STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DONALD E. KEMPLAND, Charging Party, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA (U.C. SAN DIEGO), Respondent.	)	Case No. LA-CE-13-H PERB Decision No, 299-H March 30, 1983

Appearances; Robert J. Bezemek, Attorney (Bennett & Bezemek) for Donald E. Kempland; Susan M. Thomas, Attorney for the Regents of the University of California.

Before Gluck, Chairperson; Morgenstern and Burt, Members.

DECISION

BURT, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Donald E. Kempland (Kempland or Charging Party) to the hearing officer's proposed decision, and a response to those exceptions filed by the Regents of the University of California (University or Respondent). In that proposed decision, the hearing officer found that Charging Party was unlawfully denied union representation at a September 6, 1979 meeting in violation of subsection 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA or Act).[1] The hearing

[1]The Higher Education Employer-Employee Relations Act

officer concluded that, although there was satisfactory evidence to support the inference that Kempland's request for union representation on September 6, 1979 was a partial motivating factor in the University's decision to discharge Kempland, his discharge would have occurred in the absence of his request for union representation. The Charging Party filed numerous exceptions alleging factual and legal inadequacies in the hearing officer's proposed decision. We have given careful consideration to Charging Party's exceptions and find the hearing officer's statement of facts to be free of prejudicial error,[2] and we adopt that portion of his decision, which is incorporated by reference herein, as part of the decision of the Board.

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is codified at Government Code section 3560 et seq. All references are to the Government Code unless otherwise specified.

Subsection 3571(a) provides:

> It shall be unlawful for the higher education employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

2charging Party excepts to certain credibility resolutions made by the hearing officer. A careful review of the record demonstrates that the credibility resolutions made by the hearing officer are supported by the record as a whole, Santa Clara Unified School District (9/26/79) PERB Decision No. 104.

The Board has carefully reviewed the record in light of Charging Party's exceptions and Respondent's responses thereto, and affirms the hearing officer's findings of fact and conclusions of law as modified herein.

FACTUAL SUMMARY

Kempland was a University employee for eight years. He was an active member in American Federation of State, County and Municipal Employees (AFSCME or Union), involved in Union activities since 1973, and became AFSCME vice-president in May 1979. In his capacity as a Union representative during that entire period, he represented grievants in formal grievances and informal resolutions, counseled employees, met with the campus personnel office and department heads and filed grievances and administrative appeals on his own behalf. The evidence demonstrated that Respondent was aware of Kempland's Union activity.

While it is clear from the record that Union representational activities and pursuit of grievances took Kempland away from his work site on occasion, it is equally clear that Kempland spent a considerable amount of time away from his work site, without advance notice or prior authorization, on nonwork-related activities, and frequently responded with hostility if he were asked to account for his whereabouts or activities. Kempland's supervisor,

Robert Barker, also complained of Kempland's delaying the performance of his assigned tasks.

Kempland was orally warned as early as 1978 during his performance evaluation of the problem of his leaving the work site without notice or authorization. In 1978, Barker began to go to his supervisor, Management Services Officer Angela Pluth, to complain that he was having difficulty supervising Kempland and that Kempland was spending too much time away from the job on nonwork-related activities. It is uncontradicted that during Kempland's 1978 performance evaluation Barker warned him orally about his spending too much time away from the job. Angela Pluth testified that other employees also complained to her that Kempland interrupted their work with conversations or by reading the policy manual for long periods of time and making comments that disturbed them.

Barker continued to have problems with Kempland, and in January 1979, Pluth instructed Barker to make notes on Kempland's behavior, suggesting that some form of documentation was necessary to support such a general complaint. Sanford Schane, the head of the linguistics department, also told Barker to document Kempland, though the record is unclear as to when Schane so instructed Barker. Pluth also suggested that Barker maintain priority lists of laboratory projects so that Kempland would have clearly defined tasks with specific

deadlines.[3] Finally Pluth enrolled Barker in a supervisory training course and advised Barker to speak to Kempland about curtailing nonjob-related conversations.

Barker's notes cover the period of January through August 22, 1979. These notes purport to document Kempland's time spent away from his job duties and other problems. Barker testified that he did not show Kempland these notes nor did he counsel Kempland regarding these recorded incidents.

Linguistic Department Chairman Dr. Sanford Schane sent Kempland a memo in May 1979 acknowledging Kempland's right to be involved in his representational activities and allowing for a reasonable amount of time to do so, provided Kempland obtained prior authorization like everyone else.[4] In the memo, Kempland was specifically admonished not to leave the

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[3]The last priority list was compiled in June 1979 and Barker testified that, although the items could have been completed within approximately two weeks, half of the items were not done as of the date of Kempland's termination in October.

[4]RX-18 represents the "regulations governing the use of university facilities and access to university employee organizations and their representatives." Section I(D) prohibits employee organizations and their representatives from using University facilities and equipment, such as automobiles, computers, projectors, telephones, office supplies, photocopying, reproduction equipment, and typewriters. Section II(A) reasonably permits employee organizations and their representatives to conduct employee organization business in nonwork areas during the employee's nonwork time. Section II(E) prohibits employees from participating in and conducting employee organizational business during their work time.

department without approval.[5] In June 1979, the linguistic department's technical staff was reorganized and Kempland's full-time recording technician position was replaced with a half-time electronics position effective July 1. Kempland accepted "involuntarily" this half-time position. On June 29, 1979, Kempland was suspended for insubordination.[6] His suspension letter of July 2, 1979 warned Kempland that he would be subject to dismissal if his resistance and uncooperative behavior continued. Schane sent Kempland three additional memos in July, reiterating Kempland's right to take administrative leave with pay to engage in his representational activities with prior authorization. Yet, Barker testified that Kempland's unacceptable behavior continued.

