STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 3299, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case Nos. SF-CE-858-H SF-CE-862-H PERB Decision No. 2300-H December 20, 2012

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for American Federation of State, County and Municipal Employees, Local 3299; Littler Mendelson by Joshua D. Kienitz, Attorney, for Regents of the University of California.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

HUGUENIN, Member: These cases are before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Regents of the University of California (Regents or University) to the proposed decision (attached) of an administrative law judge (ALJ). The proposed decision dismissed an unfair practice charge for lack of jurisdiction in Case No. SF-CE-858-H, that alleged the Regents violated section 3571(a), (b), and (c) of the Higher Education Employer-Employee Relations Act (HEERA)[1] when it unilaterally changed rules regarding the leafleting activities of American Federation of State, County and Municipal Employees, Local 3299 (AFSCME or Union) on sidewalks adjacent to entrances to the acute care hospitals at the University of California, Los Angeles (UCLA) medical center and at University of California, San Francisco (UCSF) medical center. The proposed decision also

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

resolved a second charge filed by AFSCME, Case No. SF-CE-862-H (which was consolidated with Case No. SF-CE-858-H for hearing), by concluding that the Regents violated HEERA section 3571(a) and (b) by denying access to AFSCME agents to certain employee break rooms at University laboratory facilities.

The Board has reviewed the hearing record, the proposed decision, the Regents' exceptions[2] and supporting brief and AFSCME's response thereto. The ALJ's findings of fact are supported by the record. We therefore adopt them as the findings of the Board itself, except as noted specifically below.

As to Case No. SF-CE-858-H, we disagree that PERB does not have jurisdiction over this charge, and we reverse the ALJ for reasons explained below. On the merits of this charge, we conclude that AFSCME failed to establish a unilateral change in regulations at UCLA, but did prove its claim with respect to the change at UCSF. As to Case No. SF-CE-862-H, we adopt the ALJ's conclusions of law, subject to our discussion below of issues raised by the exceptions.

PROCEDURAL HISTORY

The legal history of this case predates AFSCME's filing of these unfair practice charges. Negotiations for a successor memorandum of understanding (MOU) began in August 2007. After the parties reached impasse, AFSCME conducted a leafleting campaign intended to inform the public, its members and other employees about its labor dispute with the University. After the University directed the Union to stop the leafleting in early February

[2] The Regents request for oral argument pursuant to PERB Regulation 32315 is hereby denied. (PERB Regs. are codified at Cal. Code Regs., title 8, sec. 31001 et seq.) Historically, the Board has denied requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*United Teachers of Los Angeles (Valadez, et al.)* (2001) PERB Decision No. 1453; *City of Modesto* (2008) PERB Decision No. 1994-M.) Based on our review of the record, all of the above criteria are met in this case. Therefore, the Board denies the request.

2008, AFSCME filed a complaint for injunction in the Superior Court in Alameda County, alleging that the University's directive violated the Union's constitutional right to freedom of speech. Although the court initially granted a temporary restraining order against the Regents, on March 12, 2008, it ultimately denied the Union's request for a preliminary injunction, concluding that PERB had initial, exclusive jurisdiction over the dispute because the leafleting was arguably protected activity by HEERA and/or the Regents' directive restricting leafleting was arguably prohibited by HEERA.

The day after AFSCME applied for injunctive relief with the court, the Regents filed an unfair practice charge against the Union alleging that the leafleting was a unilateral change or repudiation of the access provisions in the parties' MOU. The Office of the General Counsel dismissed the charge, which was upheld by the Board in *Regents of the University of California* (2010) PERB Decision No. 2105-H (*Regents UC*). The Board concluded that the University failed to establish a prima facie case because even if the leafleting at both campuses was in violation of the campus access regulations, the facts did not demonstrate that "AFSCME's conduct amounted to anything more than an isolated breach of the CBA." (*Ibid*, p. 9.)

AFSCME filed an unfair practice charge in Case No. SF-CE-858 on April 23, 2008, and on May 27, 2009, the Office of the General Counsel issued a complaint alleging that the University unilaterally changed a policy by denying AFSCME permission to distribute leaflets in the medical center plaza at UCLA and in front of the medical center at UCSF.

On May 23, 2008, AFSCME filed a second unfair practice charge (Case No. SF-CE-862-H) against the Regents alleging that it denied AFSCME's UCLA representatives access to break rooms in violation of HEERA section 3571(a) and (b). PERB's Office of the General Counsel issued a complaint on this charge on October 15, 2009.

These cases were consolidated for formal hearing and decision on January 25, 2010, and the hearing commenced on February 22, 2010. The ALJ's proposed decision issued on October 20, 2010. The Regents filed timely exceptions, to which AFSCME timely responded.

FACTUAL SUMMARY

Case No. SF-CE-858-H

The parties' negotiations for a successor MOU to the one that expired in September 2007 had stalled by the end of January 2008 and after they had reached impasse, mediation began. The Union began a leafleting campaign in mid-January 2008 at the UCLA and UCSF medical centers, the purpose of which was to publicize its negotiation demands to the medical community, including patients of the University's medical centers, AFSCME members, and other University staff. The leaflets pointed out that wage increases would move University workers to parity in the industry and reduce high staff turnover, which in turn would improve the quality of patient care. AFSCME stationed leafleters at the entrance to the acute care hospitals at both UCLA and UCSF. Leaflets were given to anyone accepting them, including bargaining unit employees, other University staff, physicians and other visitors to the medical centers. There was no evidence that any patient's ingress or egress was blocked, that the leafleting caused excessive noise or other disturbance to the peaceful functioning of the hospitals, or that patient privacy was compromised by this activity. At UCLA, the entrance to the hospital is within the Center for Health Sciences (CHS) which has at its center a large grassy area about the size of a small city block in which employees regularly take lunch and other breaks. At UCSF, leafleters were stationed on the sidewalk directly in front of the entrance to the hospital.

The MOU governing the two units represented by AFSCME contain virtually identical provisions regarding union access.[3] Article I A of each MOU provides generally that "...it is in the Union's interest that it be granted access to University facilities for the purposes of ascertaining whether the terms of this Agreement are being met; engaging in the investigation, preparation, and adjustment of grievances; conducting Union meetings; explaining to bargaining unit members their rights and responsibilities under the Agreement; and informing bargaining unit employees of activities." Subsection A, 2 of Article 1 obligates AFSCME to "abide by the reasonable access rules and regulations promulgated at each campus/Laboratory." Subsection B permits union representatives to visit bargaining unit members at "reasonable times." Subsection F forbids AFSCME from conducting "any Union activity or Union business on University premises or while in pay status with the University unless such activity is specifically authorized by the provisions of this Agreement and is conducted in accordance and conformance with campus procedures." The University retains the right to enforce access rules in accordance with local campus procedures (Subsection G). AFSCME witnesses who were involved in the leafleting at UCLA testified that they did not consider the MOU provisions on access relevant to the leafleting because the MOU was intended for access to employees inside the employer's buildings.

UCLA Regulation of Speech Activity

At UCLA, the University adopted campus-specific regulations on activities and use of University property applicable to registered organizations, employee organizations and members of the public. These regulations provide that grounds open to the public include all paved pedestrian walkways, except sidewalks "adjacent to public entrances to the hospital and

[3] AFSCME represents both the patient care technical unit and a service unit at the University hospitals. The MOU covering the patient and technical care unit expired in September 2007.

outpatient clinics except as provided for in the specific regulations governing the Center for Health Sciences area." These specific regulations prohibit distribution of literature within the confines of the CHS, which includes CHS Plaza. The University has designated six areas around the medical complex as "external access" areas, which can be accessed by registered organizations (including employee organizations) and members of the public for speech activities. Four of these areas are sidewalks on the outside periphery of the CHS, where AFSCME's targeted audience was unlikely to congregate. Most of the Union's members at UCLA work at the hospital.

Despite the prohibition on distributing literature inside the CHS Plaza at UCLA, AFSCME did in fact leaflet in the area several times before January-February 2008. In 2001, the Union distributed leaflets inside the CHS Plaza and in front of the Health Sciences building when it was negotiating for a wage re-opener. The leafleters wore tee shirts bearing the AFSCME insignia and were present in the Plaza during the lunch period for about three to five days. No security guards or University management personnel told them to leave or cease the distribution. A similar action occurred about a month later, this time for the purpose of informing members about executive board elections for the Union and this activity was not prohibited by University management.

During the 2001-02 fiscal year, AFSCME again leafleted in the CHS Plaza during contract negotiations for the purpose of educating its members and the public about the Union's demands and to encourage employees to attend a rally that was also held in the Plaza. Neither was this activity discouraged or prohibited by University officials.

In 2005, AFSCME again distributed leaflets in the CHS Plaza in preparation for a planned one-day strike. Its aim was to inform the public about the economic needs of its members and to urge workers to participate in the walk-out. Instead of taking positions in

front of the hospital, the leafleters stood in front of the Jules Stein Eye Clinic, a building that also abuts on the CHS Plaza. President of Local 3299, Lakesha Harrison, testified that they were told to stop the leafleting, but continued anyway, and were not told a second time to cease the activity. In February, 2005, the University did send AFSCME a letter in response to the Union's "passing out inflammatory and inaccurate flyers," pointing out the areas in which leafleting was permissible. These included "Westwood Plaza, public sidewalk, and west side of the CHS complex...". The CHS Plaza was not included in the list of permissible areas.

On occasion, union meetings were held in the CHS Plaza during the eight years preceding the events of this case.

The UCLA labor relations offices are located about a mile away from the CHS complex and labor relations personnel do not regularly patrol the plaza in search of violations of the University's rules. Instead management has relied on the reports of others to notify it of possible violations of access rules.

The history of UCLA's regulations governing leafleting activity and its notification to AFSCME of those regulations is less than clear. As early as 1989, the campus labor relations department wrote to AFSCME, enclosing the guidelines. The missive described two areas that were designated for speech activities, but did not specifically prohibit non-disruptive leafleting in the CHS Plaza. Instead, it designated certain patient care areas and prohibited blocking ingress and egress and excessive noise in those areas.

In 2001, the human resources department sent Grant Lindsay, an AFSCME official, a copy of "Activity Regulations," which stated that literature may be distributed only at "external access to CHS and the Medical Plaza." Any distribution within the plaza and CHS must be done either via literature racks or at tables for "volitional pick up" in specified areas.

In 2005, the UCLA human resources department sent Brian Rudiger, an AFSCME official, three separate letters purporting to remind him of the activity guidelines. While describing the external access area to the CHS where leafleting was permitted, these letters did not clearly state that no leafleting could take place inside the CHS Plaza. The letters also referred the reader to a website for the viewing of the activity guidelines, but the University did not produce a printout of the guidelines in effect in 2005 at the hearing.

In contrast to the letters described above, the most recent "UCLA Regulations on Activities, Registered Organizations and Use of Properties" is quite explicit about literature distribution at CHS. Leaflets may be passed out at six sites located on the periphery of the CHS (so-called "external accesses") which are described in detail. As to internal access within CHS, "there is to be no distribution of literature within the physical confines of the CHS." At least one AFSCME official, Nicole Moore (Moore), admitted that she had received these guidelines in 2004.

UCSF Campus Regulations

At UCSF campus regulation concerning access and the distribution of literature is less specific than at UCLA. The regulation divides the campus into two areas—"open spaces" and "special use areas." The latter include certain lobbies, courtyards and plazas, and "open spaces" are defined as "outdoor paved walkways on campus." Both spaces may be used to "exercise speech and assembly rights in accordance with time, place and manner regulations." The regulations prohibit the distribution of literature in such a way as to impede traffic flow or obstruct entrances of buildings or harass passers-by.

AFSCME distributed its leaflets in front of the hospital at 505 Parnassus Avenue in San Francisco beginning in mid-January 2008. The leafleters stood on a five-to-six foot-wide sidewalk adjacent to a U-shaped driveway that was used primarily for patient drop-off and

pick-up. The leafleters worked in teams of two or three, two-hour shifts for about two weeks before they were instructed by the University to leave under threat of arrest. One leafleter was stationed at each side of the main entrance to the hospital.

None of the written policies addressing speech and access identifies this driveway in front of the hospital as off limits for expressive activity such as leafleting. Nor was there evidence that the University officially communicated this claimed prohibition prior to the events of this case. On the first day of leafleting in January 2008, Judy Frates, the director of labor relations for UCSF, walked by AFSCME's campaign coordinator as he was passing out leaflets in front of the hospital. She said nothing to him about the leafleting. Nor did UCSF's chief operations officer as she walked by the leafleting.

While AFSCME frequently distributed literature to passers-by on the public sidewalks and in front of the student union at UCSF prior to the events of this case, January 2008 was apparently the first time it leafleted directly in front of the hospital. As at UCLA, there was no evidence that the leafleting activity at UCSF blocked patient ingress or egress, or that it disturbed or interfered with the employer's mission in patient care areas, or compromised patient confidentiality.

Case No. SF-CE-862-H

In addition to the leafleting activities of early 2008, AFSCME increased its presence in the workplace later in the spring of that year in an attempt to mobilize its bargaining unit members to support the Union's demands as it moved into the post-impasse phase of negotiations. Ever Mazariegos (Mazariegos), a University employee who was on a paid leave to work as an AFSCME organizer during the time in question in this case, contacted employees at the Santa Monica hospital in the break room for laboratory employees. Moore was an

employee of AFSCME and one of the lead organizers at the UCLA campus. She contacted employees in the break room of the central services department of the CHS complex at UCLA.

