STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA NURSES ASSOCIATION, UNIVERSITY PROFESSIONAL AND TECHNICAL EMPLOYEES, CWA, LOCAL 9119, Charging Parties, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. SF-CE-452-H Interlocutory Appeal PERB Order No. Ad-293-H February 4, 1999

Appearances: Eggleston, Siegel & Lewitter by James E. Eggleston and Noreen A. Farrell, Attorneys, for California Nurses Association, University Professional and Technical Employees, CWA, Local 9119; Hanson, Bridgett, Marcus, Vlahos & Rudy, LLP by Douglas H. Barton and Carole R. Rossi, Attorneys, for The Regents of the University of California.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

AMADOR, Member: This case is before the Public Employment Relations Board (PERB or Board) on an interlocutory appeal filed by the California Nurses Association, University Professional and Technical Employees, CWA, Local 9119 (Charging Parties) and joined by the PERB administrative law judge (ALJ) concerning his February 24, 1998 order (attached) denying Charging Parties' motion to amend the complaint and his May 4, 1998 order (attached) denying Charging Parties' request for reconsideration

and granting their request for certification of the interlocutory appeal.[1]

After a review of the entire record in this case[2], the Board finds the ALJ's February 24, 1998 and May 4, 1998 orders to be proper and affirms them.

DISCUSSION

Essentially, Charging Parties' interlocutory appeal restates the arguments which were presented to the ALJ in the original motion to amend the complaint in this case, and in the request to reconsider the denial of that motion and certify the matter for interlocutory appeal to the Board. The ALJ thoroughly considered those arguments and reached findings and conclusions of law which are free of prejudicial error. The Board finds it unnecessary to offer extensive augmentation of those findings and conclusions, and adopts them as the decision of the Board itself.

Among Charging Parties' arguments is the assertion that Senate Bill 1350 (Chapter 927 of 1997) cannot be relied upon to authorize the lawful creation of the USHC as a private corporation not covered by the Higher Education Employer-Employee Relations Act (HEERA)[3] because the University of California (University) is not authorized to take that action pursuant to

---

[1]The underlying unfair practice charge has been placed in abeyance pending the Board's review of this interlocutory appeal.

[2]Including the brief filed by the UCSF-Stanford Health Care (USHC).

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

Article IX, section 9 of the California Constitution. In effect, Charging Parties ask the Board to conclude that Senate Bill 1350 is constitutionally unenforceable.

PERB is an administrative agency, established in Government Code section 3541, and expressly charged with the authority to administer the HEERA (HEERA sec. 3563). Article III, section 3.5 of the California Constitution states:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

There has been no appellate court determination regarding the issue of the constitutionality of the authority granted the University by Senate Bill 1350 to create USHC as a private corporation. Prior to such a determination, PERB has no power, pursuant to Article III, section 3.5 to make the finding Charging Parties urge it to make. (San Ramon Valley Unified School District (1982) PERB Decision No. 254 at p. 7; The Regents of the University of California (1998) PERB Decision No. 1301-H at

pp. 18-19.) Accordingly, the Board rejects the constitutional arguments offered by Charging Parties.

ORDER

The Board hereby AFFIRMS the ALJ's Order Denying Motion to Amend Complaint and Order Denying Charging Parties' Request for Reconsideration and Granting Charging Parties' Request for Certification of Interlocutory Appeal in Case No. SF-CE-452-H.

Chairman Caffrey and Member Dyer joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA NURSES ASSOCIATION, ET AL, Charging Party, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Unfair Practice Case No. SF-CE-452-H

ORDER DENYING MOTION TO AMEND COMPLAINT

Introduction

The California Nurses Association and the University Technical and Professional Employees, Local 9119, (charging parties) moved to amend the complaint in the above-captioned matter on November 3, 1997. Charging parties contend here that UCSF-Stanford Health Care (USHC) and the University of California (UC), acting in concert, have unilaterally transferred work out of the bargaining units at UCSF Medical Center pursuant to a scheme of purportedly contracting with an independent entity (USHC) to perform the work. In fact, USHC is only nominally separate and the work will be performed at the same locations, by the same personnel, under the same supervision, and subject to terms and conditions jointly determined and unilaterally imposed by UC and USHC.

