STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ACADEMIC PROFESSIONALS OF CALIFORNIA, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	Case No. LA-CE-584-H PERB Decision No. 1507-H January 8, 2003

Appearances: Rothner, Segall & Greenstone by Glenn Rothner and Ricardo Ochoa, Attorneys, for Academic Professionals of California; Janette Redd Williams, University Counsel, for Trustees of the California State University.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions from the Academic Professionals of California (APC) and Trustees of California State University (CSU) of an administrative law judge's (ALJ) proposed decision (attached). The charge alleged that CSU violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by unilaterally implementing computer usage policies at both its Fresno and Bakersfield campuses and a telephone/facsimile usage policy at its Fresno campus. The ALJ found that the computer usage policies constituted a violation of section 3571(a) and (c) but dismissed the charges regarding the telephone and facsimile machine usage policy.

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

Upon review of the entire record in this matter, including the proposed decision, and the exceptions and responses to exceptions filed by both parties, the Board adopts the ALJ's factual and legal findings with respect to CSU's implementation of the computer usage policies, in line with the discussion below, but reverses the ALJ's finding that the telephone/facsimile policy did not violate HEERA.

DISCUSSION

The complaint in this matter involves allegations of unilateral change in violation of HEERA section 3571(c). To prevail on a complaint of unilateral change, the charging party must establish by a preponderance of the evidence that: (1) the employer implemented a change in policy; (2) the action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the action is not merely an isolated incident, but amounts to a change of policy (i.e., having a generalized effect 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. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

1. CSU Computer Usage Policies

The threshold question here is whether the subject matter contained in the CSU Fresno and Bakersfield policies falls within the scope of representation under HEERA.[2] Whether

[2]HEERA section 3562 defines the scope of representation in the CSU system as follows:

> (r)(1) For purposes of the California State University only, 'scope of representation' means, and is limited to, wages, hours of employment, and other terms and conditions of employment. The scope of representation shall not include:

enumerated items such as wages and hours are within the scope of representation is self-evident. In determining if non-enumerated matters fall within the scope of representation as a "term or condition of employment," PERB applies a three-part test. A subject is within the scope of representation if: (1) it involves the employment relationship; (2) is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective bargaining is an appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not unduly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer's mission. (Trustees of the California State University (2001) PERB Decision No. 1451-H, adopting proposed decision of ALJ at pp. 8-9.) This test is similar to that first adopted in Anaheim Union High School District (1981) PERB Decision No. 177 and is commonly referred to as the Anaheim test.

The Board agrees with the portions of the ALJ's analysis pertaining to the CSU computer usage policies. These policies clearly establish new grounds for discipline against employees who violate their provisions. PERB has previously determined that "rules of conduct which subject employees to disciplinary action are subject to negotiation both as to

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> (A) Consideration of the merits, necessity, or organization of any service, activity, or program established by statute or regulations adopted by the trustees, except for the terms and conditions of employment of employees who may be affected thereby.
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> . . . . . .
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> (2) All matters not within the scope of representation are reserved to the employer and may not be subject to meeting and conferring, provided that nothing herein may be construed to limit the right of the employer to consult with any employees or employee organization on any matter outside the scope of representation.

criteria for discipline and as to procedure to be followed." (San Bernardino City Unified School District (1982) PERB Decision No. 255.) In State of California (Water Resources Control Board) (1999) PERB Decision No. 1337-S (Water Resources Control Board), PERB held that an internet/intranet usage policy was within the scope of representation.

These policies also affect matters within the scope of representation as they pertain to APC's use of CSU e-mail to communicate with employees. CSU excepts to the ALJ's ruling that this matter is within the scope of representation on the basis that regulation of employer-owned equipment is a management right, citing both various National Labor Relations Board (NLRB) cases and Government Code sections 8314 and 3568. The NLRB cases are not applicable because there is no statutory right of access in the National Labor Relations Act comparable to HEERA section 3568.[3] It is equally clear that computer resources, telephones and fax machines comprise "reasonable" means of access in a large academic institution. PERB has long held that reasonable access rights are negotiable. (State of California (Departments of Personnel Administration, Banking, Transportation, Water Resources and Board of Equalization) (1998) PERB Decision No. 1279-S; California State University, Sacramento (1982) PERB Decision No. 211-H; Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District (1984) PERB Decision No. 375.) Such means include the use of computers, telephones and fax machines. (Water

[3]HEERA section 3568 states:

> Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act.

Resources Control Board.) Furthermore, Government Code section 8314 does not prohibit personal use of such equipment; rather, it states that use of state resources for personal purposes is unlawful, but excludes occasional, incidental or minimal use of state resources for personal purposes from its prohibition.[4]

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[4]Government Code section 8314 states, in pertinent part:

> (a) It shall be unlawful for any elected state officer, appointee, employee, or consultant, to use or permit others to use state resources for a campaign activity, or personal or other purposes which are not authorized by law.
>
> (b) For purposes of this section:
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> (1) 'Personal purpose' means those activities the purpose of which is for personal enjoyment, private gain or advantage, or an outside endeavor not related to state business. "Personal purpose" does not include an occasional telephone call, or an incidental and minimal use of state resources, such as equipment or office space, for personal purposes.
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> (3) 'State resources' means any state property or asset, including, but not limited to, state land, buildings, facilities, funds, equipment, supplies, telephones, computers, vehicles, travel, and state compensated time.
>
> (4) 'Use'means a use of state resources which is substantial enough to result in a gain or advantage to the user or a loss to the state for which a monetary value may be estimated.
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> (c)(1) Any person who intentionally or negligently violates this section shall be liable for a civil penalty not to exceed one thousand dollars ($1,000) for each day on which a violation occurs, plus three times the value of the unlawful use of state resources. The penalty shall be assessed and recovered in a civil action brought in the name of the people of the State of California by the Attorney General or by any district attorney or any city attorney of a city having a population in excess of 750,000. If two or more persons are responsible for any violation, they shall be jointly and severally liable for the penalty.

CSU next asserts that there was no change in the status quo. According to CSU, the parties negotiated access policies and the resulting provisions in the memorandum of understanding (MOU) did not include union e-mail access rights. CSU concludes that these policies fall within the MOU access provisions and thus the policies do not change the status quo. CSU incorrectly relies upon State of California (Departments of Personnel Administration, Banking, Transportation, Water Resources and Board of Equalization) (1998) PERB Decision No. 1279-S (DPA). In DPA, the employer was ignorant of employee use of e-mail for union business and no MOU provision existed that addressed the issue. In this case, CSU acknowledges APC's use of e-mail to communicate with employees. A policy restricting that practice clearly changes the status quo. There is also no evidence in the record that either party proposed computer usage restrictions during the negotiations over access rights; and so for this reason as well, the argument fails. Furthermore, this issue was not raised during the hearing and therefore, CSU has waived its right to argue the consistency of these provisions in its exceptions. (PERB Reg. 32300(b).[5])

> (2) If the action is brought by the Attorney General, the moneys recovered shall be paid into the General Fund. If the action is brought by a district attorney, the moneys recovered shall be paid to the treasurer of the county in which the judgment was entered. If the action is brought by a city attorney, the moneys recovered shall be paid to the treasurer of that city.
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> (3) No civil action alleging a violation of this section shall be commenced more than four years after the date the alleged violation occurred. [Emphasis added.]

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

Second, CSU argues that APC failed to demonstrate otherwise that the computer usage policies comprise a change in the status quo by claiming that they were mere compilations of existing rules. On the contrary, these policies embody comprehensive rules on the use of computer resources, violation of which is grounds for discipline. These policies thus affect "unilateral implementation of a sweeping set of rules. . . . .of the 'quantity and kind'" that alter the status quo as set forth in the 1960 policy and Government Code section 8314. (Oakland Unified School District (1983) PERB Decision No. 367.)