While Mazariegos entered the laboratory break room without incident the first time he sought access, his second visit was interrupted by a supervisor ordering him to leave during a meeting with a member. One of the reasons given by the supervisor for this ejection was that Mazariegos needed prior approval to be in the break room and that the room was needed for training classes.

After this incident, Moore requested of the University's human resources office that AFSCME be granted daily access during the period the parties' bargaining conflict persisted. The Union's goal was to meet with employees during each of the three shifts worked. The University refused this request and initially limited access to three dates in late April and early May and subsequently granted access on three additional days in mid-May. The University's explanation for these dates was that it had the "right to grant or deny access. Ever's [Mazariegos'] initial request for daily access for the next month...was simply not reasonable."

Later in May 2008, Moore was told by a University supervisor to leave a break room in central services where she was speaking to employees. She was told by the supervisor that she had no right to be there, which appeared to intimidate the employees, as the supervisor spoke in an agitated manner.

The MOU allows access to employees by non-employee union representatives at "reasonable times," subject to notice being given "upon arrival" for unscheduled meetings.

THE PROPOSED DECISION

Case No. SF-CE-858-H—Leafleting Activity

The complaint in this case alleged that the University violated HEERA by unilaterally changing its rules and policy concerning access in violation of HEERA section 3571(a) and

(c). At the hearing, the ALJ granted AFSCME's motion to amend the charge to include an allegation that the conduct complained of also violated HEERA section 3571(b). However in response to objection by the University, the ALJ made clear that this amendment was granted only to permit allegation of a derivative (b) violation. He expressly noted: "I am not opening this up to an allegation or argument that the underlying regulation is unreasonable under 3568." The Union did not object to this limitation.

Although not urged by either party, the ALJ concluded that PERB does not have jurisdiction over this charge because of the interplay between the Union's right under HEERA to access the employees it represents and the constitutional rights he perceived would be implicated if he ordered the University to allow leafleters on its property. Relying on *Pittsburg Unified School Dist. v. California School Employees Assn.* (1985) 166 Cal.App.3d 875 (*Pittsburg*), the ALJ concluded that the leafleting issues were of a "local concern" not only because of the constitutional issues involved, but because the leafleting was not primarily directed at fellow employees, but to patients and their families—members of the public. Statutory access rights concern communicating with employees, not with the general public, according to the ALJ.

The proposed decision also concluded that the parties' MOU did not waive AFSCME's right to complain about an alleged change in the University's access rules. The Union did not agree to the University's local rules prohibiting leafleting in these areas, as the MOU was not a clear and unmistakable waiver, especially since the language in the MOU committed the Union to abide only by reasonable access rules and regulations. Nor did the Union's withdrawal of its bargaining proposal to alter the access article constitute a waiver, according to the proposed decision.

Case No. SF-CE-862-H—Access to Employee Break Rooms

Relying on *Regents of the University of California, Lawrence Livermore National Laboratory* (1982) PERB Decision No. 212-H (*Lawrence Livermore*) and *The Regents of the University of California, University of California at Los Angeles Medical Center* (1983) PERB Decision No. 329-H (*UCLA Medical Center*), the ALJ noted that access to employer facilities, especially break rooms in the health care setting, was presumptive. Any restrictions by the employer must be narrowly drawn to avoid unnecessary interference. The ALJ found that the prior-approval requirement imposed by the University in this case was not found in the MOU. Instead, the MOU contained only a notice-on-arrival requirement for non-employee representatives for unscheduled meetings. Nor does the requirement that meetings be held at "reasonable times" imply a prior-notice requirement. No bargaining history was presented by the University in support of its assertion that the MOU required prior approval for access to meeting or break rooms.

Nor did the University demonstrate that access to these break rooms was disruptive to its operations. Although Mazariegos was ejected from a meeting room by a supervisor who claimed it was needed for a training session, the University did not claim or present evidence that other rooms were not available or that other employer meetings were scheduled on days Mazariegos sought access. Reasons for denying Moore the frequency of access she requested were unexplained. Thus, there was no justification for the University's requirement of advance approval for access to employee break rooms. Nor was there justification for the limits it placed on the frequency with which Union representatives could meet with employees in these break rooms.

As a remedy the ALJ ordered the University to cease and desist from excluding AFSCME representatives from employee break rooms at the UCLA medical center facilities and from requiring advance approval to access those rooms.

EXCEPTIONS

The Regents' exceptions challenge the conclusion that PERB lacks jurisdiction over the leafleting controversy and urge the Board to conclude on the merits of the complaint that the University did not make a unilateral change in its access rules. Regents argue that under the Board's long-standing precedents, PERB has the power and duty to determine whether the University's ban on leafleting in front of the two medical centers here constitutes a unilateral change and/or whether the regulations were "reasonable" under HEERA. [4]

The Regents also except to the ALJ's conclusion that it violated HEERA by denying AFSCME the access requested to the UCLA break rooms and by imposing an advance approval requirement before non-employee union representatives could meet with employees in break rooms.

AFSCME filed no exceptions but responded to those filed by the University. On the critical issue of jurisdiction, the Union remains neutral. It represented in its response: "AFSCME makes no formal exception, nor a response to the University's exception, regarding the ALJ's finding that leafleting of patients and their families is a matter of local concern, one of the exceptions to the preemption doctrine." (AFSCME's response to exceptions, at p. 5: lines 18-20.) The Union urges the Board to remand the case for factual and legal findings should it determine that the leafleting issue is within its jurisdiction to resolve.

[4] The University's claim in its exceptions that PERB can rule on the reasonableness of the leafleting rule is in marked contrast to the position it took at the hearing where it successfully argued the case was limited to the unilateral change allegations. For reasons discussed, *infra,* we do not rule on the question of whether the access rules were reasonable, as the parties on the record very clearly limited their dispute to whether the University's action constituted a unilateral change.

DISCUSSION

Jurisdiction Over Case No. SF-CE-858-H

As the proposed decision notes, there is little doubt that the conduct described in the complaint in Case No. SF-CE-858-H raises questions traditional in labor law disputes: Did the employer violate its duty to bargain in good faith by unilaterally changing its rules regarding leafleting in and around the medical centers at UCLA and UCSF, respectively? If there was a change, did the Union waive its right to bargain over a right to access those areas either by the MOU or by bargaining conduct? Had AFSCME litigated the case as an interference with protected activity charge, we would also address such questions as whether the Union's distribution of leaflets primarily to the public and other employees constituted protected activity under HEERA and whether the University's ban on leafleting in front of its hospitals was a reasonable regulation. Because the Union did not pursue this case as an interference claim, we do not reach these questions.

San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d 1 and *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 953, both established that PERB has exclusive initial jurisdiction to determine unfair practice charges and fashion a remedy, or not, where the conduct in question is arguably protected or prohibited by the statutes administered by PERB. Subsequent opinions from the courts of appeal amplified this doctrine, holding that if the alleged conduct at issue was either arguably protected or arguably prohibited under the Educational Employment Relations Act (EERA),[5] exclusive initial jurisdiction required the dispute to be brought to PERB in the first instance, regardless of how the case was pleaded, and even if there were constitutional issues to be decided. The courts in both *Leek v. Washington Unified School Dist.* (1981) 124 Cal.App.3d 43, 52 (*Leek*) and *Link*

[5] EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

v. Antioch Unified School Dist. (1983) 142 Cal.App.3d 765, 769, reasoned that the Legislature intended that PERB exercise jurisdiction over matters that could be unfair practices or other violations of EERA, even if the claims also alleged constitutional violations. Where there is a reasonable probability that PERB's adjudication of non-constitutional issues could obviate consideration of the constitutional challenges, PERB does have exclusive initial jurisdiction over the matter. Moreover, the parties are required to exhaust administrative remedies. If the administrative proceedings do not resolve the constitutional issues, the aggrieved party is not precluded from raising the constitutional issues in subsequent judicial proceeding. (*Leek.*)

In this case the prerequisites for our jurisdiction are clearly presented. The conduct complained of—the employer's alleged unilateral change in rules regulating leafleting—is arguably prohibited by HEERA. Unilateral change issues are squarely within PERB's authority and expertise to decide. From the earliest days of this agency, the Board has articulated and applied its test for determining whether an employer's unilateral actions constitute a violation of the duty to bargain in good faith. (*Pajaro Valley Unified School* District (1978) PERB Decision No. 51 (*Pajaro Valley*); *San Mateo County Community College District* (1979) PERB Decision No. 94 (*San Mateo*); *Grant Joint Union High School District* (1982) PERB Decision No. 196.) More particularly, PERB has held that access rules are negotiable and unilateral changes in those rules are unfair practices under HEERA. (*Regents of the University of California* (2004) PERB Decision No. 1700-H (*Regents*); *UCLA Medical Center*, *supra*, PERB Decision No. 329-H.; *Lawrence Livermore*, *supra*, PERB Decision No. 212-H.) Also within PERB's expertise and jurisdiction is the ability to assess whether the employer's defense of waiver through contract language or bargaining conduct is valid. (See *Desert Sands Unified School District* (2010) PERB Decision No. 2092; *Los Angeles Community College District* (1982) PERB Decision No. 252 (*Los Angeles CCD*).)

Likewise, if the complaint in this case had included an allegation that the University's ban on leafleting in front of its hospitals interfered with protected activity, PERB would also have jurisdiction. This Board has consistently described leafleting to advertise a labor dispute as presumptively protected activity. (*Modesto City Schools* (1983) PERB Decision No. 291, at p. 62; *Santee Elementary School District* (2006) PERB Decision No. 1822, at p. 12.) More closely on point is *Mt. San Antonio Community College District* (1982) PERB Decision No. 224, in which the Board held that the distribution of leaflets by community college faculty members to members of the public attending the college's graduation ceremonies was protected conduct under EERA. As in this case, the leaflets criticized the employer's policies in the context of a labor dispute and were distributed on the college's property.

San Marcos Unified School District (2003) PERB Decision No. 1508 (*San Marcos*) also provides guidance on how constitutional principles of free speech inform the Board's conclusion that peaceful informational picketing is protected under EERA. The Board noted that "[t]he right to picket peaceably and truthfully is one of organized labor's lawful means of advertising its grievances to the public, and as such is guaranteed by the Constitution as an incident of freedom of speech. [citations omitted.]" (*San Marcos*, at p. 18.) The same right is protected under EERA, as it "is a collective activity both constitutionally protected and long recognized in foundational labor law to be intimately related to the ability of employees to engage in union activities, a right literally conferred by the text of EERA." (*San Marcos*, at p. 27.) No less protected is the right to leaflet. Both activities are undertaken to publicize the labor dispute to the public, to garner the public's support for labor's position, to demonstrate the strength and support for union demands, to build solidarity among fellow employees, etc.

The ALJ acknowledged these precedents but concluded nevertheless that PERB was divested of jurisdiction because of the "local concern" exception to the preemption doctrine,

relying on *Pittsburg*, *supra*, 166 Cal.App.3d 875. Even in cases where the underlying conduct unquestionably meets one or both prongs of the arguably-protected-or-prohibited test, courts relying on the "local concern" exception have refused to cede jurisdiction to the labor agency if the matter mainly touches upon matters within the traditional police powers of the state and in which adjudication by a superior court will not pose a substantial danger of interference with administrative adjudication by the labor board. (*Kaplan's Fruit & Produce Co. v. Superior Court* (1979) 26 Cal.3d 60, 75 (*Kaplan's Fruit*).) Thus, the labor board will not have exclusive jurisdiction where mass picketing blocks ingress or egress (*Kaplan's Fruit*); or where there was violence (*Auto Workers v. Wisconsin Board* (1956) 351 U.S. 266); or in cases of libel (*Linn v. United Plant Guard Workers* (1966) 383 U.S. 53); or in cases of intentional infliction of emotional distress (*Farmer v. Carpenters* (1977) 430 U.S. 290).

We disagree with the ALJ's conclusion that the dispute here falls within the "local concern" exception to the preemption rule, as significant differences distinguish *Pittsburg*, *supra*, 166 Cal.App.3d 875 from this case. The court in *Pittsburg*, held that PERB did not have jurisdiction over a case involving the union picketing the homes and businesses of individual board members during a labor dispute. The essence of that dispute as characterized by all parties was whether the picketing constituted a "corrupt practice" within the meaning of the Education Code or whether it unlawfully placed school board members in a conflict of interest in violation of Government Code Section 1090. Because these legal issues were not of "jurisdictional interest to PERB nor within its areas of expertise", there was no risk of a court decision interfering with the regulatory scheme of EERA. (*Pittsburg.*)

Here, by contrast, the parties conceived of their dispute as falling squarely within PERB's jurisdiction. The unfair practice complaint alleged that the University unilaterally changed its access regulations with the ban on leafleting in front of the hospitals. The case was

litigated by both sides in just those terms, with evidence presented of past practice, or lack thereof, and on whether the terms of the parties' MOU and/or their bargaining conduct waived the Union's right to complain about employer changes to access rules. Neither party objected to PERB's jurisdiction, although we recognize that jurisdictional issues may be determined sua sponte. Unlike *Pittsburg*, *supra*, 166 Cal.App.3d 875, the gravamen of this dispute does not rest in the meaning of a statute outside PERB's purview. On the contrary, it can be resolved through the application of the Board's precedents regarding unilateral change. Even though leafleting is a constitutionally protected activity, subject to reasonable time, place and manner restrictions, the question of unilateral change in the employer's leafleting policy can be decided without resort to enforcing constitutional rights. As noted earlier, if the parties believe that our decision fails to resolve underlying constitutional issues, or that our decision intrudes on constitutional rights, they will be free to seek redress in the courts, having exhausted their administrative remedies.