Charging parties allege therefore in their motion to amend the complaint that UC and USHC constitute a joint employer or a single employer for purposes of labor relations. Charging

parties also allege in their motion that UC and USHC have bypassed the exclusive representatives, dealt directly with employees, and unilaterally imposed terms and conditions of employment on employees. In this regard, charging parties allege that employees have been offered USHC employment under terms negotiated by UC and USHC on condition that they resign form UC, thereby giving up rights and benefits accrued as a result of UC employment, or face job loss.

UC and USHC opposed the motion on December 2, 1997, advancing a number of arguments that will be addressed herein, as necessary. After further briefing by the parties, the motion was submitted for ruling on January 16, 1998.

Summary of Motion

To support the allegations in their motion, charging parties first point to excerpts from two UC Regent meetings. The first concerns a discussion held at a June 20, 1996, meeting of the Committees on Health Services and Finance. The excerpt states:

> NEWCO will be a corporation of equals with the Board of Regents and the Trustee [sic] of Stanford sharing ultimate control. . . . The Regents and Trustees of Stanford University will share ownership and control of NEWCO. . . . [A] Professional Services Agreement would provide that NEWCO would pay for the professional services of faculty and house staff at UCSF. . . . The clinical programs of the new entity are expected to be aligned with all levels of educational programs at each university.[1]

[1] "NEWCO" was the predecessor of USHC.

The second concerns a July 19, 1996, meeting of the Committees on Health Services and Finance. The minutes state:

> The proposed board would have sufficient linkage to the Regents and the Trustees to provide accountability while creating an adequate independence from the parent organizations so that governance is not exclusively vested with The Regents and the Trustees.

In addition, charging parties allege that UC retained influence and control over USHC labor relations by conditioning its authorization of the Consolidation Agreement on USHC acceptance of certain "employment requirements" with regard to affected UC employees. As evidence to support this allegation, charging parties cite two letters from Gayle Cieszkiewicz, associate director of UC labor relations, to James Eggleston, counsel for charging parties.

The first letter, dated June 14, 1996, states:

> Please consider this correspondence the University's formal notice of its willingness to work with the unions exclusively representing employees who will be affected by the formation of the new enterprise to determine those employment requirements the University will make of the new enterprise, as it pertains to the initial employment of individuals currently employed by UCSF.

The second letter, dated June 26, 1996, states:

> The University wants to ensure that UCSF employees, and the Regents, know what employment requirements will be placed on the new enterprise. . . . If we do not hear from you . . . we will determine the initial minimum employment terms the University will require the new entity to offer without the input of the unions you represent.

Another means by which UC determined future employment conditions, charging parties allege, is reflected in the adoption of downsizing projections and plans. Because UC actually formulated the structure of USHC management of UCSF Medical Center, charging parties contend, UC "literally dictated the employment areas targeted for lay-offs under USHC 'cost-cutting' measures." To support this contention, charging parties cite an excerpt from the minutes of a June 20, 1996, meeting of the Committees on Health Services and Finance.

> The planning process has identified certain opportunities for cost savings through consolidation of services, particularly in support areas such as finance, human resources, information systems, and material management. A single administrative structure would result in substantial reductions in executive and management positions.

By June, 1997, the determination of "initial minimum employment terms" was complete, according to charging parties' motion. As described by the minutes of a September 17, 1997, meeting of the Committee on Health services, the Consolidation Agreement provides:

> USHC shall be solely responsible for hiring, supervising, setting terms and conditions of employment, disciplining and terminating all USHC employees subject to terms and conditions imposed by the Regents and Stanford Trustees on USHC.

The agreement also provides that USHC may not change the employment agreement without written consent of the UC Regents.

Charging parties next allege that the Agreement Concerning Employment Commitments, approved by UC, imposes upon USHC

specific terms regarding hiring, salary, seniority, and benefits of UCSF employees who are affected by the consolidation. The agreement also provides that USHC will offer employment to 95 percent of affected UC employees. The offer of employment includes, among other things, base wages equal to wages at UC, recognition of length of service, transfer of vacation and sick leave, and health and dental benefits. The offer of employment and all benefits was conditioned on resignation from UC employment.

According to charging parties, another indication of UC control of employment matters is reflected in a June 19, 1997, Regents report that indicates UCSF, UC Office of the President (UCOP), and USHC worked cooperatively in a variety of workgroups over employment matters. The workgroups addressed, among other topics, leased employee supervision, benefits counselling, notice of comparison of employee benefits, notice to employees who will be offered USHC employment, notice of layoff, etc.