Third, CSU asserts that the possibility of employee discipline is not within the scope of representation, otherwise all work rules would be subject to bargaining. CSU's reliance upon Placer Hills Union School District (1984) PERB Decision No. 377, in which the district required employees to sign for receipt of documents under threat of discipline, is not applicable. The ALJ properly dismissed this argument, reasoning that HEERA section 3572.5 allows the MOU to supercede various Education Code provisions including those pertaining generally to discipline. Although portions of the policies may concern matters within management prerogative, other issues, involving the ill-defined criteria for discipline, internal monitoring of employee e-mail, and training employees to comply with copyright and other licensing restrictions, clearly are negotiable items. (Trustees of the California State University (2001) PERB Decision No. 1451-H; Anaheim Union High School District (1981) PERB Decision No. 177; State of California (Water Resources Control Board) (1999) PERB Decision No. 1337-S.) In addition, as correctly stated by the ALJ, the absence of Education Code section 89535[6] from HEERA section 3572.5 does not preclude the parties from negotiating

[6]Education Code section 89535 provides:

> Any permanent or probationary employee may be dismissed, demoted, or suspended for the following causes:

forms and bases for discipline not included within section 89535, provided that the subject is related to wages, hours or other negotiable terms and conditions of employment. For example, the parties' MOU contains provisions pertaining to oral and/or written reprimand and temporary suspension without pay for specified reasons, both items not included within section 89535. Obviously, the parties have negotiated MOU provisions concerning discipline, which are not subsumed within section 89535.

Finally, contrary to CSU's assertion, a policy that unlawfully restricts union access creates a corresponding interference with employee's representation rights under section 3571(a). (The Regents of the University of California, University of California at Los Angeles Medical Center (1983) PERB Decision No. 329-H.) The Board thereby agrees with the ALJ's finding on this issue.

(a) Immoral conduct.

(b) Unprofessional conduct.

(c) Dishonesty.

(d) Incompetency.

(e) Addiction to the use of controlled substances.

(f) Failure or refusal to perform the normal and reasonable duties of the position.

(g) Conviction of a felony or conviction of any misdemeanor involving moral turpitude.

(h) Fraud in securing appointment.

(i) Drunkenness on duty.

2. CSU's Telephone and Facsimile Usage Policy[7]

The Board agrees with the ALJ that this policy falls within the scope of representation but disagrees with his conclusion that the policy is not a unilateral change in violation of HEERA section 3571(c). The Board further agrees with APC's assertion that the policy's requirement for reimbursement for long distance calls is inconsistent with Government Code section 8314. Section 8314(b)(4) prohibits use "which is substantial enough to result in a gain or advantage to the user or a loss to the state for which a monetary value may be estimated." Clearly the costs of long-distance phone calls can be gleaned from telephone bills and so such calls are prohibited by section 8314. On the other hand, the new policy allows employees to make personal long distance calls but requires the employee to pay for them, an obvious departure from section 8314.

The new grounds for discipline established under the new policy are also inconsistent with section 8314. APC is correct in its contention that section 8314 does not cover discipline. Rather, section 8314 calls for civil action brought by either the Attorney General's or a local district attorney's office and for assessment of civil penalties if a violation is found. In contrast, CSU's policy specifically states that "[e]mployees found to be misusing State phones for personal purposes in violation of this policy may be subject to appropriate personnel action." APC's assertion that the new policy improves upon the 1960 policy also has merit. Employers may not make unilateral changes to increase benefits, as well as reduce benefits. (Palo Verde Unified School District (1983) PERB Decision No. 321.) The 1960 policy prohibits the use of state "facilities, equipment, or supplies at any time for any purpose other

[7]The ALJ found that the use of fax machines was not specifically addressed in this policy. The Board disagrees with this finding. In their exceptions, both parties have stipulated to the coverage of fax machines by the policy under its plain wording. The Board hereby finds that the policy applies to fax machines.

than the performance of official business." If the generally-worded 1960 policy does indeed cover telephones and fax machines, there is no question that, from an employees' perspective, the new policy improves upon the 1960 policy by allowing for some personal use of telephones and fax machines.

3. CSU Failure to Properly Notify APC of Change

The Board agrees with the ALJ's finding that, based upon the existing practice of the parties, CSU failed to notify APC of its implementation of these policies.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Trustees of California State University (CSU) violated the Higher Education Employer-Employee Relations Act, Government Code section 3571(a) and (c) (HEERA). CSU unlawfully changed matters within the scope of representation when it unilaterally implemented computer usage policies at both its Bakersfield and Fresno campuses and telephone/facsimile usage policies at its Fresno campus without providing the Academic Professional of California (APC) notice or an opportunity to bargain in violation of HEERA section 3571(c). CSU, by the same conduct, also interfered with the right of employees to be represented by APC, the exclusive representative, in violation of HEERA section 3571(a).

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

A. CEASE AND DESIST FROM:

1. Unilaterally implementing computer resources policies at the Fresno and Bakersfield campuses and the telephone/facsimile usage policy at the Fresno campus to the extent they relate to bargaining unit 4.

2. Interfering with the rights of bargaining unit 4 employees to be represented by an employee organization of their choice.

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

1. Rescind the computer resources policies at the Fresno and Bakersfield campuses and the telephone/facsimile usage policy at the Fresno campus to the extent they relate to bargaining unit 4.

2. Provide APC with reasonable notice and an opportunity to negotiate about future attempts at the Fresno and Bakersfield campuses to implement computer resources and telephone/facsimile usage policies.

3. Within ten (10) workdays of service of a final decision in this matter, post at all work locations on the Fresno and Bakersfield campuses where notices to bargaining unit 4 employees are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of CSU, indicating that CSU 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 ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Upon issuance of a final decision in this matter, make written notification of the actions taken to comply with this order to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions. Written notification to the regional director must be served concurrently on APC.

Members Baker and Neima 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-584-H, Academic Professionals of California v. Trustees of the California State University, in which all parties had the right to participate, it has been found that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a) and (c). CSU violated the HEERA when it implemented computer resources policies at its Fresno and Bakersfield campuses and the telephone/facsimile usage policy at its Fresno campus without negotiating with the Academic Professionals of California (APC).

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

A. CEASE AND DESIST FROM:

1. Unilaterally implementing computer resources policies at the Fresno and Bakersfield campuses and the telephone/facsimile usage policy at the Fresno campus to the extent they relate to bargaining unit 4.

2. Interfering with the rights of bargaining unit 4 employees to be represented by an employee organization of their choice.

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

1. Rescind the computer resources policies at the Fresno and Bakersfield campuses and the telephone/facsimile usage policy at the Fresno campus to the extent they relate to bargaining unit 4.

2. Provide APC with reasonable notice and an opportunity to negotiate about future attempts at the Fresno and Bakersfield campuses to implement computer resources and telephone/facsimile usage policies.

Dated: _____

TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY

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 WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ACADEMIC PROFESSIONALS OF CALIFORNIA, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-584-H PROPOSED DECISION (9/10/01)

Appearances: Edward Purcell, Consultant, for Academic Professionals of California; Janette Redd Williams, University Counsel, for Trustees of the California State University.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

An employee organization contends here that a higher education employer unilaterally adopted comprehensive policies covering use of computer resources, facsimile (fax) machines, and telephones without affording the union the opportunity to negotiate. The union argues that violation of the policies could result in discipline, and the policies contained other negotiable topics. Therefore, the union alleges, the employer has breached its duty to bargain. The employer does not dispute that it adopted the policies in question on two campuses. It contends, however, that the policies constituted no change in terms or conditions of employment, and, in any event, it had no duty to negotiate about the content of the policies. The employer contends further that the union was aware certain policies were under consideration for adoption, yet it did not seek to negotiate.