On September 6, 1979, Kempland was called to a meeting with Schane. In that meeting, Kempland was handed a special performance evaluation and a letter of warning which stated in relevant part:

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[5]AFSCME Representative Kathy Esty testified at the hearing that, in her capacity as a union representative, she always requests permission from her supervisor to leave the work area to perform Union representational activities.

[6]Charging Party's argument that Kempland's June 29, 1979 suspension occurred after the effective date of HEERA on July 1, 1979 is unpersuasive. We therefore affirm the hearing officer's conclusion that PERB does not have jurisdiction over the alleged June 29, 1979 unfair practice because the suspension took place prior to the effective date of HEERA. Pasadena Unified School District (5/12/77) EERB Decision No. 16; U.S. Postal Service (1972) 200 NLRB 413 [81 LRRM 1533],

Since your last performance evaluation, your work performance has become unsatisfactory.

The work which you have been hired to do is simply not being done to your supervisor's and my satisfaction. On repeated occasions you have spent the major part of your work day in activities not directly related to your job, such as frequently leaving your work area for periods of time, engaging in the writing of memoranda and the reading of PPM manuals, interfering with other people's ability to work by engaging in unnecessary discussion and similar disruptive activities, being insubordinate to your supervisor, and using University equipment, in particular the telephone and office space, for personal and AFSCME business.

In accordance with the letter I sent you on July 17, 1979 I said I would grant you reasonable periods of time to pursue the grievances that you have been filing. As Department Chairman I have the right to decide what is reasonable based upon the operational needs of this department. The amount of time away from your work area has been excessive, and especially now that you are a half-time employee. If you wish to leave your work during office hours, your supervisor, Robert Barker, the Management Services Officer, Angela Pluth and/or I have the right to ask you where you are going, whom you intend to see, and the purpose of your leaving. We need not approve your request. Your failure to provide an answer or claiming that it is not the department's business is insubordinate behavior. You were also explicitly told that absences had to be made up as decided by your supervisor. You have attempted to make up these absences at your own convenience. This procedure is not acceptable to me nor is it in accordance with University policy. You must arrange with your supervisor for all make-up times at the department's convenience.

I have no intention to interfere with an employee's utilization of the grievance procedure in a manner consistent with

> University policy and procedure and this department's operational needs. For that reason, I outlined in my letter of July 17 the procedure for dealing with your requests that would be acceptable. In accordance with University policy, employees are entitled to a reasonable amount of time off in the resolution of grievances. You have abused this right, not only in terms of excessive time spent away from your job and your manner in making up absences, but also in on-job time spent in such activities as reading PPM's and writing and typing of grievances and memoranda. These activities can and should be carried out on your own time and utilizing your own facilities . . . .
>
> You have been hired by this department to perform a particular service as an Electronics Technician. Your work since your last performance evaluation has been highly unsatisfactory. In addition, your numerous activities have impaired other employees' ability to work. I have reached the point that I will no longer tolerate such behavior. If you again engage in any of the conduct described in this letter and if your performance does not immediately improve, you will be dismissed.

In writing the evaluation, Schane relied upon Barker's report to him. Schane testified that the letter of warning was based to a significant extent upon the information received from Barker. Other than Schane's own knowledge, he relied upon documentation from Barker and Language Librarian Linda Murphy regarding Kempland's comings and goings.

Kempland requested and was denied Union representation at this meeting.[7]

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[7]NO party excepts to the hearing officer's conclusion

On September 20, 1979, AFSCME Representative Patsy Healy sent a letter to Schane requesting to meet and discuss the disciplinary documents of September 6, 1979. Schane answered that letter on September 24, 1979 stating that he had already met with Kempland on that matter on September 6, and therefore could see no useful purpose to be served by this requested meeting. Schane testified at the hearing that he denied the request because Kempland's written comment on the evaluation had led him to expect a formal grievance to be filed, with ample opportunity for discussion in subsequent proceedings. Healy testified that her letter of September 20 was intended to be the first step in the grievance process.

Kempland was absent from work for three days following Healy's letter to Schane. On Friday, September 21, 1979, Kempland called the department at approximately 12:00 noon and reported to a student worker in the lab that he had a medical appointment. The student worker passed the message on to Linda Murphy, who then reported the absence to Pluth.

On Monday, September 24, Kempland again did not report for work. This was the first day of the fall quarter, usually a

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that the University violated section 3571(a) of the Act by denying Kempland's request for Union representation on September 6, 1979. Accordingly, we adopt that conclusion as that of the Board. We note, however, that we rely upon Robinson v. State Personnel Board (1979) 97 Cal.App.3d 994 [159 Cal.Rptr. 222] as the applicable precedent.

very busy day for the department. Kempland's alleged reporting of this absence will be discussed, infra.

Kempland was absent a third time on Tuesday, September 25. This time he phoned the department at 8:30 in the morning and reported to Murphy that he was having car trouble. He placed a second call around noon when he discovered that the trouble was serious. At 2:30 p.m., Kempland advised Murphy that things were looking better and he might come in. He did not report to work at all that day. Murphy kept Pluth and Schane informed of Kempland's calls at various times during the day. That same day Schane sent a telegram to Kempland's home asking him to report for work the following day.