In addition, charging parties contend an attachment to the same report, "Workgroup Assumptions, UCSF/Stanford Healthcare Merger," outlines planned tasks that further strengthen UC's control over terms and conditions of employment offered UCSF employees by USHC. Examples include the need for UCSF to propose specific parameters for leased employees and personnel policy exceptions. The document recognizes that UCOP will have the lead on labor relations negotiations because UCSF employees are included in systemwide bargaining units. It also recognizes that

UCSF is authorized to determine compensation components for employees below the senior management level, and to endorse proposals for negotiating with unionized employees. The need to review and approve proposals related to benefits, retirement, or leasing is reflected in the list of tasks. The last enumerated task is to assess financial liability for human resources decisions made by USHC.

Charging parties assert that the University has "practically dictated" the employees USHC will hire, their terms of employment, and the process by which the transition will occur. In sum, the charging parties allege:

> The University [and] USHC have "successfully harmonized and divided their responsibilities" over the employees who will staff UCSF Medical Center. (citation omitted) Not only has the University determined and/or retained influence and control over the wages and benefits of USHC employees, their seniority status, their leasing eligibility, and vacation accrual, the University has retained the right to maintain certain USHC employees in formal UC employment status, as leased employees. Representing over 25% of the workforce of USHC, these leased employees will have a profound effect on USHC management of its "direct" employees. USHC will provide day-to-day direction of leased employees, along with UC managers who will retain the ultimate right and responsibility to direct and supervise the employees.

Under a separate theory, charging parties allege that UC and USHC have unilaterally imposed working conditions on employees, coerced employees, and dealt directly with employees while bypassing exclusive representatives. Charging parties allege that employees have been offered USHC employment under terms

dictated by UC and USHC on condition that they resign from UC, thereby giving up rights and benefits accrued as a result of UC employment. Charging parties allege that UC and USHC have bypassed the exclusive representatives in this regard and threatened employees with job loss and forfeiture of future benefits if they did not accept conditions offered by UC and USHC.

Joint Employer Allegation

The test to determine joint employer status is as follows: "where two or more employers exert significant control over the same employees -- where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment -- they constitute joint employers." (United Public Employees v. Public Employment Relations Board (1989) 213 Cal.App.3d 1119, 1128 [262 Cal.Rptr. 158] (United Public Employees); citing NLRB v. Browning-Ferris Industries, Inc. (3rd Cir. 1982) 691 F.2d 117, 124 [111 LRRM 2748] (Browning Ferris Industries); Turlock School District (1977) EERB Order No. AD-18, at pp. 16-17 (Turlock).)

Charging parties rely here primarily on United Public Employees. In that case, the court found the City of San Francisco and the San Francisco Community College District constituted a joint employer. The court found that the applicable statutory schemes could be harmonized to support the conclusion that the City and the District were joint employers. The court also found that the District, while using the City's

civil service system, hired and fired employees, disciplined them, determined their duties, set salaries and administered benefits.

In this case, the statutory schemes cannot be harmonized. On October 12, 1997, Senate Bill 1350 was enacted into law, adding Chapter 6, commencing with section 101860, to Part 4 of Division 101 of the Health and Safety Code, relating to health care. Legislative history shows that SB 1350, although written in general terms, was enacted in response to the merger between UCSF and Stanford University Health Care. Among other things, it addresses open meeting and record disclosure requirements as they relate to USHC.

Section 101860, provides that if any state agency, including a constitutional corporation, transfers to a "private corporation" assets for the operation of a hospital by that corporation and the value of the assets is not less than fifty million dollars, the corporation shall be subject to the provisions of this chapter. Further, section 101880 expressly exempts USHC from coverage by the Government Code. It provides that "a corporation subject to this chapter shall continue to be private, notwithstanding this chapter, and in any event, shall not be subject to the provisions of the Government Code or the Education Code made applicable to any public agency, or any public or constitutional corporation, generally, or collectively."

Thus, USHC is considered a private entity under SB 1350 and expressly excluded from coverage under Government Code provisions, including HEERA. Plainly, the statutory schemes that govern UC and USHC cannot be harmonized.

In addition, charging parties' factual allegations do not establish a prima facie case that UC and USHC constitute a joint employer. Charging parties' factual allegations establish only that UC was involved in effectuating the transition of operations to USHC. It is not readily apparent from the documents attached to the motion to amend and those relied on by UC and USHC that UC retains the kind of significant control required to show joint employer status.