The Academic Professionals of California (APC) commenced this action on June 14, 2000, by filing an unfair practice charge against the Trustees of the California State University

(CSU). The general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on December 26, 2000. The complaint, as amended on March 22, 2001, alleges that CSU unilaterally implemented new policies concerning use of computer resources at its Fresno and Bakersfield campuses; the complaint further alleges that CSU unilaterally implemented a separate policy covering use of telephones and fax machines on its Fresno campus. By this conduct, the complaint alleges, CSU refused to negotiate in good faith with APC and interfered with the right of employees to be represented by an employee organization of their choice, in violation of the Higher Education Employer-Employee Relations Act (HEERA), section 3571(c) and (a), respectively.[1]

CSU submitted a timely answer, generally denying all allegations and asserting a number of affirmative defenses. Denials and defenses will be addressed below, as necessary.

A settlement conference was conducted on February 23, 2001, but the dispute was not resolved. The undersigned conducted a formal hearing in Los Angeles on May 17, 2001. With the receipt of the final brief on July 26, 2001, the case was submitted for decision.

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

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

FINDINGS OF FACT

Jurisdiction

APC is an employee organization within the meaning of section 3562(f)(1) and the exclusive representative of an appropriate unit of academic support employees (bargaining unit 4) within the meaning of section 3562(i). CSU is a higher education employer within the meaning of section 3562(g). At all relevant times, APC and CSU were parties to a memorandum of understanding (MOU). Relevant provisions of the MOU are discussed below, as necessary.

Fresno Policy

Since approximately 1960, CSU has had an incompatible activities policy in effect. In relevant part, the policy provides that "the use of state time, facilities, equipment or supplies at any time for any purpose other than the performance of official business" is "inconsistent, incompatible, or in conflict with the duties of an employee." There is no evidence that CSU adopted other incompatible activities policies from 1960 to the late 1990's, when the policies at issue here were established. Although the latter policies were adopted in the late 1990's, APC did not become aware of them until they surfaced in connection with a disciplinary action in 2000.

On April 4, 2000, Carolyn Botta (Botta), an employee at the Fresno campus, received a notice of termination. Among other things, the notice alleged that she used computer resources for personal reasons. APC representative Edward Purcell (Purcell) requested from CSU certain information for use in representing Botta. Included in Purcell's request were all policies in effect on the Fresno campus concerning employee use of CSU-owned computer resources, telephones and fax machines.

On June 1, 2000, Jeannine Raymond (Raymond), director of human resources for the Fresno campus, forwarded to Purcell a policy covering use of CSU computer resources. The written policy, dated June 1998 and implemented on or about March 24, 1999, is comprehensive and need not be set forth in its entirety here.[2] It contains, however, several provisions that are relevant to the instant dispute. A partial list of these provisions is briefly summarized immediately below.

The policy provides that computer resources are to be used only for CSU-related activities. It also states that "violations of authorial integrity (concerning electronic information), including plagiarism, invasion of privacy, unauthorized access, and trade secrets and copyright violations, may be grounds for sanctions against members of the academic community." The policy provides that "all students, faculty, administration, and staff are responsible for seeing that these computing facilities are used in an effective, efficient, ethical and lawful manner." Regarding "computer accounts," the policy states that "misuse of accounts or violation of the delineated conditions may result in the termination of the accounts, or, in cases of more serious infractions, the submission of the case to an appropriate disciplinary authority for further investigation." In such cases, the policy continues, "appropriate actions must follow the appropriate procedures (for example, the various collective bargaining agreements govern appropriate actions involving faculty and staff members and specifies specific procedures.)" The policy prohibits random mailings (also known as "spam mail" or "spamming") to large numbers of employees. The policy sets out several inappropriate uses of e-mail and recognizes the possibility of "internal monitoring (of

[2]The document initially sent to Purcell was a draft policy that was never implemented. The draft is irrelevant to the instant dispute and will not be considered here. This proposed decision will address the policy that was eventually implemented.

e-mail messages) by an authorized individual." The policy concludes, "violations of this policy will be handled through normal university procedures."

Asked if employees could be disciplined for abuse of e-mail facilities, Raymond responded, "they could, I suppose." With respect to how the policy relates to employee discipline in general, Raymond said employee conduct would be evaluated in light of the policy to determine if corrective action is appropriate.

In addition, Raymond's transmission to Purcell included a separate policy covering use of telephones and fax machines. Raymond informed Purcell that the telephone/fax machine policy was initially sent to administrators, deans and department heads "for distribution to their employees" on June 5, 1997. In brief, the policy provides that such equipment is to be used only for "State business." It authorizes incidental use of telephones, noting that personal use during the workday is to be kept at a minimum, long distance calls for personal reasons must be billed to a personal calling card or identified immediately as a personal call, and reimbursement must be provided to CSU. Use of fax machines is not specifically addressed. The policy concludes, "employees found to be misusing State phones for personal purposes in violation of this policy may be subject to appropriate personnel action."

Raymond pointed out to Purcell that both policies are found in the Manual of Administrative Policies and Procedures. She noted that the manual was originally distributed to all departments in August 1999 and is available in the School of Education and the Department of Human Development.

APC quickly adopted the position that it had not received formal notice that these policies would be implemented. Accordingly, it filed this unfair practice charge on June 14, 2000.

On November 10, 2000, while the unfair practice charge was under investigation, Raymond sent another memo to employees covering use of campus electronic mail (e-mail) and computers. The purpose of the memo was to review existing policy. Once again, the memo is a comprehensive statement of policy and need not be set forth in its entirety. In brief, it reiterates that e-mail accounts and computer resources are to be used only for work related matters. Among the uses expressly prohibited are the following: sharing of e-mail accounts or passwords; accessing or downloading pornographic material; random mailings of "any message of a commercial or political nature;" transmission of humor which may be construed as offensive or harassment; and any activity that violates state or federal laws. Raymond's memo concludes, "failure to adhere to the standards described in the campus policy will lead to an appropriate personnel action which may include an oral or written reprimand or a disciplinary action pursuant to the appropriate collective bargaining agreement." Upon receipt of Raymond's November 2000 memo, APC amended the unfair practice complaint to include additional changes to the Fresno policy contained therein.

Raymond testified that APC use of e-mail to communicate with employees would not fall under the definition of "random mail," and the Fresno campus has placed no restrictions on e-mail use by APC stewards or on APC itself. She testified, however, that she does not equate "State business" with "union business." In this regard, she said the policy presents a "conflict" between the right to distribute a union message and the prohibition against using the policy for other than state business. "Union messages" are not "state business," Raymond testified.

Raymond also said that no employee has been disciplined based on a violation of the Fresno policies. According to Raymond, employees ordinarily are disciplined for actions that violate statutory standards set forth in the Education Code, not for violations of the policy

itself. On cross-examination, however, Raymond conceded that an employee could be disciplined for abuse of the e-mail policy and other policies related to computer use.

Bakersfield Policy

APC contends a similar computer resource use policy was adopted by the Bakersfield campus without notice to the union. On or about September 7, 2000, a comprehensive computer and network use policy appeared for the first time on the Bakersfield website. That policy need not be set forth in its entirety. In brief, it provides that "minor infractions of this policy, when accidental, such as consuming excessive resources or overloading computer systems, are generally resolved informally by the unit administering the accounts or network." Repeated "minor infractions or misconduct which is more serious," the policy continues, could result in loss of computer privileges or referred to an appropriate CSU authority for further action. The policy concludes with 18 enumerated examples of conduct which would violate the policy. Examples are "knowingly or carelessly performing an act that will interfere with the normal operation of computers;" "deliberately wasting/overloading computing resources," such as printing too many copies of a document; violating the terms of software licensing agreements or copyright laws; using e-mail to harass or threaten other employees; sending "inappropriate" mass mailings or "spamming," including mailings to newsgroups, mailing lists, or individuals; and transmitting materials that are slanderous or defamatory, or that otherwise violate existing laws or CSU regulations.

