independent violation of section 3571(a) and (b), based on unlawful discrimination and interference.

UC-AFT argues that the University's policy should be deemed "inherently destructive" of employee's rights because it did not apply to non-unit 18 academic employees. Instead, it singled out unit 18 members for less favorable treatment because of their exercise of the right to representation. Further, UC-AFT contends, the consequences of the University's action was not only "foreseeable" but must have been intended, and thus bears "its own indicia of intent." Accordingly, it argues, there is no need to prove the traditional elements of a prima facie case of discrimination in order to establish the existence of discrimination.

As noted earlier, prior to and during the hearing, UC-AFT sought to amend the complaint to add the theory of unlawful discrimination resulting from the University's unilateral change action. The University vigorously opposed the motion in each instance.

Before the hearing the motion was denied by a written order issued July 22, 1992. At the hearing the motion was denied on the record.

In its renewed motion, UC-AFT has alleged no new facts nor legal support beyond those raised in its initial motion. Therefore, the request is denied for the same reasons articulated in the July 22, 1992 order and again at the hearing.

CONCLUSION

Based upon the foregoing discussion and the entire evidentiary record, it has been determined that section C.1 of Article XXIII of the MOU is silent with respect to a merit review policy for post six-year lecturers on their third or subsequent three-year appointment. Further, it has been determined that this contractual provision does not grant the University sole discretion to determine the eligibility for merit reviews for this group of employees during the term of the MOU. Thus, the subject matter was one over which the parties were obligated to meet and confer.

The University violated its duty to meet and confer with UC-AFT when it unilaterally adopted a policy changing the eligibility requirements of merit reviews for such employees. By doing so, the University violated HEERA section 3571(c), and derivatively, 3571(a) and (b).

REMEDY

PERB is empowered to issue a decision and order directing an offending party to take such affirmative action as will effectuate the policies of HEERA.

Where an employer unilaterally changes terms and conditions of employment, PERB typically orders employers to cease and desist from such unlawful actions, to restore the status quo ante, to comply with its bargaining obligations with the exclusive representative and to make employees whole as a result

of the unlawful unilateral change. (Rio Hondo Community College District (1983) PERB Decision No. 292.)

Accordingly, the University is ordered to cease and desist from unilaterally changing the merit review policy for post six-year lecturers embodied by the terms of the 1991-93 MOU.

UC-AFT seeks an order restoring the status quo ante prior to February 7, 1992. Since the unilateral change occurred during the term of the agreement, the status quo ante is determined by the policy in effect during the 1991-93 MOU, in addition to those procedures developed pursuant to this policy. The status quo established by section C.1 of Article XXIII remains binding until it is replaced by agreement of the parties or until the contract as a whole expires. It is appropriate, therefore, to order the University to immediately rescind the February 7, 1992, merit review policy and restore the policy created by the MOU for merit reviews for post six-year lecturers until such time as the parties agree to its modification or the MOU as a whole expires. (See Calexico Unified School District (1983) PERB Decision No. 357.)

In order to create a make whole remedy that is appropriate to the circumstances of this case, it is important to note that access to a merit review represents an opportunity to be considered for a merit increase, but is not a guarantee that an increase will be granted. The University will therefore be ordered to provide all post six-year lecturers who have received their third three-year appointments an opportunity for merit

review pursuant to the policy established by the 1991-93 MOU for post six-year lecturers during their first and second three-year appointments, until and unless the parties have agreed to its modification.

UC-AFT also seeks an order directing the University to reimburse it for the cost of prosecuting this matter. In Regents of the University of California (1982) PERB Decision No. 253-H, the Board denied the charging party's request for attorney's fees, finding that the university's case was not frivolous. It expressly adopted for HEERA cases the standard for awarding attorneys fees used in cases brought under the Educational Employment Relations Act and the Ralph C. Dills Act, which was formerly known as the State Employer-Employee Relations Act.

There has been no showing here that the University's position in this matter was frivolous or taken in bad faith. It is thus inappropriate to award attorney's fees.

It is also appropriate that the University be directed to post a notice incorporating the terms of this order. Posting of such a notice, signed by an authorized agent of the University, will provide employees with notice that the University has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of HEERA that employees be informed of the resolution of the controversy and the University's readiness to comply with the ordered remedy. (Davis Unified School District,

et al. (1980) PERB Decision No. 116; see also Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

From the foregoing findings of fact, conclusions of law and the entire record in this case, and pursuant to the Higher Employer-Employee Relations Act (HEERA), Government Code section 3563.3, it is hereby ORDERED that the Regents of the University of California (University), its agents and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and confer in good faith with the University Council - American Federation of Teachers (UC-AFT) over a merit review policy for unit 18 members who are post six-year lecturers on their third or subsequent three-year appointment at the Santa Barbara campus.

2. Denying the UC-AFT its right to represent unit 18 members at the Santa Barbara campus by failing to meet and confer about matters within the scope of representation.

3. Interfering with the right of unit 18 members at the Santa Barbara campus to select an exclusive representative by failing to meet and negotiate about matters within the scope of representation with the UC-AFT.

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

1. Immediately rescind the merit review policy adopted for unit 18 employees at the Santa Barbara campus on February 7, 1992, and restore the merit review policy in effect

pursuant to the terms of the 1991-93 Memorandum of Understanding (MOU) between UC-AFT and the University until the meet and confer process described above is completed, either by agreement of the parties or after completion of the University's obligations under the impasse procedures outlined by HEERA section 3590 et seq.

2. Provide lecturers at the Santa Barbara campus, who were adversely affected by the February 7, 1992 policy, with an opportunity for merit review pursuant to the merit review policy in effect by the terms of the 1991-93 MOU, until or unless UC-AFT and the University agree to modify the policy or the MOU expires.

3. Within ten (10) days of a final decision in this matter, post copies of the Notice attached hereto as an Appendix at all work locations at the Santa Barbara campus where notices to employees are customarily placed. The Notice must be signed by an authorized agent of the University, indicating that it will comply with the terms of this Order. Such posting will be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered by any other material.

4. Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the San Francisco Regional Director of the Public Employment Relations Board in accordance with the Director's instructions.

Pursuant to California Code of Regulations, 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 Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 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 Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

W. JEAŃ THOMAS
Administrative Law Judge