PERB's expertise in adjudicating unilateral change cases cannot be gainsaid. From the earliest days of the agency to the present, the Board has been presented with such charges and has developed a standard test for assessing claims. (*Pajaro Valley*, *supra*, *PERB Decision No. 51; West Side Healthcare District* (2010) PERB Decision No. 2144-M; *Fairfield-Suisun Unified School District (2012) PERB Decision No. 2262* (*Fairfield-Suisun*).)

The issue in this case as litigated by the parties is whether the University's prohibition of leafleting in front of the UCSF hospital at 505 Parnassus Avenue and in the UCLA CHS Plaza constitutes a change in a negotiable term and condition of employment.[6] Although

[6] Even if we were to view this case through the lens of alleged interference with protected activity, we would conclude that we have jurisdiction to determine and to remedy allegations that the ban on leafleting at the hospitals unreasonably interfered with protected activity. Our precedents direct us to consider whether access regulations are reasonable as measured against a reasonable time, place and manner standard. (*Richmond Unified School*

constitutional issues may come into play in our consideration of this issue, they do not defeat our jurisdiction to resolve this quintessential labor law issue. It is to that question we now turn.[7]

Unilateral Action Concerning Campus Access Rules

This Board, along with the National Labor Relations Board (NLRB), has long recognized the harm to collective bargaining caused by an employer's unilateral actions with respect to negotiable terms and conditions of employment. As the United States Supreme Court observed in *NLRB v. Katz* (1962) 369 U.S. 736, 747-748:

> Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment...and must of necessity obstruct bargaining, contrary to congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of

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District/Simi Valley Unified School District (1979) PERB Decision No. 99 (*Richmond/Simi Valley*).) We have done so in the numerous decisions reached since *Richmond/Simi Valley*. Most especially, we have assessed access disputes in the context of university hospitals, *UCLA Medical Center*, *supra*, PERB Decision No. 329-H; a nuclear research laboratory, *Lawrence Livermore*, *supra*, PERB Decision No. 212-H; and in a county hospital, *Salinas Valley Memorial Healthcare System* (2010) PERB Order No. Ad-387-M (*Salinas Valley*), and *County of Riverside* (2012) PERB Decision No. 2233-M (*Riverside*). Although these cases dealt with access by employee organizations to work areas, the holdings recognize that in a hospital setting "[a]ccess to employee work locations is subject to reasonable restrictions, particularly in the hospital setting, where considerations of patient care, privacy and security have primacy." (*Salinas Valley*, at p. 22.) Our access decisions recognize "a presumptive right of access to California's public facilities by union agents, subject to reasonable regulation upon the employer's showing that a particular regulation is: (1) necessary to the efficient operation of the employer's business and/or the safety of its employees and others; and (2) narrowly drawn to avoid overbroad, unnecessary interference with the exercise of statutory rights." (*Riverside*, at p. 7.)

[7] We decline AFSCME's invitation to remand this case to the ALJ for a finding on the merits. Because neither party raised any objection to jurisdiction, they created a record from which the Board is able to decide the factual and legal issues presented. HEERA section 3563(h) empowers the Board "[t]o investigate unfair practice charges...and to take any action and make any determinations in respect of these charges...the board deems necessary to effectuate the policies of this chapter." PERB Regulation 32320(a)(1) authorizes the Board itself to "[i]ssue a decision based upon the record of hearing."

> § 8 (a)(5), without also finding the employer guilty of over-all subjective bad faith.

(*Pajaro Valley*, *supra*, PERB Decision No. 51; *Visiting Nurse Services v. NLRB* (1st Cir. 1999) 177 F.3d 52, 58 [employer may not take unilateral action on mandatory subject of bargaining].)

Most recently in *Fairfield-Suisun*, *supra*, PERB Decision No. 2262, at p. 9, we noted:

> To prove up a unilateral change, the charging party must establish that: (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Grant Joint Union High School District* (1982) PERB Decision No. 196.

Neither may an employer unilaterally add new terms to an existing collective bargaining agreement, or repudiate provisions in an MOU. (*The Regents of the University of California* (1991) PERB Decision No. 907-H, at p. 24; *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M.) The duty to refrain from taking unilateral action concerning negotiable terms and conditions of employment applies in all stages of the collective bargaining process, including during negotiation of successor contracts. (*San Mateo*, *supra*, PERB Decision No. 94.)

We first address whether the alleged change in the University's regulations concerning where leafleting could occur on its property is within the scope of negotiations. We have long held that access rules are negotiable.[8] (*Davis Joint Unified School District* (1984) PERB

[8] The negotiability of access is a separate question from the statutory right of employees and employee organizations to access the workplace, a right guaranteed in the higher education workplace by HEERA section 3568. Under the statute, the right of access is presumed and the burden is on the employer to establish that its regulation is reasonable and necessary to prevent disruption of its operations. (*UCLA Medical Center*, *supra*, PERB Decision No. 329-H.) However, in this case, we do not analyze the University's actions under the statutory right of access framework because the complaint alleges only a unilateral change violation. Although the Union successfully moved to amend the complaint mid-hearing to include an alleged (b) violation, the ALJ clarified that he was allowing the amendment only as

Decision No. 474 [proposal to have access to school equipment, buildings and facilities at all reasonable hours was negotiable]; *Trustees of the California State University* (2003) PERB Decision No. 1507-H (*Trustees CSU*); *Regents*, *supra*, PERB Decision No. 1700-H, at p. 2.) In the dispute between these parties we have observed that there was "no dispute that the access policy is a matter within the scope of representation." *Regents UC*, *supra*, PERB Decision No. 2105-H. The regulation at issue here purports to regulate more than traditional access to employees, as its scope reaches to Union hand billing the general public and other staff on University property. We find that these broader regulations on union leafleting activity designed to reach both the public and employees are also within the scope of negotiations. We explain.

The Board reiterated in *Trustees CSU*, *supra*, PERB Decision No. 1507-H, at p. 3 that:

> 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.)

A union's publicizing its dispute over terms and conditions of employment to the public at large as well as to its members and other employees goes to the essence of the employment relationship. Providing information to the public and urging it to support labor's demands with the public employer is one of the more important levers employees and their representative organizations have in securing demands over wages, benefits and other terms and conditions of

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a derivative violation, and was not opening the case to the question of whether the regulation was reasonable. The Union did not object to this ruling.

employment. Few subjects could be more closely related to or involved with the employment relationship.

That conflict is likely to occur on this issue is demonstrated in this very case. Access to the public employer's property for the purpose of communicating the union's message implicates a variety of issues that the mediatory influence of collective bargaining is likely to resolve, such as reasonable time, place and manner restrictions, and the designation of places that the employer may legitimately reserve for itself as an area in which it is the only permitted speaker. (*The Regents of the University of California* (1984) PERB Decision No. 504-H, rev'd on other grounds *sub nom.*; *Regents of University of California v. Public Employment Relations Bd.* (1986) 177 Cal.App.3d 648.)

The obligation to negotiate over the regulation of employee organization activity directed at informational leafleting to the public and/or other employees is not likely to abridge the employer's freedom to exercise managerial prerogative any more than the obligation to negotiate over more traditional access rules impinges on such rights. To the extent the employer believes any proposal impermissibly treads on its constitutional rights to maintain or establish a non-public forum, it may simply reject the union's demands.[9]

Our conclusion is in accord with *Regents*, *supra*, PERB Decision No. 1700-H which affirmed the ALJ's conclusion that imposition of an absolute ban on demonstrations inside a university administration building unilaterally implemented a new access rule in violation of HEERA section 3571(c). As the ALJ noted, "A change in an access regulation of the type at issue here involves statutory rights of employees and employee organizations alike." (*Regents*, ALJ proposed dec., at p. 62.)

[9] We note that an imposition of a regulation will always be subject to scrutiny as to reasonableness under the statutory standard of HEERA section 3568, should an unfair practice charge be filed alleging that an imposed rule interferes with statutorily guaranteed access rights. (*Regents*, *supra*, PERB Decision No. 1700-H.)

Although we conclude that the subject covered by the University's regulations is negotiable, we do not believe that AFSCME has established the other elements necessary to prove its charge of unilateral change at UCLA. It has failed to establish that there was a clear policy excepting the Union's leafleting activity in the CHS Plaza in front of the hospital from the clear written regulations that prohibited such conduct. The written regulations governing access to UCLA's property have changed over time. The earlier versions did not explicitly describe the CHS Plaza as off-limits to leafleting, but instead described access areas external to the CHS Plaza as permissible areas for such activity. The most recent version of the regulations clearly describes the CHS Plaza as off limits to leafleting activity for both employee organizations and other advocacy groups. Whether this would pass the test of reasonableness under HEERA section 3568 we express no opinion, as that is an issue not before us. AFSCME did agree in its MOU to abide by reasonable campus regulations and it does not claim in this case that this particular rule is unreasonable. It simply asserts that it has never been applied to prohibit AFSCME from leafleting in the CHS Plaza and that the 2008 ban was therefore a unilateral change in the rules.

Despite the testimony by AFSCME's agents and its president that they had leafleted in the CHS Plaza several times prior to 2008, the evidence did not show that the University knew about these earlier incidents, but did show that to the extent the University did learn of the activity on one occasion in 2005, it promptly notified the Union that it was not permitted under the rules to leaflet inside the CHS Plaza. The Union continued leafleting despite this instruction and was not admonished a second time in 2005. This persistence however, does not convert the University's failure to admonish a second time into acquiescence with the Union's view that it was permitted to leaflet in front of the hospital or in the CHS Plaza.

The UCLA labor relations office is about a mile from the CHS Plaza and the individuals responsible for enforcing the access regulations do not regularly patrol the medical sciences campus looking for violations of the access policy. In order to prevail in its claim that the employer had a clear and mutually understood policy permitting leafleting in this area, the Union must show that there was a meeting of the minds about what the policy was. Without more convincing evidence that the University knowingly permitted AFSCME to leaflet in the CHS Plaza, we cannot conclude there was an impermissible unilateral change in the policy.

In sum, the written policy at UCLA forbids leafleting in the CHS Plaza in front of the hospital. AFSCME failed to demonstrate that the University waived these rules as to AFSCME, or otherwise made exception for this activity. The Union failed to demonstrate that the University knew about all of its previous leafleting activities. To the extent the University learned of the 2005 activity, it attempted to stop it. Thus, it cannot be said the University acquiesced in the Union's view of where leafleting was permitted. Therefore, we find that AFSCME failed to prove that the Regents unilaterally changed its policy regarding leafleting activity in the CHS Plaza when it ordered the Union to cease leafleting in this case.

At UCSF there is a different regulatory landscape, one that leads us to a different conclusion about the Regents' ban of AFSCME's leafleting on that campus. In contrast to UCLA's elaborate regulatory delineation of places that could or could not be accessed by individuals seeking to exercise their freedom of speech, the access guidelines at UCSF do not specifically prohibit leafleting activity in front of the hospital. The guidelines applicable to employee organizations address access to areas inside university buildings, such as classrooms and meeting rooms, access to bulletin boards, the mail system, computers, telephones, etc. Employees are forbidden from conducting union business on their work time and "under no circumstances, may these regulations be interpreted or applied so as to impede, disrupt, or

interfere with the normal operations of the Campus or Medical Center." (CP Ex. 1, Access Guidelines.) In addition, UCSF has a written policy, "Use of Campus Open Spaces and Special Use Areas" applicable to all eligible organizations student as well as employee. "Open spaces" are outdoor paved walkways on campus, and "special use areas" include certain internal lobbies, Saunders Court, the Milberry Union Plaza, etc.[10] The area in front of the hospital was not designated as a "special use area". In fact, it more logically falls within the definition of "open space," as it is an outdoor paved walkway. The only mention in the UCSF regulations concerning literature distribution relevant here prohibits distribution that impedes traffic flow or obstructs the entrance to buildings or harasses passers-by. The University presented no evidence that the leafleting at UCSF did any of these.

Thus, as of the time AFSCME commenced its leafleting activity at UCSF, the University's regulations had two prohibitions potentially applicable to such conduct: (1) no activity may impede, disrupt, or interfere with the normal operations of the campus or medical center; and (2) no leafleting may impede ingress or egress of any building.

Prior to January and February of 2008, AFSCME apparently had not attempted to distribute literature in front of the hospital at UCSF, instead distributing literature on sidewalks adjacent to the street and in other areas. In response to this activity, and operating outside the two prohibitions in that the activity involved peaceful, non-obstructive leafleting activity in front of the hospital, the University threatened to arrest the leafleters. In doing so, the Regents effectively imposed a new additional rule on the Union, forbidding leafleting in this particular

[10] "Special use areas" are designated open spaces for non-commercial use by student, staff and faculty registered organizations. It appears that organizations must request permission from the University prior to using the "special use areas".

place, where there had been no previous prohibition.[11] It did so without negotiating with AFSCME and thus violated the duty to bargain in good faith when it unilaterally changed a policy encompassing a negotiable term and condition of employment. See *Regents*, *supra*, PERB Decision No. 1700-H, adopting the ALJ proposed decision, at p. 62, finding that the unilateral implementation of a new access rule banning demonstrations in an administration building constituted a violation of HEERA section 3571(c).