Kellie Garcia (Garcia), director of personnel at the Bakersfield campus, testified that no employee has been disciplined under the policy. However, her testimony is not a model of clarity. On direct examination, she first said that discipline is initiated under appropriate statutes, not the policy. On cross-examination, however, she conceded that employees may be disciplined for violation of CSU policies, and employee conduct is measured against the

content of the particular policy in question. She also said an employee or APC representative may be disciplined for "inappropriate" mailings to a "mailing list," and "misuse" of e-mail by APC could result in loss of e-mail privileges under the policy. However, she noted that "it's routine that the unions do use the e-mail system and we do not -- we have not monitored it or found it to be inappropriate." On redirect examination, Garcia modified her testimony somewhat as it relates to APC use of e-mail. She said that the policy prohibits only "repeated" mass mailings of the "same information" to employees who had requested they not be included on the list.

APC stewards at Fresno and Bakersfield regularly communicate with employees through e-mail at the campus level, and APC uses e-mail as a tool to reach larger numbers of employees. As Garcia testified, the Bakersfield campus is aware of APC use of e-mail to communicate with employees. There is no evidence that the Fresno campus is aware of the practice. No APC representatives have been disciplined, nor has CSU moved to prohibit APC use of equipment for these purposes.

It is APC's position here that the union never received notice of the policies implemented at Fresno and Bakersfield. Charles Goetzel (Goetzel), who has served as statewide president of APC since May 1996, testified regarding a longstanding policy under which the union receives official notice of changes in negotiable topics at its headquarters office in Oakland. Because APC received no notice of the implementation of the policies discussed above, Goetzel reminded CSU presidents in January 2001 that formal notice of proposed changes was to be sent to APC in Oakland. He said the reminder was sent precisely because CSU had not complied with the policy. CSU's failure to comply with the notice policy apparently was not new. Goetzel testified without rebuttal that, beginning in 1996, he and

Purcell have had several conversations with administrators in the Chancellor's office about the problem.

CSU has argued that APC received actual notice of at least some of the changes at issue here. Raymond testified that the e-mail and telephone policies were discussed at meetings of the Joint Labor Council on the Fresno campus as early as January and March 1997. There is no evidence about the extent of the discussions. Documentary evidence indicates only that the telephone and e-mail policies were placed on the agenda as items for discussion in meetings held during that time. APC steward Tony Garduque (Garduque) was a member of the Joint Labor Council at the Fresno campus and presumably participated in its meetings. As a steward, however, Garduque was not a statewide officer of APC. He was not on the negotiating team, and he had no authority to accept notice of changes in negotiable topics from CSU. The extent of his authority was to act as a representative in grievances and related matters.

ISSUE

1. Did CSU's Fresno or Bakersfield campuses unilaterally adopt policies regarding use of computer resources, in violation of section 3571(c)?

2. Did CSU's Fresno campus unilaterally adopt a policy covering use of telephones and fax machines, in violation of section 3571(c)?

CONCLUSIONS OF LAW

The theory of the complaint in this case is one of unilateral change. To prevail on a complaint of unilateral change, the charging party must establish by a preponderance of the evidence that (1) the employer implemented a change in policy; (2) the action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the action is not merely an isolated incident, but amounts to a change of policy

(i.e., having a generalized effect 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. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

APC contends that the policies in question here include matters within the scope of representation, they modify existing practice and implement new requirements, and CSU failed to provide notice and an opportunity to negotiate. Under PERB law, APC asserts, meetings at the Fresno campus with Garduque present were inadequate to constitute valid notice, and there is no evidence whatsoever that APC received notice the policy would be adopted at Bakersfield. In addition, APC argues, the 1960 incompatible activities statement is not applicable here because computers and e-mail did not exist at that time; and, in any event, close comparison of the contested policies with the 1960 policy indicates there are key differences. Finally, APC argues, the broadly worded prohibitions in the new policies, if applied literally, have the potential to deprive the union of its right to distribute information to employees. For example, APC points out, the policy could be read to characterize APC's distribution of information as unlawful "random" or "spam" mailing under the policies.

In response, CSU first argues that APC has failed to establish a change in the status quo. According to CSU, there is no evidence that either campus ever permitted use of its computer resources, telephones or fax machines in a manner that differs from the policies in question; and the mere compilation of existing rules does not constitute a unilateral change under PERB law. CSU next contends the policies do not include matters within the scope of representation under HEERA. The policies do not involve wages or hours of employment, CSU asserts, and they are not brought within the scope of representation under the applicable test to determine negotiability; that is, the policies do not involve the employment relationship,

they are not of such concern to the parties that the mediatory influence of collective bargaining would be an appropriate means of resolving the dispute, and negotiations about the policies would unduly abridge the employer's freedom to exercise prerogatives essential to achievement of its mission.

In a lengthy, point-by-point analysis of every aspect of the Fresno and Bakersfield policies, CSU argues that nothing in the policies falls within the scope of representation, and nothing in the policies regarding potential discipline or infractions makes them a mandatory subject of bargaining. Discipline, CSU points out, is covered by the parties' collective bargaining agreement and relevant statutes; and, in any event, under PERB law a work rule that does not otherwise relate to a negotiable topic is not made negotiable merely by virtue of its potential relationship to discipline.

Nor does the Fresno telephone/fax machine policy fall within the scope of representation, CSU contends. According to CSU, the policy is entirely consistent with existing statutes and constitutes no change whatsoever.[3]

The threshold question here is whether the subject matter contained in the Fresno and Bakersfield policies fall within the scope of representation under HEERA. Section 3562(r) defines the scope of representation in the CSU system as follows:

> (r)(1) For purposes of the California State University only, "scope of representation" means, and is limited to, wages, hours of employment, and other terms and conditions of employment. The scope of representation shall not include:

[3]CSU's reliance on Adtranz Abb Daimler-Benz Transportation v. NLRB (D.C Cir. 2001) 253 F.3d 19 [167 LRRM 2566] as authority for an employer to adopt work rules is misplaced. In that case, the District of Columbia circuit concluded an employer's work rules, adopted prior to a union election, did not interfere with protected concerted activity. The theory of the complaint against CSU is one of unilateral change and refusal to negotiate with an exclusive representative, not one of interference in an election setting. Therefore, this case is controlled by different precedent and Adtranz has little relevance here.

> (A) Consideration of the merits, necessity, or organization of any service, activity, or program established by statute or regulations adopted by the trustees, except for the terms and conditions of employment of employees who may be affected thereby.
>
> . . . . . .
>
> (2) All matters not within the scope of representation are reserved to the employer and may not be subject to meeting and conferring, provided that nothing herein may be construed to limit the right of the employer to consult with any employees or employee organization on any matter outside the scope of representation.

Whether enumerated items such as wages and hours are within the scope of representation is self evident. In determining if nonenumerated matters fall within the scope of representation as a "term or condition of employment," PERB applies a three-part test. A subject is within the scope of representation if (1) it involves the employment relationship; (2) is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective bargaining is an appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not unduly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer's mission. (Trustees of the California State University (2001) PERB Decision No. 1451-H, adopting proposed decision of administrative law judge at pp. 8-9.) This test is similar to that first adopted in Anaheim Union High School District (1981) PERB Decision No. 177 and is commonly referred to as the Anaheim test.