Kempland did come in on September 26 and was summoned to a meeting with Schane, Pluth and Barker. Prior to the meeting, Schane had consulted with Cynthia Starkovsky, manager of labor/employee relations for the University since August 1979, and had been advised by Starkovsky that Schane could inform Kempland of the University's intention to dismiss him and could request that Kempland not appear for work in the interim. When Kempland arrived, Schane asked him to explain his three days of absence. Kempland answered that on Friday he had been ill and had a medical appointment, and that he had called in and spoken to a student worker. No one asked Kempland for a doctor's verification. He argued that his illness had continued through Monday and that another call for the same illness was

unnecessary. Pluth disagreed and testified that employees were required to call in each day they are sick. Kempland responded that he had reported in only once per illness for years. Kempland then discussed his car trouble on Tuesday and pointed out that he had called in three times. He mentioned the difficulties of alternative means of transportation in response to a question by Schane. Schane then told Kempland that he considered the absences to be unexcused and that he planned to issue a notice of intention to dismiss. He asked Kempland to give up his keys to the lab and to refrain from coming to work in the meantime. Kempland testified that Schane told him he was fired. Schane denies that he made this remark. He then left the meeting and went home where he found the telegram Schane had sent the previous day.

After the meeting, Schane drafted a notice of intention to dismiss and sent it to Kempland's home by registered mail. The notice listed the evaluation and letter of warning of September 6 and the three unexcused absences as the bases of Schane's decision. It also stated that Kempland had the right to respond orally or in writing within five days of his receipt of the notice.

Kempland and AFSCME Representative Patsy Healy met with Schane, Pluth and Starkovsky on October 2, 1979 to discuss the notice of intent to dismiss. It was during this meeting that Kempland claimed for the first time that his wife had phoned

the department on September 24 to report that Kempland was ill. Schane investigated Kempland's representation to ascertain whether or not it was true and testified at the hearing that he checked with and questioned everybody on the second floor area that could conceivably have taken the phone message and ascertained that there had been no call. At the hearing, Kempland testified that his wife called in to report his September 24 illness. Mrs. Kempland also testified that she called and spoke with Murphy. Murphy, however, testified that she did not receive a phone call from Mrs. Kempland and that she questioned her staff and was informed that no one had received a call from Mrs. Kempland.[8] Schane sent Kempland a notice of dismissal on October 3, 1979.

DISCUSSION

The hearing officer based his legal conclusions upon his application of Carlsbad Unified School District (1/30/79) PERB Decision No. 89. Since the issuance of the proposed decision in the instant case, this Board has adopted the Novato test in analyzing discriminatory discharge cases brought under HEERA subsection 3571(a). California State University, Sacramento (4/30/82) PERB Decision No. 211-H.

[8]The hearing officer credited the testimony of Linda Murphy over the testimony of Mrs. Kempland. We find this credibility resolution to be supported by the record as a whole. See footnote 2, supra.

Subsection 3571(a) expressly prohibits a higher education employer from imposing reprisals against employees because of their exercise of rights guaranteed to them by the HEERA. In Novato Unified School District (4/30/82) PERB Decision No. 210, the Board held that a party alleging such a violation has the burden of making a showing sufficient to demonstrate that protected conduct was a "motivating factor" in the employer's decision to engage in the conduct of which the employee complains. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct.

Kempland's Protected Activity

Kempland indisputably was a Union activist, involved in Union activities since 1973 and becoming AFSCME vice president in May 1979. In his capacity as a Union representative during that time period, he represented grievants in formal grievances and informal resolutions, he counseled employees, he met with the campus personnel office and department heads and he obtained signatures on a representation petition. These types of union representational activities are clearly protected under HEERA. Kempland also filed grievances and administrative appeals on his own behalf relating to his layoff and rehire, his suspension, his rights under the Public Records Act, and release time. Kempland also exercised protected rights when he requested Union representation at the meeting of September 6,

1979. This Board in Carlsbad recognized that direct proof of motivation is rarely possible and concluded that unlawful motive can be established and inferred from the record as a whole. Carlsbad, supra, at p. 11; Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620]; Radio Officer's Onion v. NLRB (1954) 347 U.S. 17 [33 LRRM 2417]. We find both the timing of Kempland's discharge in relation to his participation in protected activity as well as the University's documentation of Kempland's activities coupled with Barker's failure to show Kempland the notes or counsel Kempland regarding the recorded incidents to be circumstantial evidence of unlawful motive. The Charging Party has thus met its burden to present sufficient evidence to raise the inference that Kempland's protected activity, specifically his exercise of his Union representational activities and his request for Union representation at the September 6, 1979 meeting, a motivating factor in the University's decision to discharge Kempland. The burden now shifts to the University to demonstrate that it would have taken the same action even in the absence of the protected conduct.

Kempland would have been fired even in the absence of his protected conduct.

While it is clear from the record that Union representational activities pursuant to grievances took Kempland away from his work site on occasion, it is equally

clear that Kempland spent a considerable amount of time away from his work site without advance notice or prior authorization on nonwork-related activities, some of which were Union activities, and responded with hostility whenever he was asked to account for his whereabouts or activities. Kempland's supervisor, Barker, also complained of Kempland's delaying the performance of his assigned tasks. While the record indicates a less than favorable relationship between Barker and Kempland, Kempland's "insubordination" appeared to be the source of the problem.