For example, charging parties allege that UC retained influence and control over labor relations of USHC by conditioning its acceptance of the Consolidation Agreement on USHC acceptance of UC employment requirements with regard to affected employees. However, letters from Cieszkiewicz to Eggleston refer only to establishment of "initial" terms and conditions of employment. And the Agreement Concerning Employment Commitments appears to provide only for minimum terms in the initial offers of employment:

> [I]n order to minimize the effects of the Transfer upon employees at UC and Stanford, UC and Stanford have agreed that one condition to the Transfer shall be USHC's agreement to offer employment to at least 95% of all employees affected by the Transfer at UCSF and Stanford ("Affected Employees"), and to include in said offers certain minimum terms and conditions.

It is true, as charging parties allege, that the minimum terms and conditions of employment set by this agreement may not be changed without UC concurrence. But that does not detract from the fact that the conditions therein appear to have been established as a minimum starting point for employment at USHC to accomplish the transition.

In this connection, the final Consolidation Agreement between UC, UCSF, Stanford, and Stanford Health Services, section 4.4, provides that

> 4.4 Personnel of USHC. The Parties agree that, although USHC is obligated to comply with the terms of the Agreement Regarding Employment Conditions, USHC shall nonetheless be solely responsible for directing, supervising and setting the terms and conditions of employment of all USHC employees, including, without limitation, all job classifications, compensation, all vacation pay, sick leave, retirement benefits, social security contributions, health, life or disability insurance, and any other employee benefits.

Based on the foregoing, it does not appear that UC has retained significant control over terms and conditions of employment.

With respect to employees leased by UC to USHC, the Agreement for Services provides:

> UC shall have ultimate responsibility for the direction and supervision of all leased UC employees. A UC manager shall be identified for each leased UC employee, and shall have full authority to direct and counsel that employee. USHC shall have the right to provide direction subject to UC's ultimate responsibility as identified in herein.

Among other things, the Agreement for Services also provides that UC will continue to be the employer of the leased employees

as long as they provide services to USHC. UC will be responsible for administrative employment matters such as payment of compensation and benefits, withholding taxes, etc. If services are no longer required by USHC, UC policies will apply in the event of a layoff. Significantly, the agreement also states: "Nothing in this agreement is intended, and nothing herein shall be construed, to create an employer/employee relationship between the leased UC employees and USHC." Therefore, the arrangement regarding leased employees does not suggest the kind of control needed to show joint employer status.

As further evidence of joint employer status, charging parties allege that UC dictated the employment areas targeted for layoffs. To support this allegation, charging parties cite an excerpt from the minutes of a June 20, 1996, meeting of the Health Services Committee and the Finance Committee indicating that cost savings may be achieved through consolidation of services, and a single administrative structure would result in substantial reductions in executive and management positions.

However, this excerpt was made during an informal question and answer session to review concerns expressed by members of the public, UC Regents, and students before a final decision on the merger was reached. Significantly, the excerpt relied on by charging parties also states that the exact number of positions available will not be identified "until NEWCO defines its staffing plan."

Further, UC points out that an item for discussion at a September 10, 1997, meeting of the Committee on Health Services indicates that USHC informed UC that "its [USHC's] employment needs are such that it anticipates being able to make offers of employment to all but 28 employees employed by UCSF and [Stanford], 10 of whom are anticipated to be from UCSF. These employees could be laid off if they are not otherwise placed."

Thus, it does not appear that UC has retained significant control over the staffing plan. Rather, it appears that USHC took the lead in determining initial employment needs and the staffing plan.

Nor is the composition of USHC's Board of Directors or UC's membership in USHC indicative of the control necessary to establish a prima facie case of joint employer status. After establishment of the initial Board of Directors, the Bylaws provide that subsequent boards shall consist of seventeen members, only six of which are of UC origin.

Based on the foregoing, it is concluded that charging parties have not stated a prima facie case under the test adopted in United Public Employees.

In addition, applicable case law argues against granting the motion to amend on a joint employer theory. As a private nonprofit corporation, USHC falls under the jurisdiction of the National Labor Relations Act (NLRA), even though some interrelationship with UC may exist. (Management Training Corporation (1995) 317 NLRB 1355, 1358, fn. 16 [149 LRRM 1313].)