It cannot be disputed that the policies at issue here carry the potential for discipline. PERB has long held that implementation of policies that include the potential for disciplinary action may have a direct impact on wages, health and welfare benefits, and other terms and conditions of employment since such action may reduce or eliminate entitlement to those items. Thus, PERB has held, "rules of conduct which subject employees to disciplinary action

are subject to negotiations both as to the criteria for discipline and as to procedure to be followed." (San Bernardino City Unified School District (1982) PERB Decision No. 255 at p. 11 (San Bernardino).) In a more recent decision covering subject matter akin to the policies under review here, PERB held that an expansion or modification of an incompatible activities statement covering use of internet/intranet facilities is within the scope of representation under the Ralph C. Dills Act (Dills Act).[4] (State of California (Water Resources Control Board) (1999) PERB Decision No. 1337-S, pp. 7-8 (Water Resources Control Board).) Therefore, I find that the Fresno and Bakersfield computer use policies are negotiable to the extent they relate to discipline.

In addition, the Fresno and Bakersfield policies relate to APC's practice of communicating with employees through e-mail. Subject to reasonable regulation, employee organizations under HEERA have the right of access to "institutional . . . . means of communication" and "institutional facilities" to communicate with employees. (Sec. 3568.) Although it is clear that this right does not extend to every type of communication in existence at CSU (The Regents of the University of California v. Public Employment Relations Board (1986) 177 Cal.App.3d 648, 654 [223 Cal.Rptr. 127]), it is equally clear that computer resources, telephones and fax machines constitute reasonable means of access in a large academic institution. PERB has long held that reasonable access rights are negotiable. (State of California (Department of Personnel Administration, et al.) (1998) PERB Decision No. 1279-S, adopting proposed decision of administrative law judge at p. 38; see also California State University, Sacramento (1982) PERB Decision No. 211-H, pp. 27-32 [CSU

[4]The Dills Act is codified at section 3512 et seq. The scope of representation under the Dills Act is parallel to that in HEERA. Section 3516 states: "The scope of representation shall be limited to wages, hours, and other terms and conditions of employment, except, however,

must meet and discuss access rights even with non-exclusive representative]; Healdsburg Union High School District (1984) PERB Decision No. 375, p. 19.) Therefore, I conclude that the policies adopted by the Fresno and Bakersfield campuses fall within the scope of representation to the extent they relate to statutory access rights.

CSU advances three main arguments in support of its position that the policies are not within the scope of representation: first, the Board distinguished San Bernardino in Placer Hills Union School District (1984) PERB Decision No. 377 (Placer Hills); second Water Resources Control Board was decided under reasoning applicable only under the unique scope of representation in the Dills Act; and third, a combination of Education Code section 89535, HEERA section 3572.5, and the parties' MOU essentially removes the policies from the scope of representation as far as discipline is concerned.

Taking these arguments in reverse order, I recognize that Education Code section 89535 enumerates various causes for discipline. That section provides:

> Any permanent or probationary employee may be dismissed, demoted, or suspended for the following causes:
>
> (a) Immoral conduct.
>
> (b) Unprofessional conduct.
>
> (c) Dishonesty.
>
> (d) Incompetency.
>
> (e) Addiction to the use of controlled substances.
>
> (f) Failure or refusal to perform the normal and reasonable duties of the position.
>
> (g) Conviction of a felony or conviction or any misdemeanor involving moral turpitude.

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that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order."

(h) Fraud in securing employment.

(i) Drunkenness on duty.

HEERA Section 3572.5 provides that where certain enumerated provisions of law conflict with an MOU, the MOU shall be controlling. Education Code section 89535 is not among the provisions listed in section 3572.5.

I also recognize that the parties' MOU includes a comprehensive article on discipline and other "corrective action." Under Article 12, section 12.12, disciplinary action includes only "dismissal, demotion or suspension without pay." The definition of "disciplinary action" under the agreement does not include an oral or written reprimand, although such corrective action is permitted in section 12.1. Also, the MOU permits "temporary suspension with pay" for reasons related to "(a) the safety of persons or property, or (b) the prevention of the disruption of programs or operations, or (c) investigation of allegations which may lead to a notice of disciplinary action."

CSU asserts that any disciplinary action must fall within one of the specified statutory causes in Education Code section 89535, the MOU comports with the criteria for discipline set out in Education Code section 89535, and the contested policies provide that violations are to be processed in accordance with existing CSU procedures and collective bargaining agreements. If an employee sexually harassed another employee using e-mail, CSU continues, the employee would be charged with unprofessional conduct under Education Code section 89535, subsection (b), not with a violation of the Fresno computer use policy. Therefore, CSU concludes, the contested policies evidence no change in a negotiable matter.

It may be true that discipline generally is covered by the parties' MOU, and the MOU does not conflict with the specific provisions in Education Code section 89535. What CSU overlooks, however, is that the policies for the first time enumerated multiple uses of computer

resources that would subject an employee to discipline. In doing so, CSU implemented a policy that impinged on a negotiable matter. It bears repeating that rules of conduct which subject employees to disciplinary action are subject to negotiation both as to criteria for discipline and as to the procedure to be followed. (San Bernardino at p. 11; see also San Bernardino City Unified School District (1998) PERB Decision No. 1270, adopting proposed decision of administrative law judge at p. 52; Vernon Fire Fighters v. City of Vernon (1980) 107 Cal.App.3d 802, 815-816 [165 Cal.Rptr. 908] [citing with approval private sector cases holding that a new requirement that exposes employees to discipline which did not prevail under preexisting rules "vitally affected employee tenure and conditions of employment generally" and is therefore a matter which is not subject to unilateral employer control].)

The argument that employees are formally charged with violations of Education Code section 89535, rather than a particular policy, when CSU proposes discipline misses the mark. In reality, the conduct that forms the true basis of the discipline and which an employee must rebut is measured against the underlying policy governing use of computer resources, as Raymond and Garcia testified. Any claim that the actual reasons for discipline are based solely on the content of Education Code section 89535, as opposed to the underlying policy, elevates form over substance and cannot be used to erode APC's right to bargain about a subject so fundamental to the employment relationship as discipline.

In addition, the absence of Education Code section 89535 from HEERA section 3572.5 does not require a different conclusion. While it is clear that Education Code section 89535 is not among the provisions of law listed in section 3572.5 as subject to supersession, it does not follow that an MOU may never include aspects of discipline that are not expressly enumerated in Education Code section 89535, provided the subject is otherwise related to wages, hours or other negotiable terms and conditions of employment. In fact, the parties' MOU illustrates the

point. Education Code section 89535 provides that employees may be "dismissed, demoted, or suspended" for certain causes, thus suggesting discipline must fall within these specific actions. Yet the MOU contains a provision for an "oral and/or written reprimand" as a form of discipline. The MOU also provides for temporary suspension without pay in certain enumerated situations. But Education Code section 89535 does not mention temporary suspension or criteria for which an employee might incur a temporary suspension. Plainly, the parties have negotiated about aspects of discipline that are not included in Education Code section 89535.

Further, I conclude that CSU's reliance on Placer Hills is misplaced. The policy at issue in Placer Hills required an employee to acknowledge receipt of certain work-related documents in writing or face possible discipline. PERB found that the potential of discipline for violation of the requirement did not render the requirement itself negotiable. In reaching this conclusion, the Board reasoned that the rule did not relate to an otherwise negotiable topic. "The fact that discipline may result if an employee refuses to acknowledge receipt does not elevate the rule itself to a disciplinary matter with an impact on wages, hours or other enumerated subjects. To adopt this analysis would bootstrap all work rules into negotiable items within scope. We, therefore, find the institution of this rule to fall within the parameters of the employer's discretion." (Placer Hills at p. 36.) I conclude that Placer Hills may be distinguished from the instant case.