Kempland was warned orally as early as 1978 during his performance evaluation of the problem of his leaving the work site without notice or authorization. The testimony of Respondent's witnesses and record evidence indicated that the linguistic department complained of Kempland's frequent disappearances and engagement in nonwork activities, not about his right to engage in authorized Union representational activities. Schane sent Kempland a memo as early as May 1979 acknowledging Kempland's right to be involved in his representational activities and allowing for a reasonable amount of time to do so. However, Kempland was expected to obtain prior authorization like everyone else and was specifically admonished not to leave the department without approval. Kempland's July 2, 1979 suspension for insubordination warned him that he would be subject to

dismissal if his resistance and uncooperative behavior continued. Schane sent Kempland three additional memos in July, reiterating Kempland's right to take administrative leave with pay to engage in his representational activities with prior authorization, yet Barker testified that Kempland's unacceptable behavior continued.

On September 6, 1979, Kempland received his letter of warning and special performance evaluation, which again admonished Kempland for his insubordinate behavior and refusal to obtain prior approval for administrative leave in accordance with University policy and procedures. This letter warned of dismissal if Kempland's performance did not immediately improve.

Kempland's three-day absence on September 21, 24 and 25, 1979 was determined by the University to be unauthorized and further evidence of Kempland's insubordination. The University did not credit Kempland's explanations for the absences. Kempland's change of story regarding the reporting of his September 24 absence provided ample basis for the University's conclusion. The University's stated reasons enumerated in the notice of intention to dismiss included the September 6, 1979 letter of warning and performance evaluation as well as the events of September 21, 24 and 25, 1979. The notice stated that the three-day absence clearly demonstrated Kempland's failure to correct the inadequate performance outlined in the letter of warning and performance evaluation.

It is clear that Kempland repeatedly refused to follow University procedures authorizing him to engage in his representational activities,[9] that he spent excessive time away from his work, and that he refused to be held accountable for his whereabouts or his behavior. Thus, we find that the University has met its burden to demonstrate that it would have fired Kempland in the absence of his protected conduct. Indeed, the University repeatedly made it abundantly clear that it had no intention of interfering with Kempland's Union activities, provided that they were conducted in a manner consistent with University policy. Clearly, Kempland would have been fired even in the absence of his protected conduct for insubordination.[10] Accordingly, the Union's exceptions are dismissed.

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[9]AFSCME does not contend that Kempland observed University policy in his conduct of Union activities, nor that the policy itself was unreasonable.

[10]While the University may have demonstrated poor management practices, our inquiry does not encompass the justness of the discharge on that basis, where the facts do not raise discriminatory motives on the part of management. In Moreland Elementary School District (7/27/82) PERB Decision No. 227, we stated at p. 15:

> Lack of 'just cause' is nevertheless not synonymous with anti-union animus. By itself, it does not permit such a finding. Disciplinary action may be without just cause where it is based on any of a host of improper or unlawful considerations which bear no relation to matters contemplated by

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Public Employment Relations Board ORDERS that the charge brought by Donald E. Kempland against the Regents of the University of California, Case No. LA-CE-13-H is DISMISSED, except as to that portion thereof alleging that the University violated subsection 3571(a) of the HEERA by denying Union representation to Donald Kempland on September 6, 1979.

The hearing officer's decision and order with respect to said allegations, not having been excepted to, is final as to the parties. Therefore, we adopt the order and compliance requirements set forth in the hearing officer's order and notice.

Chairperson Gluck and Member Morgenstern joined in this Decision.

EERA and which this Board is therefore without power to remedy.

Thus, the Union bears the burden of producing evidence which would permit the conclusion that the discharge here was an act of employer retaliation against Kempland for his organizing efforts.

PUBLIC EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

DONALD E. KEMPLAND, Charging Party, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Unfair Practice Case No. LA-CE-13-H PROPOSED DECISION (8/5/81)

Appearances; Christopher L. Ashcraft, Attorney (Thistle, Krinsky, Idler & Lambert) for Charging Party, Donald E. Kempland; Susan M. Thomas, Attorney for The Regents of the University of California.

Before Kenneth A. Perea, Hearing Officer.

PROCEDURAL HISTORY

On February 25, 1980, Charging Party, Donald E. Kempland, filed an unfair practice charge against the Regents of the University of California (hereafter University). The charge alleged that the University had violated section 3571(a) of the Higher Education Employer-Employee Relations Act (hereafter HEERA[1] in that it first suspended and later discharged **Mr. Kempland** because of his union **position, activities** and request for union representation at meetings with his supervisors.

[1]Government Code section 3560 et seq. All statutory references are to the California Government Code unless otherwise specified.

The University answered on March 17, 1980. The parties were unable to resolve the matter at an informal conference held on March 21. The charge was amended on June 17 and the answer was amended on July 2 and again on November 24, 1980.

The formal hearing was originally set for September, but was continued at the request of both parties. The hearing took place at San Diego, California, on December 10-12, and 15-16 1980.

FINDINGS OF FACT

A. Events Prior to July 1, 1979

Charging Party Donald Kempland was first employed by the University at its San Diego campus in September, 1971. In April, 1973, he began work in the Department of Linguistics (hereafter Department) as a recording technician in the language laboratory (hereafter lab).

In the following years, Mr. Kempland became an active member of the California State Employees' Association (hereafter CSEA) and of the American Federation of State, County, and Municipal Employees (hereafter AFSCME). He served as president of CSEA, Chapter 104 from 1973 to 1975. In 1976 he became a steward for AFSCME, Local 2068, and he was elected vice-president of the same local in 1979.