This case is analogous to at least two earlier PERB decisions in which the employer's action unilaterally adds an interpretation or new term to a negotiated policy. In *The Regents of the University of California*, *supra*, PERB Decision No. 907-H, the University was found to have violated the duty to bargain in good faith when it unilaterally established a limit on the allocation of long-term appointments of lecturers in the writing department, thereby creating a quota based on considerations such as a preference for granting such appointments to newer lecturers. This hiring ratio or quota was not contained or contemplated by the MOU article regarding long-term appointments. PERB held that this action violated HEERA by "unilaterally implementing a change in the parties' agreed upon policy." (*Ibid*, p. 24.)

More recently PERB held in *Fairfield-Suisun*, *supra*, PERB Decision No. 2262 that a school district violated its duty to bargain in good faith when it unilaterally imposed what was essentially a new term in the parties' agreement regarding progressive discipline when it adopted a "zero tolerance" policy. Previously all discipline was subject to a progressive

[11] This conclusion is conformity with the Board's observation in its first consideration of the facts in this case, *Regents UC*, *supra*, PERB Decision No. 2105-H: "With respect to UCSF, the local regulations prohibit union access to work areas involving patient care, clinical laboratories and clinical areas. While the record contains much discussion by both parties regarding whether or not AFSCME's leafleting was disruptive...the record does not contain facts that clearly show that leafleting at the entrance of the UCSF Medical Center violated the campus regulations." (*Ibid*, pp. 8-9.) The Regents did not present any evidence at the hearing contradicting this conclusion.

discipline policy, except for conduct that threatened the safety of district students, employees or property, or in cases of emergency. With the adoption of the zero tolerance policy, a third exception was unilaterally grafted onto the progressive discipline policy—refusal to submit to a random drug test. This was found to have effected a unilateral change in the parties' negotiated policy and therefore violated the duty to bargain in good faith.

In prohibiting leafleting at UCSF, the University unilaterally grafted a new prohibition onto the UCSF regulations without giving AFSCME notice and an opportunity to bargain over the new rule. By doing so, the University has violated its duty to bargain in good faith with respect to the UCSF regulations.

In its exceptions the University argues that AFSCME is not entitled to a remedy because it unsuccessfully proposed at the bargaining table to delete the MOU's access provisions. We agree with the ALJ's analysis of this claim. First, it is not clear that the MOU, Article 1, "Access and Union Rights" applies to the leafleting conduct at issue here. The text of that article is mainly concerned with access to employees in the work place. As noted previously, the primary purpose of the leafleting activity in front of the University hospitals was to inform the public and other staff of the labor dispute. Even assuming, arguendo, that Subsection F applies to the Union's leafleting activity here, we find that this is not the type of clear and unmistakable waiver based on unmistakable evidence that is required in order to find a waiver of a statutory or constitutional right.[12] (*San Marcos*, *supra*, PERB Decision No. 1508.) Subsection F must be read in conjunction with Subsection A(2) which limits enforcement of access rules to "reasonable rules" only. While we do not address the merits of these rules because that issue is not before us, we do rely on this clause for support of our conclusion that

[12] Subsection F prohibits the Union from conducting "any Union activity or Union business on University premises...unless...conducted in accordance and conformance with campus procedures."

by agreeing to this language the Union did not intend to waive its right to challenge the reasonableness of University access rules.

Because the MOU is ambiguous as to whether it applies to this conduct, neither has the employer sustained its burden to prove its *Marysville Joint Unified School District* (1983) PERB Decision No. 314 (*Marysville*) defense. The University argues in its exceptions that even if it had previously refrained from enforcing its leafleting rules at CHS Plaza, it was privileged to do so in 2008 because the MOU allowed such enforcement. *Marysville* establishes that an employer does not waive its right to enforce the clear terms of a collective bargaining agreement even if it had allowed a benefit that was more generous than the agreement. Because the record is devoid of evidence about whether Article 1 applies to leafleting to the public, the employer cannot rely on *Marysville,* as the MOU is not clear and unambiguous.

We also join with the ALJ in rejecting the University's claim that an abandoned negotiating proposal constitutes a waiver. As the Board stated in *Los Angeles CCD, supra*, PERB Decision No. 252, at p. 14: "... 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." (Citing *Beacon Piece Dyeing and Finishing Co., Inc.* (1958) 121 NLRB 953, 959-961.)

Case No. SF-CE-862-H

In its exceptions to the ALJ's conclusion that it violated HEERA by denying AFSCME access to break rooms, the University argues that AFSCME organizers were given adequate access, as determined by the University, and that the MOU contained an implied prior approval requirement. In making these arguments, the University misapprehends the presumptions our previous cases establish.

As the ALJ noted, the right of access to facilities where employees work is presumptive, and employer restrictions on that right must be narrowly drawn. (*Lawrence Livermore*, *supra*, PERB Decision No. 212-H; *Richmond/Simi Valley*, *supra*, PERB Decision No. 99; *UCLA Medical Center*, *supra*, PERB Decision No. 329-H [recognizing the "unique suitability of employee break rooms" for access purposes].)

In the absence of facts demonstrating why daily access to break rooms would be disruptive to University operations, the employer may not prevail here by simply saying "the union had all the access it needs." Such a position does not meet the standard of a narrowly drawn regulation that avoids overbroad and unnecessary interference. Further, it is not for the employer to determine how much access is "needed" by the union, especially in the absence of evidence that such frequent access was or tended to be disruptive.

The University repeats its argument made to the ALJ that whatever harm to protected rights may have occurred was de minimis. We agree with the ALJ's analysis that the summary manner in which Mazariegos and Moore were ordered to leave their meetings amounted to at least slight harm to both the Union's right to communicate with employees and to employees' right to participate in these meetings, thereby triggering the *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*) test.[13] Under that test, the University simply failed to justify its actions as a legitimate operational necessity.

[13] Under *Carlsbad*, *supra*, PERB Decision No. 89, at p. 10-11, we assess allegations of employer interference with protected activity according to the following test: where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights under HEERA, a prima facie case shall be deemed to exist; where the harm is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly; where the harm is inherently destructive of employee rights, the employer conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available.

The Regents also argue that even if its actions amounted to slight harm, it should be absolved of any liability because it rescinded the order issued to Moore immediately upon being notified of it. We disagree that the retraction in this case nullified the University's interference with protected rights.

An honest retraction of a coercive statement can erase the effects of that illegal statement or threat. (Sacramento City Unified School District (1985) PERB Decision No. 492, ALJ proposed dec., at p. 28; Bartley Company v. NLRB (1969) 410 F.2d 517; Redcor Corp. (1967) 166 NLRB 1013). Cases in which PERB has absolved an employer of liability for interference upon a retraction of the offending conduct differ from the facts of this case. In *Carlsbad Unified School District* (1989) PERB Decision No. 778, a school principal denied a union activist's request to be on the bargaining team. This directive was immediately rescinded by a higher-ranking administrator, and PERB held that the retraction made the violation "de minimis," noting that the employee in question admitted that she wanted to be appointed to the bargaining team only to bolster her attempted reclassification to a confidential employee.

In *Riverside*, *supra*, PERB Decision No. 2233-M, we found a violation of the employer's access rules to be de minimis where the access was inadvertent and not intentional and where it was promptly corrected. Likewise in *West Contra Costa Healthcare District* (2010) PERB Decision No. 2145, where the union immediately corrected a misrepresentation about where election ballots should be returned by notifying every unit member by mail of the correct procedure and where employees had ample means of learning of the correct balloting information, we held there was no interference by the union.

In contrast, PERB has refused to credit a retraction where it was incomplete and did not reach all of the employees who were subjected to the original coercive statements. See *Inglewood Unified School District* (1989) PERB Decision No. 624 (*Inglewood*), where a

school principal made several anti-union comments in faculty meetings, including offering his opinion that the union was "worthless" and telling the faculty that anyone who filed a grievance that was unsuccessful would be transferred. The principal later offered an explanation of the transfer threat but only to the male faculty members with whom he met after making the original comments. This was insufficient to erase the harmful effects of coercive statements because the retraction was made to only a subset of the faculty, rather than to the entire group. Moreover, in the context of the other comment (that the union was "worthless"), merely offering a self-serving explanation for one of the comments did not erase the effects of the earlier statements.

The University's retraction here does not convince us that the retraction completely cured the violation, rendering it a de minimis violation. The University's denial of access was a pattern of conduct consisting not only of ordering Moore off the premises, despite the fact that she previously had routine access to the break room, but also of summarily ordering Mazariegos off premises and denying him the access he sought, accompanied by the explanation that the Union had all the access it needed.[14] These acts were accompanied by the University's claim that non-employee AFSCME agents were required to obtain advance approval before they attended meetings with employees on non-work time and in non-work areas, a claim that is completely belied by the plain language of the MOU. In this context, the single retraction of an illegal denial of access to Moore is insufficient to remedy the harm. Equally significant is the fact that rescinding the denial of access to Moore does nothing to erase the harm done to the employees who appeared to be intimidated after the supervisor ordered Moore to leave, telling her in an agitated manner that she had no right to be there. We

[14] It has been well settled since the early 1980s that there is a presumptive right of union access to workplaces, including such university workplaces as nuclear laboratories and hospitals. (*Lawrence Livermore, supra,* PERB Decision No. 212-H; *UCLA Medical Center, supra*, PERB Decision No. 329-H.)

agree with the ALJ that this conduct "had coercive tendencies toward employee participation". The University may have informed Moore that the supervisor mistakenly ordered her to leave her meeting, but it never informed the employees that the supervisor had made a mistake.

We do not believe the University's retraction to Moore renders its violations de minimis because it was an incomplete retraction. It was not communicated to the employees affected by the wrongful conduct. Nor can it be said that the original interference was unintentional or inadvertent, coming as it did in the context of other actions that deprived the Union and employees of their right of access.

We find the circumstances in the instant case closer to those described in *Inglewood, supra*, PERB Decision No. 624. Seen in the context of the University's overly restrictive interpretation of the MOU access provisions, its assertion that it alone has the right to grant or deny access, and its aggressive attitude toward both organizers as they sought to increase their presence in the workplace as the labor dispute grew increasingly heated, we do not view the retraction given to Moore alone erases the coercive effect her original ejection from the workplace had on employees protected rights.

The University also objects to the ALJ's finding that the MOU did not contain a prior approval requirement for non-employee representatives of AFSCME to have access to employees. We agree with the ALJ that the MOU plainly and clearly requires only that non-employee representatives are permitted access at reasonable times, subject to notice being given "upon arrival" for "unscheduled meetings" "in accordance with local campus/Laboratory procedures." (Art. 1, Sec. B of MOU.) Mazariegos was an employee, so this provision of the MOU could not justify the University imposing a prior approval requirement on him, especially in break rooms, which are not in patient care areas and do not contain sterile or

bioactive materials, unlike a laboratory itself. (*San Ramon Valley Unified School District* (1982) PERB Decision No. 230; *Riverside*, *supra*, PERB Decision No. 2233-M.)

The University urges us to imply a prior approval requirement, arguing that the only reasonable way it could determine and enforce access at "reasonable" times is to retain the right to deny access if the time and place requested conflicted with business or operational needs. In the context of break rooms, which is the only place at issue here, we agree with the ALJ that there are no limitations in either the MOU or any regulations in evidence on the right to meet with employees, aside from the prohibition against meeting during working hours. When there is a scheduling conflict, such as when a break room is being used for a training room or other job-related meeting room, it ceases to be a non-work area for that period of time, as the ALJ correctly pointed out.

We hereby affirm the proposed decision and its proposed remedy with respect to Case No. SF-CE-862-H.

ORDER

Based on the findings of fact and conclusions of law and the entire record in this matter, the Public Employment Relations Board (PERB) finds in Case No. SF-CE-858-H, that the Regents of the University of California (Regents or University) violated the Higher Education Employer-Employee Relations Act (HEERA) section 3571(a), (b) and (c) by unilaterally changing its policy regarding leafleting at the University of California, San Francisco (UCSF) when it ordered American Federation of State, County and Municipal Employees, Local 3299 (AFSCME) to cease and desist from distributing leaflets to members of the public in front of the Medical Center located at 505 Parnassus Avenue in San Francisco. The Board also finds that AFSCME failed to sustain its burden of proof that the University's order to stop the distribution of leaflets in front of the hospital in the Center for Health Services Plaza at

University of California, Los Angeles (UCLA) constituted a change in past practice. Those allegations will therefore be DISMISSED.

With respect to Case No. SF-CE-862-H, PERB finds that the University violated HEERA section 3571(a) and (b) when it denied AFSCME access to employee break rooms.

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to HEERA section 3563.3, it is hereby ordered that the Regents and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally implementing a regulation prohibiting employees or representatives of the AFSCME from peacefully distributing leaflets in front of the UCSF hospital at 505 Parnassus Avenue in San Francisco without giving AFSCME prior notice and an opportunity to bargain over this regulation.

2. Denying AFSCME its right of access under HEERA by excluding representatives from employee break rooms at the UCLA Medical Center facilities and requiring advance approval to access such rooms.

3. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

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

1. Immediately rescind the regulation implemented at UCSF prohibiting employees or representatives of AFSCME from peacefully distributing leaflets in front of the UCSF hospital at 505 Parnassus Avenue in San Francisco.

2. Upon request meet and negotiate with AFSCME over any proposed rules or regulations concerning peaceful leafleting in front of the UCSF hospital.

3. Within ten (10) workdays of service of this decision, post at all locations where notices to employees are customarily posted, copies of the Notice attached hereto as an appendix. The Notice must be signed by an authorized agent for the Regents, 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 ensure that the Notice is not reduced in size, altered, defaced or covered by any other material.

4. Within 30 workdays of service of this decision, notify the General Counsel of PERB or her designee, in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General Counsel or her designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on AFSCME and the San Francisco Regional Director of PERB in accord with the Regional Director's instructions.

All other allegations against the Regents in the complaint are hereby DISMISSED.

Chair Martinez joined in this Decision.

Member Dowdin Calvillo's concurrence and dissent begins on page 36.

DOWDIN CALVILLO, Member, concurring in part and dissenting in part: I agree with my colleagues that the Public Employment Relations Board (PERB or Board) has jurisdiction over the allegations set forth in Case No. SF-CE-858-H and that the American Federation of State, County and Municipal Employees, Local 3299 (AFSCME) failed to establish a unilateral change violation with respect to leafleting at the University of California (University), Los Angeles (UCLA) medical center. With respect to Case No. SF-CE-862-H, I further agree that the University violated Higher Education Employer-Employee Relations Act (HEERA) section 3571(a) and (b) when it denied Ever Mazariegos's (Mazariegos) request for daily access to the laboratory employees break room. For the reasons set forth below, however, I disagree that the evidence established a violation of HEERA with respect to leafleting at the University of California, San Francisco (UCSF) medical center and the single instance of denial of access to Nicole Moore (Moore).

Leafleting at UCSF Medical Center

The burden is on the charging party to establish a breach of a written policy or established past practice. (*County of Sonoma* (2012) PERB Decision No. 2242-M (*County of Sonoma*); *San Francisco Unified School District* (2009) PERB Decision No. 2057; *City of Commerce* (2008) PERB Decision No. 1937-M.) To constitute a valid, established past practice, a practice must be: (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a period of time as a fixed and established practice. (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186.) The charging party must plead and prove facts demonstrating the unequivocal, fixed, and longstanding past practice. (*County of Sonoma*; *Regents of the University of California* (2010) PERB Decision No. 2109-H.) As noted in the majority decision, the issue here is not whether the University

violated its obligations under HEERA section 3568, but only whether a unilateral change violation has been established.

It is clear that the evidence in this case does not establish the existence of an unequivocal, fixed and longstanding past practice of permitting leafleting on the U-shaped driveway adjacent to the entrance to the UCSF hospital at 505 Parnassus Avenue. The written regulations governing access do not address leafleting at all, and there is no evidence that the University has ever permitted any form of leafleting at that location. To the contrary, the University put on uncontroverted evidence that, other than one instance when required to do so by court order, it has never allowed any type of leafleting at this location and has always interpreted the written policy to prohibit leafleting at the entrance of the hospital due to concerns over impeding patient access. Thus, I disagree that the University imposed a new additional rule forbidding leafleting at this location.

I find prior decisions involving the unilateral imposition of new terms and conditions of employment inapplicable here. In *The Regents of the University of California* (1991) PERB Decision No. 907-H (*Regents*), the Board found that, given the existence of clear and unambiguous contract language setting forth the criteria for three-year appointment of university lecturers, the university violated HEERA when it unilaterally applied additional criteria for making such appointments not set forth in the agreement. Likewise, in *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262 (*Fairfield-Suisun*), the parties negotiated a progressive discipline policy with specified exceptions. The Board majority held that the employer unlawfully imposed a unilateral change when it added an additional exception to the progressive discipline policy.

In both *Regents, supra,* PERB Decision No. 907-H, and *Fairfield-Suisun, supra,* PERB Decision No. 2262, the employer altered an existing past practice embodied in a clear and unambiguous written agreement. In this case, there is no clear and unambiguous past practice permitting leafleting at the UCSF hospital entrance. Therefore, as with the leafleting at UCLA, I would find that AFSCME failed to meet its burden of establishing a change in policy regarding leafleting at the UCSF hospital.

Access by AFSCME Representative Moore

PERB has found de minimis violations of employee access rules by both employers and employees where the violation had minimal impact or was corrected immediately. (See, e.g., *Carlsbad Unified School District* (1989) PERB Decision No. 778 [no interference violation found where employer corrected refusal to allow employee to serve on negotiating committee shortly thereafter, resulting in only de minimis harm]; see also *County of Riverside* (2012) PERB Decision No. 2233-M [de minimis, inadvertent violation of local access rule by union did not violate the Meyers-Milias-Brown Act]; *West Contra Costa Healthcare District* (2010) PERB Decision No. 2145-M [de minimis impact of change in access requirement].)

The evidence established that, on one occasion, an interim manager told AFSCME representative Moore to leave a break room. Immediately after Moore complained about this incident, the University's Labor Relations Manager sent a memo instructing managers to let her know "on quick notice" where the break rooms were and how Moore could access those areas. Moore was not denied access on any subsequent occasions. There is no evidence that the University authorized the interim manager's conduct or that it was anything but honest and sincere in its retraction. Rather, the University promptly rectified the situation by directing all managers to provide break room access to Moore. Therefore, I conclude the single instance of

denial of access to Moore was de minimis and did not rise to the level of an interference violation.

I disagree with the majority's conclusion that the circumstances of this case justify elevating this isolated incident to an interference violation. Unlike *Inglewood Unified School District* (1987) PERB Decision No. 624, this is not a case in which the employer made disparaging remarks about the union and threatened employees with reprisal for engaging in protected activity. Here, there is no direct evidence of any impact on employees, but only Moore's own testimony concerning her *perception* that employees appeared uncomfortable and intimidated. I further disagree with the majority's reliance on what it characterizes as "other actions that deprived the Union and employees of their right of access" as having any bearing on the issue of whether the University's conduct in this instance amounted to a violation of HEERA. While I agree with the finding that the University unlawfully denied the request by Mazariegos for daily access to the laboratory employee break room, no other employee access violations were alleged or established. Viewed on its own facts, I find the evidence insufficient to establish an interference violation with respect to the single incident involving Moore.

Prior Notice Requirement

I agree with the majority that the memorandum of understanding does not establish a prior notice requirement before AFSCME representatives may have access to employees at reasonable times, subject to notice upon arrival for unscheduled meetings. I would note, further, that in the event a representative arrives unannounced, the University may deny access if the requested break room is not available due to training, meetings or other work-related purposes. I would further find that employee representatives such as Mazariegos are subject to

the same notice requirements when acting in their representative capacity. In the context of break rooms in areas with restricted access, such as the laboratory, both employee and non-employee representatives must comply with the University's reasonable procedures for entering such restricted areas.

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 Nos. SF-CE-858-H and SF-CE-862-H, *American Federation of State County and Municipal Employees, Local 3299 v. Regents of the University of California*, in which all parties had the right to participate, it has been found:

In Case No. SF-CE-858-H, that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(c), by unilaterally changing its policy regarding leafleting at the University of California, San Francisco (UCSF) when it ordered American Federation of State County and Municipal Employees, Local 3299 (AFSCME) to cease and desist from distributing leaflets to members of the public in front of the Medical Center located at 505 Parnassus Avenue in San Francisco. This conduct also violated HEERA section 3571(a), by interfering with the right of bargaining unit members to participate in the activities of an employee, organization of their own choosing. This conduct also violated HEERA section 3571(b), by denying AFSCME its right peacefully to distribute leaflets to members of the public in front of the UCSF hospital at 505 Parnassus Avenue in San Francisco.

In Case No. SF-CE-862-H, that the University violated HEERA section 3571(b), when it excluded representatives of AFSCME from employee break rooms at the University of California, Los Angeles (UCLA) Medical Center and Santa Monica hospital on two occasions and thereafter required advance approval to access employees in such rooms. This conduct also violated HEERA section 3571(a), by interfering with the employees' right to participate in the activities of an employee organization of their own choosing.

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 a regulation prohibiting employees or representatives of the AFSCME from peacefully distributing leaflets in front of the UCSF hospital at 505 Parnassus Avenue in San Francisco without giving AFSCME prior notice and an opportunity to bargain over this regulation.

2. Denying AFSCME its right of access under HEERA by excluding representatives from employee break rooms at the UCLA Medical Center facilities and requiring advance approval to access such rooms.

3. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

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

1. Immediately rescind the regulation implemented at UCSF prohibiting employees or representatives of AFSCME from peacefully distributing leaflets in front of the UCSF hospital at 505 Parnassus Avenue in San Francisco.

2. Upon request meet and negotiate with AFSCME over any proposed rules or regulations concerning peaceful leafleting in front of the UCSF hospital.

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 WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICPAL EMPLOYEES LOCAL 3299, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	UNFAIR PRACTICE CASE NOS. SF-CE-858-H SF-CE-862-H PROPOSED DECISION (10/20/2010)

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele, Attorney, for American Federation of State, County and Municipal Employees Local 3299; Littler Mendelson by Joshua J. Cliffe and Joshua D. Kienitz, Attorneys, for Regents of the University of California.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

American Federation of State, County and Municipal Employees Local 3299 (AFSCME) initiated this case under the Higher Education Employer-Employee Relations Act (HEERA or Act)[1] on April 23, 2008, by filing an unfair practice charge (Case No. SF-CE-858-H) against the Regents of the University of California (University). On May 27, 2009, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the University unilaterally changed a policy by denying AFSCME permission to distribute literature in the Medical Center Plaza at the University of California, Los Angeles (UCLA) and in front of the Medical Center at the University of California, San Francisco (UCSF). This conduct is alleged to violate section 3571(a) and (c).

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

On May 23, 2008, AFSCME filed a second unfair practice charge (Case No. SF-CE-862-H) against the University. On October 15, 2009, the Office of the General Counsel issued a complaint alleging that the University denied AFSCME's UCLA representatives Ever Mazariegos and Nicole Moore access to break rooms.[2] This conduct is alleged to violate section 3571(a) and (b).

On June 17, 2009, the University answered the complaint in Case Number SF-CE-858-H, denying the material allegations of the complaint and asserting a number of affirmative defenses.

On September 9, and October 6, 2009, informal settlement conferences were held in Case Number SF-CE-858-H but the matter was not resolved.

On November 9, 2009, the University answered the complaint in Case Number SF-CE-862-H, denying the material allegations of the complaint and asserting a number of affirmative defenses.

On December 16, 2009, an informal settlement conference was held in Case Number SF-CE-862-H, but the matter was not resolved.

On January 25, 2010, both matters were consolidated for formal hearing and decision.[3]

On February 22, 23, 25, and March 1, 2010, a formal hearing was conducted by the undersigned in Oakland. During the hearing, AFSCME's motion to amend the complaint to allege that the no-distribution policy change violated section 3571(b) was granted.

On April 30, 2010, the matter was submitted for decision following receipt of post-hearing briefing.

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[2] Other allegations of the charge were dismissed and the dismissal was upheld on appeal. (*Regents of the University of California* (2010) PERB Decision No. 2109-H.)

[3] One of the charges in SF-CE-862-H was removed and consolidated with a different case involving the same parties (Case No. SF-CO-168-H).

FINDINGS OF FACT

The University is a "higher education employer" within the meaning of section 3562(g). AFSCME is an "employee organization" within the meaning of section 3562(f)(1) and an "exclusive representative" within the meaning of section 3562(i).

AFSCME's Decision To Leaflet

AFSCME represents the patient-care technical and service units at the University. Beginning in August 2007, the parties began bargaining for a successor memorandum of understanding (MOU) to the one expiring in September 2007 for the patient-care technical unit. When the parties reached impasse in their negotiations near the end of January 2008 and entered into mediation, AFSCME decided to commence a leafleting campaign at all five of the University's medical centers, including those at UCLA and UCSF.

Mario Fuentes and Nicole Moore are AFSCME staff members and lead organizers at the UCLA campus. On January 29, 2008, Fuentes and Moore, pursuant to directions from the statewide bargaining team, conducted training for staff and volunteers regarding the leafleting to take place at the UCLA Medical Center complex on the main campus, beginning later that day. Sanjay Garla was AFSCME's UCSF counterpart to Fuentes and Moore. He coordinated leafleting at the UCSF campus and supervised the training of the UCSF contingent. A point of emphasis in the training was that leafleters should not block ingress or egress at the medical facilities, and no leaflet or engagement should be forced upon anyone.

AFSCME's strategy was to target patients of the University's medical centers and convince them that the union's wage demands would move the workers toward parity within the industry. AFSCME believed this would curtail the high staff turnover that was compromising the quality of patient care. To this end, AFSCME chose to station its leafleters at the entrances to the UCLA and UCSF acute care hospitals. Although patients and their

families were the primary target, the leafleters would hand their literature to anyone accepting it, including bargaining unit employees, non-bargaining unit staff members, non-staff physicians, and other visitors to the medical centers.