The policies at issue here involve far more than a mere request that an employee acknowledge receipt of a document from the employer, plainly a minor matter not related to wages, hours or other terms and conditions of employment. The policies at issue here expressly relate to legitimate employee concerns about work rules that govern use of computer resources, as well as APC's organizational concern about access to equipment to communicate

with employees. These are policies that involve not only discipline, they also involve work rules that govern use of equipment that is indispensable for employees to function in a university setting in a technology-driven age. Plainly, the policies at issue here do not involve the same kind of "work rules" that the Board found nonnegotiable in Placer Hills. And, in a recent HEERA case, PERB found negotiable a work rule that carries the potential for discipline and affects the employment relationship far less than those at issue here, thus casting doubt on the continued validity of Placer Hills. (See e.g., Trustees of the California State University, supra, PERB Decision No. 1451-H, adopting proposed decision of administrative law judge at pp. 9-10 [requirement that employees wear name tags is a "plant rule" that falls within the scope of representation.].)

Nor is the reasoning underlying Water Resources Control Board inapplicable here, as CSU argues. In that case the Board found an incompatible activities statement covering internet/intranet use negotiable. The Board reasoned that the Dills Act expressly provides that section 19990, which contains an incompatible activities statement, may be superseded by a MOU.[5] Because section 19990 does not apply to CSU or permit supersession of an MOU under HEERA, CSU argues, Water Resources Control Board has no application here. I find this argument has limited application here.

Like the Dills Act, HEERA is a supersession statute. Section 3572.5 sets forth several Education Code sections which may be superseded by an MOU if there is a conflict between the MOU and the statute. A few of these are relevant here. Education Code section 89500 provides that CSU has the authority to establish rules for, among other things, "dismissal," "demotion," and "suspension." Education Code section 89542.5 provides that CSU may

establish a grievance procedure to resolve allegations that an employee was "directly wronged in connection with the rights accruing to his or her job classification, benefits, working conditions, appointment, reappointment, tenure, promotion reassignment, or the like."

Thus, according to section 3572.5, Education Code sections giving CSU authority over discipline and a broad category of other negotiable "working conditions" may be superseded by an MOU. As discussed in more detail immediately below, the Fresno and Bakersfield policies relate to discipline and other negotiable working conditions. Under the Board's reasoning in Water Resources Control Board, such matters fall within the scope of representation.

It cannot be disputed that many aspects of the contested policies involve managerial prerogatives. Some aspects of the policies do not involve a managerial prerogative. And other aspects of the policies may involve a managerial prerogative, yet lend themselves to proposals which might satisfy union concerns while preserving the prerogative. Although every aspect of the policies that arguably involves a matter within the scope of representation need not be repeated here, a few are noteworthy. These examples are not meant to define the parameters of any future negotiations between the parties. They are offered here soley for the purpose of resolving the issues presented by the complaint.

The Fresno policy plainly relates to criteria for discipline or other action akin to discipline. Ill-defined standards such as "authorial integrity" and "invasion of privacy" may be grounds for unspecified "sanctions." An employee who fails to use computer resources in an "effective, efficient, ethical and lawful manner" may find himself subject to discipline under the Fresno policy. These are ambiguous standards, especially when applied to the use of

[5]Section 19990 requires each state agency to determine those activities which "are inconsistent, incompatible or in conflict with their duties as state officers or employees." Dills Act section 3517.6 provides that section 19990 may be superseded by a MOU.

equipment that has such a wide a variety of uses and features, such as computer resources. Yet the policy does not mention how these standards are defined. Nor is "misuse" of a computer account defined, although "serious infractions" for misuse may land an employee in the middle of an "appropriate disciplinary authority for further investigation." Even if such violations would be processed in accordance with the MOU, they involve new criteria for discipline and therefore are negotiable. (San Bernardino at p. 11.)

There is no guarantee of confidentiality for "programs and files" under the Fresno policy. The policy provides, "in most instances, there is no reason for e-mail to be retrieved by anyone other than the intended addressee, but in limited and appropriate circumstances (e.g., in the course of an official investigation of wrongdoing), e-mail messages may become subject to internal monitoring by an authorized individual." Because the policy does not delineate the precise conditions under which an employee's files may be monitored, it is not difficult to envision employee concerns about the confidentiality of such files. Is an official investigation the only circumstance under which an employee's e-mail may be retrieved, or is it but one example of such a circumstance? What rights does an employee have to notice and/or union representation if CSU determines to monitor his or her files? In my view, a carefully crafted proposal which permits CSU to investigate legitimate wrongdoing while affording employees protection against unnecessary invasion of privacy would fall within the scope of representation.

In addition, the Fresno policy states that "unmannerly or unprofessional" conduct using a computer account is "inappropriate," but the policy does not attempt to explain the definition of that standard except to say that "obscene or abusive messages" are not acceptable. This provision may relate to protected conduct and create legitimate union concerns. Does a union

representative who vigorously criticizes a supervisor on a work-related matter run afoul of this standard as acting in an "unmannerly or unprofessional" manner and thereby subject himself or herself to discipline? A proposal which seeks to incorporate standards established by PERB decisions certainly would fall within the scope of representation, while protecting managerial concerns about inappropriate behavior. (See e.g., Rancho Santiago Community College District (1986) PERB Decision No. 602, p. 13 [employee speech will lose its protection only where it is so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" as to cause "substantial disruption" in operations]; see also Barstow Unified School District (1996) PERB Decision No. 1164, adopting proposed decision of administrative law judge at p. 22 [individual employee activity directed against a supervisor's performance is protected when its purpose is to further a legitimate interest in working conditions]; compare State of California (Department of Transportation) (1982) PERB Decision No. 257-S [employee criticism aimed at humiliating supervisor based on personal grudge not protected].)

The Fresno policy further provides that software protected by copyright laws is not to be copied, except as permitted by law or by license agreement with the owner of the copyright. An employee may be ill-equipped to comply with such a rule, and a union may have a legitimate concern that additional information or training is necessary in copyright law or licensing for employees who may not be informed about such matters. PERB has found training negotiable because it may relate to employee job performance, evaluations, and wages. (See e.g. Healdsburg Union High School District, supra, PERB Decision No. 375, p. 83.)

The Bakersfield policy contains similar provisions that may fall within the scope of representation. It provides that "minor infractions," "when accidental," such as consuming "excessive resources or overloading computer systems" may be resolved informally. But "repeated minor infractions or misconduct which is more serious" may result in loss of

computer privileges or modification of such privileges. Several examples of "more serious violations" are set forth in the policy, but the policy does not indicate how many infractions must occur before an employee is considered to be a repeat offender. The same section provides that "offenders may be referred to their sponsoring advisor, department, employer, or other appropriate university office for further action." Further, the policy contains a long list of actions that would violate the policy. These range from violating software licensing agreements to transmitting slanderous or defamatory material to initiating chain letters to mass mailing or spamming. Thus, the policy relates to criteria for discipline, a matter within the scope of representation.

The Bakersfield policy also provides that system administrators and other CSU employees have the "right to access user files when necessary to protect the integrity of computer systems or the rights or property of the University." Like the Fresno policy, this provision creates obvious employee and APC concerns about privacy rights that could be addressed at the bargaining table without infringing on basic managerial rights.

The policy provides that "misuse" of computer resources may result in the loss of access to such resources. This too might reasonably create employee and APC concerns about the conditions under which an employee could lose the right of access to resources that are essential for employee performance, or have an effect on evaluations that are based on performance. As noted above, these are matters that have traditionally been subjects of negotiations.

The Bakersfield policy provides that "when accessing remote resources from CSUB facilities, users are responsible for obeying both the policies set forth in this document and the policies of other organizations." APC may be concerned about whether employees are aware of policies set by "other organizations" and propose that employees, at minimum, receive

notice and/or training in such policies before they are held accountable for compliance with this requirement. It seems unlikely that negotiations about such matters would interfere with CSU managerial prerogative.