Robert Barker became Kempland's supervisor in the lab in 1976. In the following three years, considerable friction developed between Kempland and Barker. Much of this friction arose from Barker's perception that Kempland was slow in

completing assignments and was spending too much time on activities unrelated to his job. Barker objected that he often observed Kempland working on written material unrelated to lab business and that Kempland frequently gave little or no advance notice before leaving the lab during working hours.

Dr. Sanford Schane, chairman of the Department, first became involved with the above-stated situation in the lab in April, 1979. Barker assigned Kempland to adjust his work schedule by half an hour on three dates to accommodate certain scheduled video tape showings. When Kempland resisted, he was called to a meeting with Angela Pluth, a management services officer in the Department. A series of memos ensued between Pluth and Kempland. On April 12 Schane sent a memo to Kempland stating that failure to work the adjusted schedule would result in corrective action. Kempland subsequently filed for administrative review of the schedule adjustment under a University procedure. Schane's response to the filing reasserted the need to adjust Kempland's hours on the three occasions and set forth the chairman's views on break time and on the requirement of Department approval to leave the work place.

On June 1, 1979, Schane sent to the University's Staff Personnel Office a proposal to reorganize the Department's technical staff. Because of shifting departmental needs, Schane sought to increase the position of computer programmer

from half-time to full-time and to replace the full-time recording technician with a half-time electronics technician. Accordingly, Schane notified Kempland on June 15 that his position of recording technician would be eliminated as of June 30 and that he would be laid off with the right of preferential rehire for twenty-four months. Schane also offered Kempland the new position of electronics technician to be created July 1. On June 20, Kempland indicated his "involuntary acceptance" of the half-time position.

On June 29, Pluth called Kempland in the lab and asked him to come to the Department offices to sign the necessary forms for his layoff and rehire. Kempland indicated that he did not wish to come without a union representative. Schane also called and explained that the meeting did not require representation because it did not involve discipline, but Kempland repeated his desire to be represented. Some time later, Kempland came to the Department offices and met with Pluth and Schane. Schane handed him the forms to be signed along with an envelope containing a memo about his new working hours. Kempland took these and started to leave the room, but Schane insisted that the papers were not to leave the office. Kempland returned them and left without signing.

Later in the day, Kempland returned with a draft of a letter confirming his continuing preferential rehire rights. He asked Schane to sign this, but Schane refused. When

Kempland again declined to accept the memo about his working hours, Schane suspended him and told him to return the following Thursday to be told when he could resume work.

B. The One Week Suspension of June 29 and Events of the Summer of 1979

On July 2, Schane sent Kempland a letter informing him that his suspension would be for one week and that the reason was insubordination in delaying his appearance in the office and refusing to cooperate with the processing of standard forms. The letter also indicated that further uncooperative behavior could result in dismissal.

During the summer months, Kempland worked as an electronics technician on a four-hour afternoon shift. He and Barker continued to argue in the lab about the use of work time for outside activities. In late July, Schane sent Kempland three memos reiterating the need to secure approval before taking any "administrative leave" from the work place. Schane further stated that he would grant one hour per week with pay for grievance resolutions. In addition, Kempland filed grievances during the summer concerning his layoff and suspension and filed administrative appeals on other subjects.

C. The Letter of Warning and Performance Evaluation of September 6

On September 6, Kempland went to the Department offices for a meeting to which he had been **summoned the previous day. He** was accompanied by Patsy Healey, his AFSCME union representative. Schane, who was standing in the doorway,

refused to permit Healey to enter on the grounds that the purpose of the meeting was simply to present Kempland with a performance evaluation and a letter of warning. Kempland and Healey stepped aside for a brief discussion and then tried again to gain entry for Healey. When this second attempt failed, Kempland went alone to meet with Schane, Pluth and Barker. He received the evaluation, which Schane and Barker had prepared, and the letter of warning by Schane. Kempland did not comment orally, although he had the opportunity to do so and his comments would have been considered by Barker and Schane, but he did write on the evaluation that he disagreed with its allegations of unsatisfactory performance and would pursue the matter through University procedures.

On September 20, Healey wrote to Schane to request a meeting for purposes of "informal review" of the warning and evaluation. Schane denied the request on the grounds that he had met with Kempland on September 6 and that there was no reason for further discussion. He testified at the hearing that he denied the request because Kempland's written comment on the evaluation had led him to expect a formal grievance to be filed, with ample opportunity for discussion in subsequent proceedings. Healey testified that her letter of September 20 was intended to be the first step in the grievance process.

D. The Events of September 21, 24 and 25

Kempland was absent from work on Friday, September 21. He

called the Department at approximately 12:00 noon and reported to a student worker in the lab that he had a medical appointment. The student worker passed the message on to language librarian Linda Murphy, who then reported the absence to Pluth.