UCLA Literature Distribution Policies

The University has adopted campus-specific policies related to access to facilities. UCLA's Student Affairs Office promulgated a comprehensive set of policies, described as its "Regulations on Activities, Registered Organizations and Use of Properties," which govern use of facilities and grounds by "registered organizations" as well as the public. Registered organizations include employee organizations, student organizations, and support groups such as alumni organizations. The UCLA regulations are designed to address First Amendment issues on the campus, as noted in the first sentence of the policy: "Free and open association, discussion and debate are important aspects of the educational environment of the University, and should be actively protected and encouraged, even where the positions advocated are controversial and unpopular." The UCLA human resources office has no input into these regulations.

During the day and night, until 12:00 a.m., grounds open to the public include all paved pedestrian walkways, with specified exceptions. One of the exceptions is sidewalks "adjacent to public entrances to the hospital and outpatient clinics except as provided for in the specific regulations governing the Center for Health Sciences area." Those specific regulations are set forth in an appendix to the policy, bearing the title, "UCLA Center for Health Sciences and Medical Plaza Supplemental Time, Place and Manner Regulations." As to other sidewalks, "individuals, University Units, Student Governments, and Registered Organizations" may distribute literature subject to general guidelines, including prohibitions on obstruction of the free flow of traffic, forcing literature upon others, and placing literature on vehicles.

The additional regulations applicable to the Center for Health Services (CHS) are grounded in special concerns about patient care. CHS is a large complex of connected buildings, housing the Schools of Medicine, Dentistry, and Public Health, as well as the acute care hospital, referred to as Health Sciences. The CHS complex is bordered by Le Conte Avenue to the south, Westwood Plaza to the west, Charles Young Drive to the north, and Tiverton Drive to the east. Distribution of literature is limited to six listed "external accesses" to the CHS and the Medical Plaza. The regulations prohibit distribution "within the confines of the CHS," which includes the Medical Plaza.

The Medical Plaza is a large open courtyard area directly in front of the main entrance to the Medical Center. Based on photographs entered into evidence, the area is approximately the size of a small city block (described by an AFSCME representative as 100 by 125 yards). A large portion of the plaza is covered by a lawn. This is a popular lounging area for employees of the CHS complex, especially during the lunch hour. At the south end of the plaza, on the side opposite the CHS entrance, is a large, five-level parking structure. It is used by patients and their families, admitting physicians, and other members of the public. Employees are not permitted to park in the CHS structure. They have their own parking lots located to the north and west of the CHS complex. Westwood Plaza is the main traffic thoroughfare for entry to the campus from the south. Immediately to the west of the plaza is the Jules Stein Eye Research Institute, which fronts onto Westwood Plaza. Immediately to the east of the plaza is the Emergency Room building, fronting Tiverton Drive. Emergency Room patients and visitors arrive to the east and south of the plaza.

Shortly after entering the main doors of the Medical Center, visitors arrive at a waiting area for the hospital. Patients and their families typically access this area after parking their cars in the CHS parking structure and walking north across the plaza. The Medical Center's

front entrance is protected from the elements by a large overhanging roof. Further in front are a few large permanent planter boxes and some seating benches. The grass area begins on the other side of the benches. Pedestrian access to the plaza is also available by walking through the Jules Stein building and exiting on the east side of that building. There is a private access road from Westwood Plaza to the Jules Stein building. Entrance to the Medical Center may also be made from entrances to the north side of the CHS complex along Charles Young Drive.

Since the events underlying this matter, the hospital facilities have been moved to a new building on the west side of Westwood Plaza, known as the Reagan UCLA Medical Center.

UCSF Literature Distribution Policies

UCSF has a written policy regarding the general distribution of literature, contained under the heading "Use of Campus Open Spaces and Special Use Areas." Open spaces are defined as "outdoor paved walkways on campus." Special use areas are certain lobbies, courts and plazas. Both open spaces and special use spaces may be used to "exercise speech and assembly rights in accordance with time, place, and manner regulations." Distribution of literature "may not occur in such a way as to impede traffic flow or obstruct entrances to buildings, or harass passers-by." The control of these spaces is under the jurisdiction of the Student Relations Office. Based on unwritten policy, UCSF permits general leafleting without restriction on the sidewalks outside campus facilities as these are deemed public areas, so long as such activity does not block ingress or egress.

UCSF also has a written policy specifically addressing distribution of literature to employees, entitled "Access Guidelines." It governs use of UCSF facilities and access to UCSF employees by employee organizations. Under this policy, employee organizations may distribute literature to employees in work areas (though not during work time), with exceptions

for patient care areas, academic areas while educational activities are ongoing, and private residential areas. Union requests to distribute literature within UCSF buildings are handled by the labor relations office. A practice has been established allowing unions upon request to distribute literature in the lobby area of the Medical Sciences building, which is adjacent to the Medical Center building. In relation to unions specifically, the University also relies on the following general proviso in the Access Guidelines that informs all unspecified leafleting issues: "Under no circumstances, may these regulations be interpreted or applied so as to impede, disrupt, or interfere with the normal operations of the Campus or Medical Center."

The Medical Center, UCSF's acute care facility, and the Children's Hospital are located in a large building complex at 505 Parnassus. Fronting the main entrance doors is a U-shaped driveway, connected to Parnassus. Patients and their families use the driveway as a place for embarking and disembarking from vehicles at the main entrance. The sidewalk adjacent to the driveway, leading to the main doors is approximately five to six feet wide. The driveway is on University property, and the University maintains that its policy since at least 1999 has been to ban leafleting anywhere in this area, including the sidewalk. Leafleting is also prohibited on other driveways nearby, including one to the Emergency Room and a parking lot. However, none of the written policies identify the driveway in front of 505 Parnassus for this special prohibition, and there is no evidence the University officially communicated this restriction to an appropriately authorized representative of AFSCME prior to the prohibition in this case.

AFSCME's Leafleting in the Medical Plaza and 505 Parnassus Driveway

AFSCME representatives at UCLA coordinated 35 to 40 volunteers to hand out leaflets during two, two-hour shifts each day in front of the Medical Center doors facing the Medical Plaza. Between two and six leafleters were stationed in this location, either to one side of a

23-foot-wide short stairway to the entrance or by one of two planter boxes a similar distance in front of the stairway. After a few days of distributing literature, the leafleters were informed that University security would prohibit further leafleting in this area.

AFSCME representatives at UCSF coordinated approximately 15 volunteers to hand out leaflets in teams of two, covering three, two-hour periods during the day. One leafleter was stationed at each side of the main entrance doors in front of the building at 505 Parnassus. Leafleting occurred for approximately two weeks before AFSCME was instructed that the leafleting had to cease under penalty of arrest. AFSCME was informed that the driveway was private property, and leafleting was to move to the sidewalk if it was to occur at all. The director of UCSF security testified that leafleting was not permitted in either of the driveway areas in front of the 505 Parnassus entrance and Emergency Room Services because it would block ingress and egress. Based on photographs submitted, the sidewalk where the leafleting occurred appeared to be too narrow for two wheelchairs to pass simultaneously, as claimed by the University's witness, though it would appear that one wheelchair and a pedestrian could pass each other.[4] Based on this witness's testimony, it appears that the University has chosen a flat prohibition rather than attempting to regulate leafleting activity through time, place, and manner rules.

Systemwide Access Provisions

The parties' MOU, in article 1 ("Access and Union Rights"), provides that AFSCME will "abide by the reasonable access rules and regulations promulgated at each campus/Laboratory." (Sec. A(2).) Section B provides that union representatives may visit bargaining unit members at "reasonable times." Section F provides that AFSCME "shall not conduct any Union activity or Union business on University premises . . . unless such activity

[4] Not all patients at the medical centers are non-ambulatory or even acutely ill.

is specifically authorized by the provisions of this Agreement and is conducted in accordance and conformance with campus procedures." Section G provides that the University retains "the right to enforce access rules and regulations in accordance with local campus procedures." Section N states that use of University facilities shall be "[s]ubject to the time, place and manner rules in effect at the time." Article 2 contains a merger clause.

Prior Litigation

Prior to the hearing in this matter, AFSCME filed an application for temporary restraining order and preliminary injunction in Alameda County Superior Court under Code of Civil Procedure sections 526 and 527 and article I, section 2, of the California Constitution. AFSCME and the University submitted declarations in support of their positions, covering much of the same factual ground presented here. A number of these declarations were entered into evidence in this case. Though granting the temporary restraining order, the superior court denied the request for preliminary injunction on March 12, 2008, deferring to PERB's exclusive initial jurisdiction under the authority of *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1 (*San Diego Teachers*) and *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946 (*El Rancho*). The University argued for dismissal of AFSCME's application based on the pending unfair practice charge here and PERB's preemptive jurisdiction over the dispute. The court ruled that the challenged restriction on leafleting involved activities arguably protected under the HEERA; that even if the superior court matter involved a significant state interest regarding "how and where" leafleting should be permitted, adjudication of the matter entailed a risk of interference with the jurisdiction of PERB; and that for these reasons, the "local concern" exception to PERB's initial exclusive jurisdiction did not apply.

Access to UCLA Break Rooms

Ever Mazariegos is employed by the University at the Santa Monica Hospital as an administrative clinical care partner. He is also active in AFSCME, having served on the executive board, and he was an organizer on paid leave status during the events in question here. Both Mazariegos and Moore were active in mobilizing support for AFSCME as the parties proceeded into the impasse phase of their 2007-2008 negotiations. Both began accessing employees. Mazariegos contacted employees at the Santa Monica Hospital in the break room for employees in the laboratory where patient blood, urine and other samples are tested. Moore contacted employees in the break room of the "central services" department of the CHS complex, where medical equipment of various types is serviced.

Mazariegos entered the break room without incident on the first occasion he attempted to access employees. The laboratory is a restricted area and entrance through a locked door is controlled by an employee behind a window serving the public. Access to the break room requires that Mazariegos walk along a pedestrian corridor through the laboratory work area, but does not bring him into contact with any of the clinical samples being tested. On the second occasion, a supervisor interrupted a meeting Mazariegos was having with an AFSCME member and instructed Mazariegos to leave. The supervisor gave Mazariegos several reasons why he could not be there. The ones Mazariegos remembered were that he needed prior approval to be in the room and that the break room was needed for training classes. Mazariegos reported the problem to Moore.

Moore sent an e-mail to the human resources office requesting daily access during the time the parties continued to be in conflict at the table. Mazariegos's goal was to meet with employees on each of the three shifts. University Labor Relations Specialist Rhonda Williams responded by defining limitations on the frequency with which Mazariegos could access the

break room after consulting laboratory management. The laboratory initially limited access visits to three dates, April 28, April 30, and May 2, 2008, specifying a time for each visit. A second authorization from the laboratory was announced through an e-mail from Williams allowing three dates in May (12th, 14th and 16th), again with specified times that on this occasion were more convenient to Mazariegos' schedule, accommodating the distance he lives from work. Mazariegos testified that he had never before been limited in the times he could access employees or required to obtain prior approval for use of break rooms. Williams wrote in her e-mail to the union: "Our position is that following [contractually specified] notice, the University has the right to grant or deny access. Ever's initial request for daily access for the next month . . . was simply not reasonable." Williams did not testify.

Sometime in May 2008, Moore was in the central services break room speaking with employees, when she was interrupted by a supervisor and told to leave because she had no right to be there. Moore called the human resources office and complained to Williams. Moore observed that the employees appeared to be intimidated after the supervisor spoke to her in an agitated manner.

Maure Gardner is the labor relations director for the medical facilities at the UCLA campus. Gardner testified that unions are required to contact the human resources office to make arrangements for accessing meeting rooms, classrooms and break rooms, whether or not they are in restricted-access work areas. Restricted-access areas may require that union representatives be escorted to the meeting room. Some areas are strictly off-limits to union activity, such as operating rooms and the intensive care unit.

The MOU permits visits by non-employee representatives (Mazariegos was an employee) at "reasonable times," subject to notice being given "upon arrival" for "unscheduled meetings" "in accordance with local campus/laboratory procedures." (Art. 1, sec. B.) No

written local campus procedures were presented in regard to this issue. Article 1, section N, entitled "Use of University Facilities," references requests for facilities used for "Union Meetings." It goes on to describe the procedure when the requested room is scheduled for "other activities" and requires reimbursement for "expenses such as room rental, security, maintenance and facility management costs or utilities costs incurred as a result of the Union's use of the University's facilities." No bargaining history was presented as to the meaning of these provisions. The MOU does not specifically refer to break rooms.

In Gardner's view, this MOU language applies to break rooms, as well as classrooms and meeting rooms. Gardner was made aware of Moore's complaint to Williams. She directed the local managers to allow access to break rooms "[o]n quick notice," but stated to them that she wanted to avoid union representatives "wandering through the work areas at their whim." Moore did not complain thereafter about access to the central services break room. Although there had been earlier disputes about unwarranted access activities by AFSCME representatives none involved the issue of prior approval to access break rooms.

ISSUES

1. Is the policy restricting leafleting locations on University property alleged to have been unilaterally implemented a matter within PERB's jurisdiction, and if so, did the University commit an unlawful unilateral change?