As the NLRB stated, "we will not employ a joint employer analysis to determine jurisdiction. Whether the private employer and the exempt entity are joint employers is irrelevant. The fact that we have no jurisdiction over governmental entities and thus cannot compel them to sit at the bargaining table does not destroy the ability of private employers to engage in effective bargaining over terms of employment within their control." Management Training Corp. at p. 1358. fn. 16.) In reaching this conclusion, the NLRB overruled prior cases holding that it would not effectuate the policies of the NLRA to assert jurisdiction over a private employer because the state is a joint employer. (Id.) Thus, USHC is subject to NLRB jurisdiction.

Also relevant here is PERB case law holding that PERB will not exercise jurisdiction over entities that do not fall within the definition of employer under HEERA. Because USHC is a private entity that does not fall within the definition of employer under HEERA section 3562(h), PERB may not exercise jurisdiction over USHC or its employees.[2] (Fresno Unified School District (1979) PERB Decision No. 82, at p. 5 Fresno); See also San Diego Community College District (1988) PERB Decision No. 662, at p. 13, adopting proposed decision of administrative law

---

[2]Section 3562(h) defines a higher education employer as

> the regents in the case of the University of California, the Directors in the case of the Hastings College of the Law, and the trustees in the case of the California State University, including any person acting as an agent of an employer.

judge at 10 PERC Para. 17087, p. 363, rev. on other grounds San Diego Adult Educators v. Public Employment Relations Board (1990) 223 Cal.App.3d 1124, 1133 [273 Cal.Rptr. 53] (San Diego) (private foundation that contracts with community college district is beyond PERB jurisdiction).)

As noted above, charging parties have not shown that UC has retained significant control over the employees of USHC. Under these circumstances, amending the complaint to include an allegation that UC and USHC are joint employers would impermissibly extend PERB jurisdiction to matters involving the regulation of labor relations of USHC and its employees, in violation of the PERB cases cited above and established federal preemption principles. (See e.g., Bethlehem Steel Co. v. New York State labor Relations Board (1947) 330 U.S. 767, 775-776 [19 LRRM 2499] (Bethlehem Steel); Weber v. Anheuser-Busch, Inc. (1955) 348 U.S. 468, 481 [35 LRRM 2637]; San Diego Building Trades Council v. Garmon (1959) 359 U.S. 236, 245 [43 LRRM 2838] (San Diego Building Trades Council); Building and Construction Trades Council v. Associated Builders and Contractors of Massachusetts/Rhode Island (1993) 507 U.S. 218 [142 LRRM 2649] (Building Trades).)

Single Employer Allegation

A single employer relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that there is in fact only a single employer. The question in single employer cases is whether the two nominally

independent enterprises, in reality, constitute only one integrated enterprise. In answering questions of this type, courts look to four factors: (1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. (Browning-Ferris Industries at p. 1122; Turlock at p. 1516.)

No single factor is controlling and all need not be present. (NLRB v. O'Neill (9th Cir. 1992) 965 F.2d 1522, 1529 [140 LRRM 2557].) However, while common ownership is the least critical factor, centralized control of labor relations is highly significant. (See Turlock at p. 17; Fresno at p. 5.)

To the extent that charging parties' motion alleges that UC and USHC constitute a single employer, it is denied. For the reasons discussed above in connection with charging parties' joint employer theory, the factual allegations offered in support of the motion to amend the complaint do not state a prima facie case that UC and USHC constitute a single integrated enterprise so that there is in fact only a single employer.

In any event, a finding that UC and USHC constitute a single employer would preclude PERB from exercising jurisdiction, for USHC does not fall within the definition of employer in HEERA section 3562(h). (See Fresno at p. 7; San Diego.) Moreover, the regulation of labor relations of USHC and its employees is a matter within the exclusive jurisdiction of the NLRB. (See Bethlehem Steel Co.; San Diego Building Trades Council; Building Trades.)

Unilateral Imposition, Coercion and Direct Dealing Allegations

Charging parties contend that UC and USHC unilaterally imposed terms and conditions of employment on employees, coerced employees, and bypassed the exclusive representatives in dealing with employees. In its reply to the UC and USHC arguments opposing the motion to amend the complaint, charging parties expressly argue that the Board has jurisdiction in the first instance with respect to whether the relationship between a public employer and an otherwise private employer is such as to bring the private employer within the jurisdiction of PERB.