On Monday, September 24, Kempland again did not report for work. This was the first day of the fall quarter, usually a very busy day for the Department. Kempland testified that his wife called in to report that he was ill. Mrs. Kempland also testified that she called and spoke with Murphy. However, Murphy's testimony was that she did not receive such a phone call. It is concluded that the testimony of Linda Murphy must be credited over the testimony of Mrs. Kempland due to Mrs. Kempland's interest in the outcome of this case, Mrs. Kempland's equivocal testimony regarding her telephone conversation with Linda Murphy of September 24, and the fact that although asked to explain his absence as early as September 26, 1979 Mr. Kempland did not mention his wife's phone call to anyone in the Department until October 2. There is an inconsistency in Mr. Kempland's testimony on this latter point in that Kempland explained his failure to mention his wife's phone call to anyone in the Department until October 2 on the basis that he did not know she had called until after September 26. However, in earlier testimony, Kempland testified that his

wife had told him of her call to the Department on September 24. For the foregoing reasons, the testimony of Mrs. Kempland that she called the Department on September 24 is not credited.

Kempland was absent a third time on September 25. This time he phoned the Department early in the morning and reported to Murphy that he was having car trouble. He placed a second call a few hours later when he discovered that the trouble was serious. By mid-afternoon he had solved the problem, and he called to tell Murphy he might come in. He did not report to work at all that day. Murphy kept Pluth and Schane informed of Kempland's calls at various times during the day. That same day Schane sent a telegram to Kempland's home asking him to report for work the following day.

E. The Notice of Dismissal Effective October 13, 1979

Kempland did come in on September 26 and was summoned to a meeting with Schane, Pluth, and Barker. Prior to the meeting, Schane had consulted with Cynthia Starkovsky, manager of labor/employee relations for the University, and had been advised by her that he could inform Kempland that he would be dismissed and could request that Kempland not appear for work in the interim. When Kempland arrived, Schane asked him to explain his three days of absence. Kempland answered that on Friday he had been ill and had a medical appointment, and that he had called in and spoken to a student worker. He argued that his illness had continued through Monday and that another call for the same illness was unnecessary. Pluth disagreed and

said that employees should call in each day they are sick. Kempland then discussed his car trouble on Tuesday and pointed out that he had called in three times. He mentioned the difficulties of alternative means of transportation in response to a question by Schane. Schane then told Kempland that he considered the absences to be inexcusable and that he planned to issue a notice of intention to dismiss. He asked Kempland to give up his keys to the lab and to refrain from coming to work in the meantime. Kempland requested and was given a receipt for the keys. He then left the meeting and went home, where he found the telegram Schane had sent the previous day.

After the meeting, Schane drafted a notice of intention to dismiss and sent it to Kempland's home by registered mail. The notice listed the evaluation and letter of warning of September 6 and the three unexcused absences as the bases of Schane's decision. It also stated that Kempland had the right to respond orally or in writing within five days of his receipt of the notice.

The following day, September 27, Kempland went to the Department offices to examine his personnel file. He was accompanied by Kathy Esty, a union representative. Pluth made the file available, and Kempland and Esty proceeded to go through and initial the various documents therein. In the file Kempland found a series of notes about his activities in the lab with an indication that they had been taken by Barker over

a period of several months. He requested a copy of them, and Pluth gave them to another employee to xerox and presented the copies to Kempland.

Pluth testified that Kempland also found a copy of the notice of intention to dismiss in the file and requested and received a copy of it. Kempland testified that he did not see a copy of the notice in the file and did not receive one that day.

The original notice, sent by registered mail on September 26, was not received by Kempland until October 1. On that date, Kempland took the notice to Healey, who drafted a letter to Schane to request a meeting. This letter was hand-delivered by Kempland the same day.

On October 2, in response to Healey's letter, Pluth tried to contact both Kempland and Healey by phone. Healey returned her call in the afternoon. Pluth informed Healey that if a meeting was desired it would have to be held that day because five days had elapsed since Kempland had inspected his personnel file and received a copy of the notice. Healey protested that this would not provide adequate time for preparation and that the five days should have started on October 1, when Kempland received the mailed notice. Nevertheless, she contacted Kempland and agreed to meet at the Department offices. Kempland arrived first and found Schane, Pluth, and Starkovsky waiting. Kempland took Starkovsky aside

and requested an extension of the five-day period, but she declined to grant it. When Healey arrived, the meeting began. It was during this meeting that Kempland first mentioned that his wife had phoned the Department on September 24.

Schane sent Kempland a notice of dismissal on October 3, the day following their last meeting. Kempland received the notice two days later and protested in writing that his dismissal was in violation of University procedure, in part because of the hasty manner in which the meeting of October 2 had been called. Kempland's dismissal became effective on October 13, 1979.

ISSUES

Did the University violate section 3571(a) by:

(a) Denying the Charging Party's request for union representation on June 29, 1979, and by subsequently suspending him from employment?

(b) Denying the Charging Party's request for union representation at the meeting of September 6, 1979?

(c) Calling the meeting of October 2, 1979, at such a time that Charging Party could not be represented by an attorney?

(d) Discharging the Charging Party from employment?

CONCLUSIONS OF LAW AND DISCUSSION

1. The One Week Suspension of June 29

The Charging Party alleges that the University violated section 3571(a) by denying his request for union representation

and by subsequently suspending him from employment. Section 3571(a) makes it unlawful for a higher education employer to:

> Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

The University raises the following three procedural defenses to this allegation in addition to its substantive response: (1) the allegation is based on events which are outside the jurisdiction of the Public Employment Relations Board (hereafter PERB) because they occurred prior to the effective date of HEERA; (2) PERB should defer to an arbitrator's award concerning the subject matter of the allegation; and (3) the charge was not filed within six months after the alleged violations and is therefore barred by the statute of limitations.