2. Did the University deny AFSCME access to employees at the UCLA campus?

CONCLUSIONS OF LAW

Leafleting

If an employer makes a unilateral change during bargaining but prior to the completion of bargaining, or during the term of an existing agreement but without a waiver of the right to bargain from the exclusive representative, that employer violates its duty to meet and confer in

good faith. (*Grant Joint Union High School District* (1982) PERB Decision No. 196; *Davis Unified School District, et al.* (1980) PERB Decision No. 116; *NLRB v. Katz* (1962) 369 U.S. 736.) The elements of a unilateral change violation involving the repudiation of an existing agreement or unwritten past practice are: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) the change is not merely an isolated departure from the policy, but amounts to a change of policy, i.e., the change has a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment; (3) the change in policy concerns a matter within the scope of representation; and (4) the policy change was implemented without giving the exclusive representative notice or an opportunity to bargain. (*Grant Joint Union High School District*, *supra*, PERB Decision No. 196.)

AFSCME contends that the University's order that it cease and desist from further leafleting constituted a unilateral change in access policies, emphasizing that the activity was not disruptive and the parties' negotiated language on access contains no prohibition on such activity. The University contends that there was no change in policy, as it has long maintained policies against leafleting by any organization in the specific locations where AFSCME supporters were leafleting (as set forth in local campus rules), that AFSCME like all other organizations has reasonable alternatives satisfying its free speech needs, and that under the MOU AFSCME has ceded authority to the University to enforce local access rules and regulations.

It is well settled that access rules are a negotiable subject. (*Regents of the University of California*, *supra*, PERB Decision No. 2109-H; *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, pp. 16-20.) Access in this sense typically relates to the express statutory right

contained in a number of the statutes administered by PERB (and implied as to others). That right pertains to the union's right to communicate with employees it represents or seeks to represent. Communication of this sort may take place in a variety of forms, including leafleting. (See *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793.) When construing this right, PERB has noted the statutory language of qualification, "subject to reasonable regulation," is an analogy to the constitutional parameters of lawful "time, place and manner" restrictions. (*Richmond Unified School District/Simi Valley Unified School District* (1979) PERB Decision No. 99, p. 19; *University of California at Berkeley* (1984) PERB Decision No. 420-H, pp. 9-11.)

Although not raised by either party, the initial issue concerns PERB's jurisdiction. Jurisdiction is fundamental and must always be found; it cannot be conferred by consent, waiver, estoppel, or the mere filing of charges. (*California State University, San Diego* (1989) PERB Decision No. 718-H, p. 9, overruled on other grounds in *Long Beach Community College District* (2003) PERB Decision No. 1564, citing *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230; see also *Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 890.) As explained below, I find this issue to be dispositive.

In *Pittsburg Unified School Dist. v. California School Employees Assn.* (1985) 166 Cal.App.3d 875 (*Pittsburg*), the court described the accommodation of jurisdiction between PERB and the courts. *Pittsburg* involved the school district's application for injunctive relief to stop leafleting by union members on public sidewalks in front of school governing board members' private offices for the purpose of informing the public about lack of progress in contract negotiations. In opposing injunctive relief, the union argued that the injunction violated its First Amendment rights. (*Id.* at p. 881.) An amicus brief by another union argued

that the superior court lacked jurisdiction because the leafleting was arguably an unfair practice of failing to negotiate in good faith and/or that assertion of the right to leaflet constituted "organizational participation" arguably protected under the Educational Employment Relations Act (EERA).[5] (*Id.* at pp. 884, 886.) The school district argued that the leafleting in front of private citizens constituted a "corrupt practice" within the meaning of an Education Code provision, which overcame any constitutional free speech rights. (*Id.* at pp. 886-887.)

In deciding in favor of court rather than PERB jurisdiction, the *Pittsburg* court traced the doctrine of exclusive initial jurisdiction as formulated in *El Rancho*, *supra*, 33 Cal.3d 946, and *San Diego Teachers*, *supra*, 24 Cal.3d. 1, under which PERB has exclusive jurisdiction over "arguably protected or prohibited" conduct under the statutes it administers. (See also *City of San Jose v. Operating Engineers Local Union No. 3* (2010) 49 Cal.4th 597.)

Pittsburg explained that even if the activity in question is arguably protected or prohibited an exception to preemptive jurisdiction exists under the doctrine of "local concern." (*Pittsburg*, *supra*, 166 Cal.App.3d at pp. 884-888.) If a legal obligation exists independent of the labor relations statute, it is enforceable in state court. *Pittsburg* noted as well the dynamic interplay between state court and PERB jurisdiction whereby PERB may exercise jurisdiction under the arguably protected/prohibited premise while simultaneously addressing legal issues outside of its jurisdiction. (*Id.* at pp. 884-886, citing *El Rancho* and *San Diego Teachers*; see also *Leek v. Washington Unified School Dist.* (1981) 124 Cal.App.3d 43 [agency objection couched in both constitutional and EERA terms preempted by PERB jurisdiction]; see also *City of San Jose v. Operating Engineers Local Union No. 3*, *supra*, 49 Cal.4th at pp. 609-612 [resort to PERB initially also involves application of the exhaustion of administrative remedies doctrine].) The *Pittsburg* court determined that the state law "corrupt practice" issue was

[5] The EERA is codified at section 3540 et seq.

conceived by "all parties" to be the "central issue" presented. An additional factor favoring state court jurisdiction was that the individual members of the governing board had no means of invoking, or inducing the union to invoke, PERB's jurisdiction. (*Id.* at p. 888.)

It is no doubt true that the leafleting here was protected activity under the HEERA, was a proper subject of bargaining, and that PERB could remedy AFSCME's claim. (*San Marcos Unified School District* (2003) PERB Decision No. 1508.) AFSCME does not dispute that the regulations existed or that they purport to cover the areas in question. If the result were in AFSCME's favor, PERB would necessarily find that the University's local regulations were unenforceable as to the leafleting here, and the University would be ordered to cease and desist from applying the challenged policies. Remedying the unilateral change without addressing whether the restrictions were reasonable by virtue of the University's property rights or time-place-manner regulation authority would be unfair to the University. (See *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, affd. *sub nom. Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74 [private property rights]; *Planned Parenthood v. Wilson* (1991) 234 Cal.App.3d 1662, 1671-1672 [parking lot driveway serving as walkway to entrance of multi-story medical plaza lacks attributes of a *Robins* public forum][6]; but see *Widmar v. Vincent* (1981) 454 U.S. 263, 267, fn. 5 [public university has many characteristics of a public forum, at least as to students]; *Planned Parenthood Shasta-Diablo, Inc. v. Williams* (1994) 7 Cal.4th 860 [important governmental interest supports place-restriction injunction as to public forum where manner of communication, as opposed to ideas communicated, requires regulation]; see

[6] The UCLA regulations state in their opening sentence that the University is an institution where "discussion and debate are important aspects of the educational environment." The medical centers, even as *sui generis* situs, have already become the focus of a lively bio-medical ethics debate around animal research used to develop new treatments, as noted by two University witnesses. Correspondence from the University to AFSCME states that teaching and research are as vital to the medical centers as patient care.

also *San Leandro Teachers Assn. v. Governing Board of San Leandro Unified School Dist.* (2009) 46 Cal.4th 822 [analyses of First Amendment and state constitutional "liberty of speech" claims].) It would severely test the University's ability to enforce local rules as to a myriad of other organizations seeking to leaflet, and not simply other unions. As the University claims here, if PERB were to find the place restriction too narrow (in constitutional terms), its remedy "could perversely force the University either (i) to open these locations to the flood of various interest groups who wish to distribute their literature (thereby exacerbating the potential harm to patient ingress and egress) or (ii) to risk a finding that it engaged in unconstitutional content-based restriction on speech (if the University allowed *only* AFSCME leafleters in these locations)." (See *Perry Education Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37; *State of California (Department of Personnel Administration, et al.)* (1998) PERB Decision No. 1279-S, adopting administrative law judge's proposed decision at pp. 47-52.)

Conversely, finding in favor of the University simply on grounds that there was an existing practice, either by virtue of the MOU's language incorporating local regulations or as an extra-contractual past practice, would leave unanswered the questions whether the local policies are reasonable in time-place-manner or public-forum terms and whether the union's peaceful handbilling is authorized by the Moscone Act. (Code of Civ. Proc., secs. 526, 527.) But as it stressed throughout these proceedings, the University insists that PERB not reach these issues it deems peripheral. Rather it seeks a ruling solely on AFSCME's waiver.

In *San Marcos Unified School District*, *supra*, PERB Decision No. 1508, PERB held that non-disruptive picketing aimed at informing the public about a labor dispute is a fundamental statutory and constitutional right that can only be waived based on clear and

unmistakable evidence, a standard more stringent than for ordinary contract waivers. Based on the less than clear and unmistakable language of the MOU here, I reject the University contention that AFSCME acceded to enforcement of local rules prohibiting such leafleting under the contractual waiver rule of *Marysville Joint Union High School District* (1983) PERB Decision No. 314. Even assuming that the MOU applies to leafleting of the public because AFSCME is not to "conduct *any* Union activity or Union business on University premises . . . unless . . . conducted in accordance and conformance with campus procedures" (art 1, sec. F, italics added), the contract cannot be construed as waiving AFSCME's objection to constitutionally overbroad campus rules, especially when the same regulations say that AFSCME only agrees to abide by "*reasonable* access rules and regulations promulgated at each campus/Laboratory." (Art. 1, sec. A(2); italics added.) The University provided no contemporaneous bargaining history as to exchanges concerning the meaning of the article 1 provisions, evidence that the local regulations in effect at the time were presented to AFSCME for their review during bargaining, or evidence that it noticed AFSCME on the regulations as a proposal for adoption prior to implementation.[7] Further, constitutional rights cannot be waived

[7] The University also claims that by proposing in the 2007-2008 negotiations to delete the language permitting enforcement of reasonable local rules and regulations on access and later withdrawing the proposal, AFSCME agreed to accept the policies on leafleting of which it had become aware, even if it denied constructive knowledge thereof prior to the enforcement actions here. But the University's witness conceded that the subject of leafleting never came up at the bargaining table during the discussion of this proposal. Even assuming the MOU covers the leafleting at issue here, the University cites no authority establishing that failure to achieve a bargaining objective results in waiver. Indeed, PERB has found to the contrary. (*North Sacramento School District* (1981) PERB Decision No. 193, citing *Beacon Piece Dyeing & Finishing Co., Inc.* (1958) 121 NLRB 953, 959-961.) For this reason, I also reject the University's related contention that PERB is powerless to fashion a remedy for AFSCME under any circumstances.

by inaction as to local rules unilaterally adopted absent evidence of an intentional relinquishment of the right. (See *Barker v. Wingo* (1972) 407 U.S. 514, 524-526.)[8]

That the central issues are extra-jurisdictional is supported by the fact that the leafleting targeted members of the public rather than the bargaining unit. In contrast, the issue of access as defined by statute, whether cast as a unilateral change or a denial of statutory organizational rights, concerns communicating with employees. (Sec. 3568.) Indeed, the language of the MOU as a whole, which never references "leafleting of the public," suggests the contract is intended to address statutory access only. Thus, despite the fact that the employee access issue could be decided here, it is not the main focus of AFSCME's challenge to the local restrictions. (See *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council* (1988) 485 U.S. 568 [consumer boycott handbilling protected as free speech].) An order in AFSCME's favor on the employee access issue cannot and should not be leveraged so as to open up access for other non-union organizations and individuals. (*California School Employees Assn. v. Travis Unified School Dist.* (1984) 156 Cal.App.3d 242 [source of legal obligations that are fixed outside of the collective bargaining agreement].) Moreover, if the employee access issue were addressed simply because leafleters tried to distribute to some

[8] Although the University presented correspondence alerting the local AFSCME "contact persons" to the UCLA regulations in 2001 and 2005, the AFSCME president denied being informed of these letters. I find the University's evidence insufficient to demonstrate a waiver on this basis, even if such a purported wavier could survive the stricter constitutional waiver requirements. (*San Jacinto Unified School District* (1994) PERB Decision No. 1078, adopting administrative law judge's proposed decision at p. 23, citing *Johnson-Bateman, Co.* (1989) 295 NLRB 180, 185, 187-188 [no waiver by inaction for unilaterally adopted practices].) Conflicting evidence was presented as to whether the place restrictions amounted to unequivocal, clearly enunciated, and readily ascertainable practices prohibiting AFSCME leafleting of the public as to both campus locations. And no prior notice evidence was presented as to the UCSF policies. Similarly, then, even if AFSCME has a burden of establishing existing practices allowing leafleting, as opposed to challenging the policies as new or unbargained ones, the evidence is insufficient to warrant dismissal of the complaint on grounds of fixed and established local practices accepted by both parties. (See *Riverside Sheriffs' Assn. v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291-1292.)

employees, there would be risk of labor law principles deciding the free speech issue. (See *Beth Israel Hospital v. NLRB* (1977) 437 U.S. 483, 492-493 [presumptive rules for solicitation activities].)