Under the Anaheim test, I find the Fresno and Bakersfield policies contain at least the negotiable matters noted above. The policies clearly involve the use of resources that are essential for employees to perform in a large university setting. As such, they involve the employment relationship. The issues raised by the policies are of such concern to management and employees that conflict is likely to occur. CSU is legitimately concerned about maintaining efficient use of its computer resources and avoiding liability as a result of misuse or illegal use of such resources. APC and employees similarly may have concerns about matters such as privacy rights, discipline, training, performance evaluations, and access to computer resources as a means of communication. The mediatory influence of collective bargaining is an appropriate means of resolving the conflict, and the obligation to negotiate would not unduly abridge CSU's freedom to exercise those managerial prerogatives essential to achievement of its mission.

APC does not seek to "bootstrap" a minor non-negotiable work rule into a matter within the scope of representation or otherwise infringe on a managerial prerogative. APC points out that the union seeks to negotiate only about such matters as the impact of the policies on discipline, the practice of spamming, and the definition of terms such as "excess" use of computer resources. APC recognizes in its brief that, "the Union could not propose elimination of the CSU's right to establish a reasonable use policy under the Government Code because to do so would, in essence, supersede the authority provided the CSU under the Code. No conflict would exist, however, concerning a whole variety of likely Union proposals which might seek to influence the content of a reasonable use policy involving such topics as the

types of equipment which an employee can use, the amount of such permissible use, penalties for misuse, privacy concerns, union use of resources, etc." Indeed, it is settled that use of computer resources is a matter about which the state employer must bargain under the Dills Act. (Water Resources Control Board.) There is no reasonable basis for concluding that similar negotiations under HEERA would interfere with managerial prerogatives of higher education employers.

Finally, if APC submits proposals that CSU contends go beyond the scope of negotiations, such proposals may be rejected or refined at the bargaining table.[6] The duty imposed on CSU here is not to negotiate about managerial prerogatives. The duty to negotiate extends only to negotiable topics and carries no obligation to agree. As the Board recently pointed out, "the law does not mandate success, but only requires a 'good faith' effort by the parties to reach agreement. A willingness to negotiate will, by itself, never guarantee success. A refusal to negotiate, however, will almost always guarantee failure, and circumvent what legally and rightfully should be a mutual effort to find solutions to mutual problems." (Lucia Mar Unified School District (2001) PERB Decision No. 1440, adopting proposed decision of administrative law judge at p. 45.)

The next question for consideration is whether the action taken by the Fresno and Bakersfield campuses constituted a change, for CSU has no duty to negotiate about adoption of

[6]CSU argues that its policies contain managerial prerogatives embedded in federal and state statutes such as the California Public Records Act (Govt. Code, sec. 6250 et seq.) and the Electronic Communications Privacy Act (18 U.S.C., sec. 2510 et seq.). Because the theory of the complaint is one of unilateral change, there are no concrete proposals to evaluate here. However, if CSU is confronted with a proposal that conflicts with a managerial prerogative protected by statute, it is free to reject the proposal or the parties may refine the proposal to bring it within the scope of representation. Terms and conditions of employment are not rendered nonnegotiable merely because they are statutory in nature. (See e.g., Fremont Unified School District (1997) PERB Decision No. 1240, adopting proposed decision of administration law judge at pp. 34-35.)

policies that do not change the status quo. Arguing that APC has failed to establish a change in practice, CSU claims there is no evidence that either campus administered its computer resources in a manner inconsistent with the challenged policies. "There is simply not a shred of evidence in the record to establish (or even suggest) that either campus knowingly permitted any of the improper uses described in the contested policies," CSU argues, "whether using computing facilities or other university-owned equipment." The mere compilation of already existing rules does not constitute a negotiable change, CSU concludes. I do not find this argument persuasive.

The issue here is not whether CSU previously permitted improper use of its computer resources. Even if CSU has not condoned improper use of its resources in the past, the contested policies represent a change in the status quo that far exceeds a mere compilation of whatever unwritten rules CSU claims existed. The new policies challenged here represent unilateral implementation of a sweeping set of rules for the first time at Fresno and Bakersfield. Their implementation constituted a unilateral change in the "quantity and kind" of written rules employees and APC were bound to follow previously. (See e.g. Oakland Unified School District (1983) PERB Decision No. 367, p. 24; State of California (Department of Personnel Administration, et al.) (1998) PERB Decision No. 1279-S, adopting proposed decision of administrative law judge at pp. 37-38.) As such, the policies changed the status quo.

In addition, as far as use of computer resources is concerned, the policies changed the status quo as reflected in CSU's 1960 policy and Government Code section 8314. The 1960 policy provides that an employee may not use CSU resources "at any time for any purpose other than the performance of official business." In relevant part, section 8314 provides:

> (a) It shall be unlawful for any elected state officer, appointee, employee, or consultant, to use or permit others to use state resources for a campaign activity, or personal or other purposes which are not authorized by law.
>
> (b) For purpose of this section:
>
> (1) "Personal purpose" means those activities the purpose of which is for personal enjoyment, private gain or advantage, or an outside endeavor not related to state business. "Personal purpose" does not include an occasional telephone call, or an incidental and minimal use of state resources, such as equipment or office space, for personal purposes.
>
> (3) "State resources" means any state property or asset, including, but not limited to, state land, buildings, facilities, funds, equipment, supplies, telephones, computers, vehicles, travel, and state compensated time.
>
> (4) "Use" means a use of state resources which is substantial enough to result in a gain or advantage to the user or a loss to the state for which a monetary value may be estimated.

Water Resources Sources Control Board is useful in determining whether a change has occurred in the status quo. In that case, the Department of Water Resources adopted an incompatible activities policy that expanded an existing policy covering internet/intranet use. Rejecting the state's argument that the policy was a mere expression of its existing incompatible activities policy, the Board found that the unilateral creation or alteration of an incompatible activities policy breached the duty to negotiate in good faith. "Insofar as the internet/intranet policy constituted a departure from the terms of the WRCB's incompatible activities policy, the imposition of the internet/intranet policy violated the [duty to bargain]." (Water Resources Control Board at p. 8.) The same reasoning applies here.

There is no evidence of a prior CSU policy that expressly addressed use of computer resources. As APC points out, the 1960 policy could not possibly be viewed as covering the new policies to the extent they addressed use of computer resources, for such equipment did

not exist in 1960. Therefore, the argument that the 1960 policy set the status quo for use of computer resources is rejected.

Section 8314 sets general standards governing use of all CSU resources, but that section would permit "incidental and minimal use" and use which is not "substantial enough to result in a gain or advantage to the user or a loss to the state for which a monetary value may be estimated." The policies at issue here are more restrictive. The Fresno policy would prohibit all use of computer resources for reasons not related to CSU-related activities. For example, the policy issued on March 24, 1999, provides that "computer facilities . . . . are only to be used for university-related activities." At another point, the policy provides that "electronic communications facilities . . . . are for university-related activities only." Raymond's November 10, 2000, memo to employees states that "these resources are to be used exclusively for the conduct of state business."

The Bakersfield policy, while not as restrictive as the Fresno policy, nevertheless does not comport fully with section 8314. The policy prohibits "unauthorized use of a computer account" and provides that even "minor infractions" violate the policy. Implicit in these provisions is the prohibition against any unauthorized "incidental and minimal use" of computer resources for personal reasons, a use permitted by section 8314.

Therefore, I conclude that the computer resources policies adopted by the Fresno and Bakersfield campuses are not in line with section 8314. Adoption of a new policy or modification of an existing policy in areas which fall within the scope of representation is unlawful. (See e.g., Water Resources Control Board at pp. 7-9.)

The same cannot be said about the Fresno telephone/fax machine policy. Unlike the computer use policies, the telephone/fax machine policy is consistent with Government Code section 8314. Section 8314 permits incidental use of telephones and fax machines, as does the

Fresno policy. More importantly, the telephone/fax machine policy is different that the computer resources policies in a key respect. Unlike the comprehensive computer resources policies at issue here, the telephone/fax machine policy is a short, one-half page statement that does little more than reiterate the incidental use standard in section 8314, as far as telephones are concerned. The policy is silent as to use of fax machines. As such, the policy does not amount to the quantity and kind of change embodied in the computer resources policies. For these reasons, I conclude that CSU has made no unilateral change in its telephone and fax machine policy. This aspect of the complaint will be dismissed.