The record discloses that on June 29, 1979, the Charging Party was called to the Department offices to sign forms pertaining to his layoff and rehire and to be notified in writing about his new working hours. He requested and was denied union representation and was told on the same day that he was suspended from employment. On July 2, Department Chairman Schane sent him a letter which confirmed the suspension and stated the reasons for it.

The effective date of HEERA was, July 1, 1979. In Petrone v. Pasadena Unified School District (5/12/77) EERB Decision No. 16,[2] the PERB sustained the dismissal of an unfair practice charge where all of the employer's alleged actions occurred prior to the effective date of the Educational Employment Relations Act, Government Code section 3540 et seq. containing language similar to section 3571(a). Since the denial of representation and the suspension both occurred on June 29, 1979, two days before HEERA became operative, the University argues that they cannot form the basis of an unfair practice charge. The Charging Party responds with the claim that the suspension was not effective under University regulations until July 2, when Dr. Schane gave written notice of it. But assuming arguendo that Charging Party's claim is correct, it still cannot be said that the Charging Party was engaged in the exercise of protected rights under HEERA when he requested union representation on June 29. Though such rights may arguably have existed under other legislation enforceable in another forum, HEERA granted no rights to employees prior to July 1, 1979. The University therefore did not violate HEERA by denying a request for representation on June 29 or by

[2]See also U.S. Postal Service (1972) 200 NLRB No. 56 [81 LRRM 1533], in which the National Labor Relations Board (hereafter NLRB) dismissed a complaint based on events occurring before it acquired jurisdiction over the Postal Service through the Postal Reorganization Act.

allegedly suspending the Charging Party because of that request subsequently.

Since the University's actions under these facts cannot form the basis of an unfair practice charge, no violation of section 3571(a) is found and it is unnecessary to consider the University's two remaining defenses of deferral to arbitration and the statute of limitations, whether the Charging Party would have had a right to union representation under similar circumstances after July 1, 1979 or whether the suspension was in fact a reprisal for said request.

2. Union Representation at the Meeting of September 6

The Charging Party alleges that the University violated section 3571(a) by denying his request for union representation at the meeting of September 6, 1979. He claims that his request was an exercise of his rights under section 3565, which provides that:

> Higher education employees shall have the right to form, join and participate *in* the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations and for the purpose of meeting and conferring. Higher education employees shall also have the right to refuse to join employee organizations or to participate in the activities of these organizations subject to the organizational security provision permissible under this chapter.

In SEIU v. Marin Community College District (11/19/80) PERB Decision No. 145, the PERB found a right to representation by

an employee organization in the parallel language of section 3543 of the Educational Employment Relations Act (hereafter EERA).[3] The Board cited with approval the analogous private sector right enunciated by the U.S. Supreme Court in NLRB v. J. Weingarten, Inc. (1975) 420 U.S. 251 [88 LRRM 2689]. Weingarten upheld the right of an employee to union representation upon request at an investigatory interview which he reasonably believes might result in disciplinary action. This right was based on the NLRB's interpretation of the "concerted activities" clause of section 7 of the National Labor Relations Act (hereafter NLRA)[4] to include union assistance in such a situation. The Court reasoned that the union representative would safeguard the interests of other union members by assuring that the employer does not impose punishment unjustly.

In recent cases both the NLRB and the federal courts have emphasized the element of the investigatory interview in determining when the Weingarten right attaches. In Baton Rouge Water Works (1979) 246 NLRB No. 161 [103 LRRM 1056], the NLRB held that when an employer has reached a final decision to impose discipline, and calls a meeting merely to inform the employee of that decision, there is no right to union representation. The right attaches only when the employer seeks

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[3]Gov. Code sec. 3540 et seq.

[4]29 U.S.C. sec. 157.

facts or admissions from the employee, either to help him reach a decision or to support a decision already made. In Anchortank, Inc. v. NLRB (5th Cir. 1980) 104 LRRM 2689, the Court of Appeals approved the holding of Baton Rouge and clarified the rationale further. When the employer simply announces discipline and does not seek information, there is no need for concerted activity to protect the employee from intimidation or to guard against an unjust decision-making precedent. Once the decision is final, it is of concern only to the disciplined employee himself.

California courts have likewise had the opportunity to consider the question of whether certain public employees are entitled to union representation at meetings with their employer. In Civil Service Association v. City and County of San Francisco (1978) 22 Cal.3d.552 [150 Cal.Rptr.129, 586 P.2d 162] , the Supreme Court held that the Meyers-Milias-Brown Act granted to local governmental employees the right, upon request, to participation of a union representative during an investigatory interview held prior to the imposition of a short-term suspension. Furthermore, in Robinson v. State Personnel Board 97 Cal.App.3d 994 [159 Cal.Rptr. 222], the Court of Appeal concluded that a state employee has a right to union representation, at a meeting with his superiors held with a significant purpose to investigate facts to support disciplinary action and may not be disciplined for attempted

exercise of that right. In reaching its result, the Court of Appeal held that the studied congruence of sections 3503-3504 and 3528-3529 leads to the conclusion that the meaning attributed by Civil Service Association, supra, must also be attributed to the State Employee Organizations Act and that the rulings of NLRB v. J. Weingarten, Inc. (1975) 420 U.S. 251 [43 L.Ed.2d 171, 95 S.Ct. 959] and its progeny are persuasive in interpreting sections 3528 and 3529.

In the present case, the record shows that Department Chairman Schane called the Charging Party to the Department offices to present him with a letter of warning and a performance evaluation, both already prepared. When the Charging Party arrived, Schane informed him of the purpose of the meeting and denied entry to his representative.