As a private employer, USHC is subject to the jurisdiction of the NLRB, (Management Training Corp), and exercise of PERB jurisdiction over the regulation of conduct arguably protected or prohibited by the NLRA as it relates to USHC and its employees would violate well established principles of federal preemption. (See e.g., San Diego Building Trades Council; Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc. (1986) 475 U.S. 282 [121 LRRM 2737].) Moreover, because USHC does not fall within the definition of employer under HEERA section 3562(h), PERB decisions hold that this agency may not exercise jurisdiction over the activities of USHC. (See Fresno; San Diego.) Therefore, to the extent that charging parties' motion claims that USHC has violated HEERA by coercing employees or dealing directly with employees, it is denied.

To the extent that charging parties allege UC bypassed the exclusive representatives, dealt directly with bargaining unit

employees, or coerced employees, I find that allegation is encompassed by the original complaint.

Conclusion

Based on the foregoing and PERB Regulation section 32648, charging parties' motion to amend the complaint is denied.

Date: February 24, 1998.

Fred D'Orazio
Administrative Law Judge

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA NURSES ASSOCIATION, ET AL, Charging Party, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA Respondent.	)	Unfair Practice Case No. SF-CE-452-H

ORDER DENYING CHARGING PARTIES' REQUEST FOR RECONSIDERATION AND GRANTING CHARGING PARTIES' REQUEST FOR CERTIFICATION OF INTERLOCUTORY APPEAL

Request For Reconsideration

The request for reconsideration of the February 24, 1998, Order Denying Motion to Amend Complaint (Order) is based on three arguments summarized by charging party as follows. First, charging parties assert, the Order erroneously assumes that Senate Bill 1350 (SB 1350) authorized the creation of UCSF-Stanford Health Care (USHC) as a private corporation exempt from coverage by HEERA and thus beyond PERB jurisdiction. Second, because of this error, the Order fails to evaluate whether USHC can properly be considered "private" for purposes of exemption from the Higher Education Employer-Employee Relations Act (HEERA) and jurisdiction of the Public Employment Relations Board (PERB or Board) consistent with constitutional obligations of the Regents of the University of California (UC or University) to protect the public trust of University Medical Center operations and limit delegation of authority over essential University

functions. In this respect, the Order fails to consider USHC's role as an "agent" of the University within the meaning of Government Code section 3562(h). Third, there is new evidence of ongoing USHC authority and control over "leased" employees that extends beyond the "transition period." (Request for Reconsideration, pp. 1-2)

As the University and USHC point out in their opposition to the Request for Reconsideration, arguments raised by charging parties in large part have already been addressed in the February 24, 1998, Order. Conclusions reached in the Order need not be repeated here. However, a few brief comments are warranted.

Based on SB 1350 and its legislative history, the Order concludes that USHC is a private entity not covered by HEERA. Charging parties argue, however, that it cannot be assumed USHC was lawfully created as a private corporation simply by reference to the language of SB 1350 and its legislative history. According to charging parties, the determination of whether USHC is a private corporation must be made independently of SB 1350 after considering whether the University acted within its constitutional authority in creating USHC in the first place. Charging parties contend further that the University exceeded its authority because nothing short of a constitutional amendment can support the creation and delegation of authority to USHC. Thus, SB 1350 cannot be relied upon for the conclusion that USHC is a private entity.

The crux of charging parties' argument is that PERB should ignore SB 1350 on the ground that any construction of that statute that recognizes USHC as a private entity is unconstitutional. However, PERB has no authority to declare a statute unenforceable on constitutional grounds. (California Constitution, Article III, Section 3.5; San Ramon Valley Unified School District (1982) PERB Decision No. 254, p. 7.) Moreover, whether the University acted within constitutional bounds in the formation of USHC is the subject of litigation in another forum.[1]

Charging parties also argue for reconsideration based on new evidence in the form of recently issued "Guidelines for UCSF Employees Leased to UCSF Stanford" (Guidelines). Under these Guidelines, according to charging parties, USHC managers exercise control over the supervision of all UCSF leased employees.

For example, employees are subject to daily direction of USHC managers. Employees must follow work rules -- including scheduling, leaves, etc. -- in the unit or department in which they work. USHC managers play a significant role in evaluating the performance of leased employees. Disciplinary action is taken in coordination with the employee's USHC manager. USHC provides payroll services for leased employees. Leased employees must notify USHC when seeking treatment for work-related injury or illness. USHC provides malpractice and general liability

---

[1]See University Response to Request for Reconsideration, p. 3, fn.1.

coverage and UC charges USHC for the cost of workers' compensation coverage.