The next question is whether there has been a change in APC's access to e-mail as a means of communication. The record is clear that APC regularly communicates with employees at the Fresno and Bakersfield campuses through e-mail. Although the contested policies purport to set new rules that apply to APC use of e-mail to communicate with employees, the meaning of the policies and the testimonial evidence on this point is not so clear.

Raymond testified that APC use of e-mail does not fall under the definition of random mail and no restrictions have been placed on APC use of e-mail. She conceded, however, that a "union message" is not "state business," the sole purpose for which computer resources may be used. The logical inference is that the Fresno policy would prohibit APC from using e-mail as a means of communicating with employees.

Garcia's testimony is equally unclear. Although she is aware that APC uses e-mail as a means of communication, the Bakersfield campus has not monitored APC use of e-mail or found it to be inappropriate. However, she testified that an APC representative may violate the policy and be disciplined in certain circumstances. She said repeated mailings to a "mailing list" directed to employees who had requested they not be included on the list could result in

discipline. Garcia's testimony clouds the precise meaning of the Bakersfield policy in this regard and leaves APC in the dark about its right to use e-mail to communicate with employees.

It is clear from the testimony given by Raymond and Garcia that the policies for the first time set rules covering APC use e-mail as a means of communication. Whether APC's mailings are viewed as beyond the scope of the permitted use under the Fresno policy or too frequent or unwanted to comply with the Bakersfield policy, it cannot be disputed that the policies define use of e-mail in a manner previously unknown to APC.

CSU next argues that no valid practice exists here because there is no evidence that its representatives at Fresno and Bakersfield were aware of the practice described by APC witnesses. Therefore, CSU contends, it cannot be held responsible for unilaterally changing the practice under which APC communicated with employees via e-mail.

While it is true as a general rule that the charging party carries the burden of establishing the existence of the practice and employer knowledge (see e.g., State of California (Department of Personnel Administration et al.), supra, PERB Decision No. 1279-S, adopting proposed decision of administrative law judge at pp. 38-39), that rule does not dispose of the instant dispute. Garcia testified that she is aware that APC has used e-mail to communicate with employees at Bakersfield. However, even assuming CSU was unaware of APC's use of e-mail, it is clear that the Fresno and Bakersfield policies implemented new rules governing access via electronic means. These newly adopted policies impact the right to communicate with employees through e-mail, a matter within the scope of representation, and CSU has refused to negotiate about the policies. Under Water Resources Control Board, unilateral adoption of a policy that contains new rules or rules that modify existing policies is unlawful.

In sum, the Fresno and Bakersfield computer resources policies contained changes in matters that fall within the scope of representation. As broad statements of CSU policy, they had a generalized impact on bargaining unit employees represented by APC, as well as on APC itself. And CSU has refused to negotiate about the policies. Therefore, I find that APC has met its burden of showing that CSU unlawfully adopted policies that relate to negotiable subjects under HEERA.

Finally, CSU asserts as an affirmative defense that APC had actual notice of certain aspects of the Fresno policy as it was being developed. CSU's claim rests on Garduque's participation in Joint Labor Council meetings in early 1997 where the e-mail and telephone policies allegedly were discussed.

PERB has long held that "actual knowledge" must "clearly inform" the charging party of the allegedly unlawful act. (Lucia Mar, adopting proposed decision of administrative law judge at p. 23; Victor Valley Union High School District (1986) PERB Decision No. 565, p. 5 (Victor Valley).) The evidence here does not indicate that Garduque was clearly informed of the implementation of e-mail or telephone policies. The evidence indicates only that these matters were placed on the agenda of the Joint Labor Council. But there is no evidence about the discussion that took place at the meetings, nor is there evidence that a discussion about these matters even took place. "[A]n agenda may suffice [for notice purposes] if it is delivered to a proper official and is presented in a manner reasonably calculated to draw attention to any item(s) reflecting a proposed change in a matter within the scope of representation." (Victor Valley at p. 6, fn. 6; Marin Community College District (1995) PERB Decision No. 1092, adopting proposed decision of administrative law judge at pp. 73-74.) However, that did not occur here. Garduque was not a proper official to receive notice. He was a steward at the Fresno campus, he was not a statewide officer, he was not on the negotiating team, and he had

no authority to accept notice on proposed changes in negotiable matters. His authority extended only to representation in grievances and related matters. Moreover, Goetzel testified without rebuttal that a longstanding practice existed under which APC required CSU and its campuses to give official notice in writing to APC at its Oakland office. He said further that APC received no notice of the Fresno policy at its Oakland office. Under these circumstances, CSU's argument that APC had legal notice of the Fresno telephone and e-mail policies is rejected.

REMEDY

The PERB in section 3563.3 is given

> . . . 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.

It has been found that CSU unilaterally implemented computer resources policies at its Fresno and Bakersfield campuses. By this conduct CSU breached its duty to negotiate in good faith with APC, in violation of section 3571(c). By the same conduct, CSU interfered with the right of employees to be represented by an employee organization of their choice, in violation of section 3571(a). It is appropriate therefore that CSU be ordered to cease and desist from such activity and to rescind its computer resources policies on the Fresno and Bakersfield campuses to the extent they apply to bargaining unit 4 employees. Any future attempts by CSU to implement computer resource use policies in bargaining unit 4 must be accompanied by reasonable advance notice to APC and an opportunity to negotiate about the proposed policies.

It is also appropriate that CSU be required to post a notice incorporating the terms of this order at the Fresno and Bakersfield campuses where notices to bargaining unit 4

employees are customarily posted. Posting of such a notice, signed by an authorized agent of CSU, will inform employees that CSU has acted in an unlawful manner, is being required to cease and desist from such activity, and will comply with the terms of the order. It effectuates the purposes of HEERA that employees be informed of the resolution of this controversy and CSU's readiness to comply with the ordered remedy. (The Regents of the University of California (1990) PERB Decision No. 826-H, p. 13; Trustees of the California State University (1988) PERB Decision Order No. Ad-174-H.)

The allegation that CSU unlawfully adopted telephone and fax machine policies at its Fresno campus is hereby dismissed.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is found that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (Act). CSU breached its duty to negotiate in good faith with the Academic Professionals of California (APC) when it unilaterally implemented computer resources policies at its Fresno and Bakersfield campuses. By this conduct CSU breached its duty to negotiate in good faith with APC, in violation of Government Code section 3571(c). By the same conduct, CSU interfered with the right of employees to be represented by an employee organization of their choice, in violation of Government Code section 3571(a).

Pursuant to Government Code section 3563.3, it is hereby ordered that CSU and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally implementing computer resources policies at the Fresno and Bakersfield campuses to the extent they relate to bargaining unit 4.

2. Interfering with the rights of bargaining unit 4 employees to be represented by an employee organization of their choice.

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

1. Rescind the computer resources policies at the Fresno and Bakersfield campuses to the extent they relate to bargaining unit 4.

2. Provide APC with reasonable notice and an opportunity to negotiate about future attempts at the Fresno and Bakersfield campuses to implement computer resources policies.

3. Within ten (10) workdays of service of a final decision in this matter, post at all work locations on the Fresno and Bakersfield campuses where notices to bargaining unit 4 employees are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of CSU, indicating that CSU will comply with the terms of the Order. Such posting shall 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 with any other material.

4. Upon issuance of final decision, make written notification of the actions taken to comply with this order to the Sacramento 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 Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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 Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

FRED D'ORAZIO
Administrative Law Judge