Despite skirting the extra-jurisdictional issues, both parties proffer arguments based on free speech and/or Moscone Act, injunctive relief principles. AFSCME argues that in order to be "reasonable," the campus rules must be construed so as to allow handbilling (as opposed to picketing) when there is no blockage of ingress and egress. (See *Kansas Color Press, Inc.* (1968) 169 NLRB 279, enfd. (10th Cir. 1968) 402 F.2d 452 [picketing designed to keep employees or customers away from a business as distinguished from handbilling as free speech only]; *Pittsburg, supra*, 166 Cal.App.3d at p. 891, citing *Kaplan's Fruit & Produce Co., Inc. v. Superior Court* (1979) 26 Cal.3d 60 [no preemption of labor picketing required where Moscone Act issues involved]; Code of Civ. Proc., sec. 527.3.)[9] Two of the University's contentions are that (1) the medical centers are non-public fora (citing *San Leandro Teachers Assn. v. Governing Board of San Leandro Unified School Dist., supra*, 46 Cal.4th at p. 844, and (2) even if public fora, the local place restrictions are reasonable regulations (citing *Ward v. Rock Against Racism* (1989) 491 U.S. 792 and *Fashion Valley Mall LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850, 865[10]). (Compare with *Frisby v. Schultz* (1988) 487 U.S. 474, 486 [narrowly tailored, content-neutral ban on public forum picketing serves a significant

[9] The California Supreme Court recently granted review as to (1) whether the parking area and walkway in front of the entrance to a private business which is part of a larger shopping center is a public forum and (2) whether Moscone Act requirements for injunctive relief in labor disputes violate the First Amendment by forcing open otherwise private fora. (*Ralphs Grocery Co. v. United Food etc. Union* (Sep. 29, 2010) 113 Cal.Rptr.3d 88, Case No. S185544).

[10] Although the National Labor Relations Board exercised jurisdiction initially, when the case was appealed to the Court of Appeals, the appellate court requested review of the state law constitutional issue by the California Supreme Court.

governmental interest by protecting private citizens against intrusive expression]; *Schneider v. State* (1939) 308 U.S. 147, 162-163, distinguished in *Frisby*, 487 U.S. at pp. 485-486 [handbilling as a more highly protected form of expression].)

As *Pittsburg* explains, the local concern exception applies if there is a "significant state interest in protecting the citizen from the challenged conduct," and the exercise of state jurisdiction over the matter "entail[s] little risk of interference with the regulatory jurisdiction of the administrative agency." (166 Cal.App.3d at p. 885.) The peaceful handbilling, free speech issue here involves a significant state interest. As to both of the local campus policies the University asserts privacy concerns of patients entering and exiting its hospitals as deserving of the restriction on the right to free speech. Extra-jurisdictional matters constitute the core of the dispute, none of which is fully briefed by the parties. The issues in this case are controlled by a continually evolving area of court-made law. They include: (1) the interplay between the governmental-public-forum and private-property tests, whereby the walkways at issue here might be considered "traditional public" fora (even though not publicly "designated" so) but for the fact that they are contained within the property boundaries of a governmental entity; (2) whether the University's local campus rules constitute narrowly tailored, place regulation or governmental non-public-forum speech prohibition depending on whether the restricted areas are a different forum or only parts of the larger campus forum; and (3) whether there is a more protective state constitutional standard with continuing vitality under the "liberty of speech balancing" or "basic incompatibility" tests as applied to public university medical center walkways. PERB would be ill advised to determine these matters under its

limited authority to address constitutional matters, especially when its rulings might affect parties not before it.[11] (See *Pittsburg*, *supra*, 166 Cal.App.3d at p. 886.)

In the prior litigation, the superior court found that the place restriction did involve a significant state interest, but believed adjudicating that issue would entail risk of interference with PERB's jurisdiction. Because the HEERA rights of AFSCME are implicated to only a small degree and the leafleting issue itself is concerned only with the location of the activity, there is little risk of interference with PERB's regulatory jurisdiction. (See *City of San Jose v. Operating Engineers Local Union No. 3*, *supra*, 49 Cal.4th at p. 608.) I find the local concern exception to the preemption doctrine applies in this case. Therefore, the leafleting unilateral change allegation is dismissed.

Employee Break Rooms

A union is entitled to reasonable access to employees under section 3568. Refusal of such access denies the union its statutory right in violation of section 3571(b) and interferes with the employees' right to participate in union activities in violation of section 3571(a). To state a prima facie case the employer's conduct must cause or tend to cause "at least slight harm" to statutory rights. Once this is shown and so long as the action is not inherently destructive of protected rights, the employer may prevail if it demonstrates its action is justified by operational necessity under a balancing test. (*Carlsbad Unified School District* (1978) PERB Decision No. 89.)

[11] Where access to employees was more directly involved, comity and public-forum issues were avoided without comment in *Regents of the University of California v. Public Employment Relations Bd.* (1986) 177 Cal.App.3d 648, 655-657, because the court denied the union's request to use prominently placed UCLA banner space to deliver its message.

The right of access to facilities is presumptive and restrictions by the employer must be narrowly drawn to avoid overbroad and unnecessary interference. (*Regents of the University of California, Lawrence Livermore National Laboratory* (1982) PERB Decision No. 212-H, pp. 13-15; *Richmond Unified School District/Simi Valley Unified School District, supra*, PERB Decision No. 99, pp. 18-20.) In the health care setting, PERB has recognized the "unique suitability of employee break rooms and eating facilities" for access purposes. (*The Regents of the University of California, University of California at Los Angeles Medical Center* (1983) PERB Decision No. 329-H, p. 16.)

AFSCME contends that access to members was critical during the negotiations impasse and educating employees was necessary to mobilize them for possible job actions. The restrictions imposed interfered with the ability of members to obtain such information and tended to restrain them from participation in union activities due to fears of selective treatment. The University contends that the restrictions were inconsequential, in compliance with local procedures, and Mazariegos and Moore were not denied reasonable access to the break rooms despite their exclusion on two occasions.

There are several issues presented here. Both Mazariegos and Moore were excluded from a break room on the occasion they were interrupted by a supervisor. Despite allowing both representatives access to break rooms upon request thereafter, in the case of Maraziegos, the frequency of access requested was not granted. A conflict also arises because AFSCME was presented with a requirement to obtain prior approval for further meetings, a policy it disputes as applying to break rooms.

The University does not deny that both representatives were excluded on these occasions. The University's reason for excluding the two representatives is their lack of compliance with the MOU procedures, and additionally in Mazariegos' case because a meeting

was taking place that day. I find that the summary manner in which Mazariegos and Moore were ordered to leave their meetings had coercive tendencies toward employee participation. Though the University asserts there was in fact a meeting scheduled the day Mazariegos was excluded, it does not do so on the basis of any affirmative evidence but simply Mazariegos' failure to demand proof of such from the supervisor. Uncorroborated hearsay evidence of an official room use cannot support a finding for the University.[12] The advance-request-and-approval policy was also subsequently applied so as to deny Mazariegos as much access as he required. Therefore the burden shifts to the University to justify its action both as to the exclusions and the time, place and manner rules. (*San Ramon Valley Unified School District* (1982) PERB Decision No. 230; *St. Johns Hospital* (1976) 222 NLRB 1150, 1151, enfd. in part (10th Cir. 1977) 557 F.2d 1368 [impact on patient care of activities in cafeteria and lounges].)

The University begins with a waiver defense. (See *San Mateo County Community College District* (1993) PERB Decision No. 1030 [statutory rights may be limited by contractual provisions when they are controlling].) The MOU's language does not clearly and unmistakably impose a prior-approval requirement for non-employee representatives (let alone employee representatives like Mazariegos), only a notice-upon-arrival obligation for non-employee representatives attending "unscheduled meetings." I do not read the limitation of meetings to "reasonable times" to authorize a prior-approval requirement, as the University suggests, and no bargaining history was presented to that effect. Nor does the MOU waive any statutory access right specifically as to use of break rooms. Thus, I decline to rest the outcome on a waiver by AFSCME. (*San Marcos Unified School District*, *supra*, PERB Decision

[12] The University's citation to Mazariegos' testimony that on the earlier occasion, he left the room after 30 minutes because a meeting took place does confirm that meetings of some sort take place there, but does not prove a meeting actually took place on the day he was removed. It does reveal he is voluntarily willing to cease his organizing efforts in the face of formal group activities in the room.

No. 1508; *San Jacinto Unified School District*, *supra*, PERB Decision No. 1078, adopting administrative law judge's proposed decision at p. 23.)

The University has legitimate interests in matters of security that could justify limitations on the right of access based on operational needs. (*The Regents of the University of California, University of California at Los Angeles Medical Center*, *supra*, PERB Decision No. 329-H.) The University prohibits access activities in certain secure areas such as operating rooms and, where there are competing users of meeting room space, requires advance notice to reserve such rooms. From AFSCME's standpoint, the accommodation necessary to effectuate statutory rights should not unduly infringe on organizational activities.

Apart from the occasional conflict over meeting space for training or other purposes, there is nothing in the record concretely demonstrating that access activities are disruptive to University operations in the break rooms at issue here. (*The Regents of the University of California, University of California at Los Angeles Medical Center*, *supra*, PERB Decision No. 329-H, p. 7; see also *Beth Israel Hospital v. NLRB*, *supra*, 437 U.S. 483; *NLRB v. Los Angeles New Hospital* (9th Cir. 1981) 640 F.2d 1017, 1021.) Although in the case of the Santa Monica Hospital, the supervisor justified his action to Mazariegos (and presumably the schedule that resulted) on the ground of concurrent employee trainings, Gardner did not assert that this room was in fact a meeting room or that other meetings were scheduled on days Mazariegos was denied access. Additionally, Williams did not testify to explain her reasons for limiting access to every-other-day, one-shift visits. (*Beth Israel Hospital v. NLRB*, *supra*, 437 U.S. at p. 502.)

Viewed in this light, the University's justification for AFSCME obtaining human resources office and departmental approval for access to break rooms does not withstand scrutiny. Once the identity of the union representative has been verified, no further limitations

on the right to meet with employees, apart from the normal prohibition against meeting on work time, are demonstrated to be necessary as to the break rooms at issue here. (*The Regents of the University of California, University of California at Los Angeles Medical Center*, *supra*, PERB Decision No. 329-H, p. 10 [University may regulate union representative conduct to ensure corridors are not used for any purpose other than to reach areas to which access is allowed, including lingering there to meet employees].) Due to increasing levels of workplace violence and other threats, security technology (e.g., password or card-swipe protected doorways and security-glass public windows) is more widespread today. Although it may be reasonable for the University to insist on escorts of union representatives to and from break rooms, the advance-request-and-approval requirement was carried further by Williams than Gardner suggests it should have, resulting in Mazariegos not getting access sufficient for the union's purposes. (See *NLRB v. Baptist Hospital, Inc.* (1978) 442 U.S. 773, 784-786.)

Moreover, the University's purported need for discretion in granting approval for access to secured areas for informal soliciting activities is unpersuasive. Despite the University's claim that the human resources office and/or the specific department would never unreasonably deny permission, its need to reserve discretion is left unexplained, except perhaps where break rooms are subject to multiple uses as classrooms or meeting rooms. The University's rule is not narrowly enough drawn to avoid unnecessary interference with AFSCME's right of access. In cases where a break room does become a training room, it ceases to be a non-work area for that period of time. (*San Ramon Valley Unified School District*, *supra*, PERB Decision No. 230, pp. 6, 12 [prior approval practice whereby principal granted access every day he was present, but denied when he was not, unreasonable]; *Long Beach Unified School District* (1980) PERB Decision No. 130, pp. 15-17 [advance notice to employee relations office to obtain identification card discriminatory, likely to lead to delay,

and unreasonable]; *The Regents of the University of California, University of California at Los Angeles Medical Center*, *supra*, PERB Decision No. 329-H, p. 9 [a few representatives passing through corridors in patient care areas does not demonstrate special work circumstances].)

Therefore, the University denied AFSCME its statutory right of access and interfered with employee rights in violation of section 3571(a) and (b).

REMEDY

Pursuant to section 3563.3, PERB has the remedial authority:

> 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.

In this case it has been determined that the University denied AFSCME its right of access by excluding Mazariegos and Moore from their meetings with employees and requiring advance approval to access employee break rooms at the Santa Monica Hospital's laboratory and the Medical Center's central services. The traditional remedy in such cases is to order the University to cease and desist from the unlawful practice. It has been determined that by such conduct the University also interfered with bargaining unit members' right to participate in the activities of an employee organization of their own choosing. The appropriate remedy is to cease and desist from such unlawful conduct.

It is also appropriate that the University be required to post a notice incorporating the terms of this order. The Notice should be signed by an authorized agent of the University indicating that it will comply with the terms thereof. The Notice shall not be reduced in size. Posting of such notice will provide employees with notice that the University has acted in an unlawful manner and is being required to cease and desist from this activity and will comply

with the order. It effectuates the purposes of the 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* (1980) PERB Decision No. 116.)

PROPOSED ORDER

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

A. CEASE AND DESIST FROM:

1. Denying American Federation of State, County and Municipal Employees Local 3299 (AFSCME) its right of access under the HEERA by excluding representatives from employee break rooms at the University of California, Los Angeles Medical Center facilities and requiring advance approval to access such rooms.

2. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. Within ten (10) workdays of service of a final decision in this matter, post at all locations where notices to employees are customarily posted, copies of the Notice attached hereto as an appendix. The Notice must be signed by an authorized agent for the District, indicating that the District 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 by any other material.

2. Within 30 workdays of service of a final decision in this matter, notify the General Counsel of the Public Employment Relations Board (PERB or Board), or his or her designee, in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or his or her designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on AFSCME and the San Francisco Regional Director of the Public Employment Relations Board in accord with the director's instructions.

All other allegations against the District in the complaint are hereby dismissed.

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 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 95811-4124
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, § 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, §§ 32135, subd. (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, § 32135, subd. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 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, §§ 32300, 32305, 32140, and 32135, subd. (c).)