However, while these factors point to an interrelationship between USHC and UC, they do not override the terms of the lease agreement (Agreement for Services) that governs the relationship. As noted in the Order, the Agreement for Services provides that

> UC shall have ultimate responsibility for the direction and supervision of all leased UC employees. A UC manager shall be identified for each leased UC employee, and shall have full authority to direct and counsel that employee. USHC shall have the right to provide direction subject to UC's ultimate responsibility as identified herein.

The Agreement for Services contains many additional references to areas where UC retains responsibility over lease employees. While these need not be enumerated here, a few are worth mentioning. Section 9 provides that "UC is and will continue to be the employer of the leased UC employees" and "nothing contained in this agreement is intended, and nothing herein shall be construed, to create an employer/employee relationship between the leased UC employees and USHC." And section 12 provides that "nothing herein shall in any way reduce or detract from the obligation of any leased UC employee to comply with UC policies."

In addition, the Guidelines inform employees as follows:

> As a leased employee, you continue to be covered by the UC collective bargaining agreement and/or personnel policy which applies to your UC job classification. These [Guidelines] do not supersede or replace any existing University of California collective bargaining agreements or personnel policies.

Therefore, it is concluded that the new evidence offered by charging parties adds little to the existing record. Charging parties' request for reconsideration is denied.

Request for Certification of Interlocutory Appeal

Charging parties also request that the February 24, 1998, Order and this denial of reconsideration be certified for interlocutory appeal on an augmented record which includes arguments and materials submitted with the Request for Reconsideration.

PERB regulations provide that a party may object to an administrative law judges's (ALJ) interlocutory order or ruling on a motion and request a ruling by the Board itself. The Board will not accept the request unless the ALJ joins in the request. The ALJ may do so only where all of the following apply: (1) the issue involved is one of law; (2) the issue is controlling in the case; and (3) an immediate appeal will materially advance the resolution of the case. (Cal. Code Regs., tit. 8, sec. 32200.)

The issues for certification are as follows: (1) whether charging parties have stated a prima facie case that USHC and UC are joint employers? and (2) Assuming joint employer status is established, may PERB exercise jurisdiction over USHC or its employees? All of the section 32200 criteria are met with respect to these issues.

First, whether a prima facie case exists is a legal determination made after considering charging parties factual allegations in light of the existing record. Also, whether USHC

and UC may legally constitute a joint employer under the circumstances presented here involves a question of law related to PERB jurisdiction. This involves application of PERB decisions addressing the issue of joint employer status, National Labor Relations Board (NLRB) decisions addressing NLRB jurisdiction, federal preemption principles, the interpretation of SB 1350, and the definition of higher education employer under HEERA, section 3562(h). Second, the issues certified for appeal control the ultimate disposition of charging parties' motion to amend the complaint. Third, an immediate appeal will materially advance the ultimate resolution of the case. The underlying unfair practice complaint concerns allegations that UC has refused to negotiate about the decision and/or the effects of the decision to enter into the merger with Stanford and refused to provide information. If the February 24, 1998, Order is affirmed, the hearing will address only the decision/effects bargaining allegations and the refusal to provide information allegations contained in the original complaint. It will be unnecessary to engage in litigation about the UC-USHC relationship and joint employer status. However, if charging parties prevail in their appeal of the Order, the complaint will be amended and the hearing expanded to include issues related to joint employer status.

Therefore, I hereby certify for interlocutory appeal the February 24, 1998, Order denying the motion to amend the complaint and this denial of charging parties' request for

reconsideration of the Order, including the augmented record which includes arguments and materials submitted with the Request for Reconsideration.

This certification does not include that part of the Order concerning allegations that USHC and UC have violated HEERA by unilaterally imposing terms and conditions of employment on employees, coercing employees, and bypassing the exclusive representatives in dealing with employees. (Order at pp. 16-17.)

This interlocutory appeal and responses thereto must be filed in accordance with PERB regulations 32350-32380. Future correspondence regarding this interlocutory appeal should be directed to the Public Employment Relations Board, 1031 18th Street, Sacramento, CA. 95814-4174.[2]

Dated: May 4, 1998

Fred D'Orazio
Administrative Law Judge

[2]Unfair Practice Case No. SF-CE-452-H will be held in abeyance until further notice.