Examination of the above-cited California precedent, together with Weingarten and its progeny, provides significant guidance in determining whether Kempland was entitled to union representation during the September 6, 1979 meeting with his superiors. Had the University held said meeting for the sole purpose of presenting its letter of warning dated September 6 it could well be argued that Kempland was not entitled to union representation since under the rationale of Anchortank, Inc., and Baton Rouge when the employer simply announces discipline and does not seek information there is no need for union

representation at the meeting to protect the employee from intimidation or to guard against an unjust decision-making precedent. However, under the facts of this case, in addition to presenting the letter of warning, the University presented Kempland with a performance evaluation in support thereof specifically warning Kempland that, "If you again engage in any of the conduct described above [spending major parts of the workday on activities unrelated to his job, interfering with other person's ability to work, insubordination and unauthorized use of University equipment for personal and AFSCME business] and if your performance does not immediately improve, you will be dismissed."

Since the penalty of discharge was clearly contemplated in the performance evaluation of September 6, 1979, the performance evaluation contained space for "Employee Comments," University policy requires discussions with employees to reach understandings on duties, responsibilities, and objectives as part of performance evaluations, and Barker and Schane would have considered any comments Kempland offered and could have changed his evaluation based upon those comments, is concluded under the facts of this case that Charging Party was entitled to union representation.

This is not to hold that all routine performance evaluations are subject to union representation. This holding is limited to those situations where a performance evaluation which includes the opportunity for discussions with the employee to reach understanding on duties, responsibilities, and objectives is prepared to serve as a warning of contemplated disciplinary action should the employee's performance not improve.

3. Representation by Attorney on October 2

The Charging Party further alleges that the University violated section 3571(a) by the manner in which it called and conducted the meeting of October 2, 1979. The record discloses that Angela Pluth arranged the meeting by phone on October 2, in response to a letter written the previous day by union representative Patsy Healey. The University's argument is that the meeting had to take place on or before October 2 because the Charging Party had received the notice of intention to dismiss five days earlier. The Charging Party argues that he should have had an opportunity to respond to the notice within five days after he received a copy in the mail. Since he received the mailed copy on October 1, he claims he had until October 6 to meet with his superiors. The Charging Party further argues that because the meeting was so hastily called, he was unable to be represented by his attorney and had to

settle for a union representative. He also alleges that the meeting was conducted in violation of various University policies, including a requirement that the University disclose the information it used in reaching its decision to dismiss him.

With respect to the Charging Party's inability to be represented by an attorney, it should first be noted that the record contains no evidence that the Charging Party expressed a desire for such representation at any time on October 2. But even if he had done so, he would not have been exercising any right guaranteed by HEERA. The Charging Party's argument relies on the case of Civil Service Association v. City and County of San Francisco, supra, decided under the Meyers-Milias-Brown Act, supra, (hereafter MMBA). The Charging Party interprets that case as holding that the right of representation guaranteed by MMBA includes the right to counsel at a hearing to review discipline. But the primary holding of the court actually was that employees are entitled to a hearing either during or within a reasonable time after a short-term suspension from employment. The court recognized that under previous California cases employees were entitled to counsel at disciplinary hearings generally. Then, in a separate analysis, the court found that employees enjoyed the right to union representation at these same hearings under the MMBA. The court did not however find that the MMBA in any way guarantees the right to counsel.

Similarly, HEERA guarantees only that employees may be represented by employee organizations and does not protect the right to counsel. Since the Charging Party was represented by his union representative at the meeting of October 2, the University cannot be found to have violated his representational rights under HEERA on that date and it is therefore unnecessary to resolve the conflicting testimony as to whether Kempland received a copy of the notice of intention to dismiss on September 27.

It is also found that alleged violations of University policies do not fall within the purview of HEERA. The PERB is not the proper forum for the enforcement of University regulations, nor is it the proper forum for enforcement of rights involving pre-dismissal hearings under Skelly v. State Personnel Board, supra. Indeed, the record shows that the parties have been engaged in litigation of these very issues in another forum.[5] For all of the foregoing reasons, it is found that the University did not violate section 3571(a) at the meeting of October 2.

4. Discharge

The Charging Party's final allegation is that his discharge from University employment was a violation of section 3571(a). His claim is that the discharge was a reprisal imposed upon him

[5]The record contains exhibits which are identified as pleadings in an action in superior court against the University for writ of mandate.

for his exercise of protected rights over a period of years and for his requested union representation on September 6. He also alleges that the discharge was the result of the denial of his right to counsel on October 2; but since it has been found that HEERA does not protect this right, it is unnecessary to consider this additional claim.

Since section 3571(a) is identical to section 3543.5(a) of EERA, it is appropriate to apply here the test promulgated by the PERB for alleged violations of the latter section. That test was set forth in Carlsbad Unified School District (1/30/79) PERB Decision No. 89 as follows:

> 1. A single test shall be applicable in all instances in which violations of section 3543.5 (a) are alleged;
>
> 2. Where the Charging Party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA a prima facie case shall be deemed to exist;
>
> 3. Where the harm to employees' rights 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;
>
> 4. Where the harm is inherently destructive of employee rights, the employer's 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;
>
> 5. Irrespective of the foregoing, a charge will be sustained where it is shown that the

> employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.
>
> . . . . . .
>
> Unlawful motivation, purpose or intent is essentially a state of mind, a subjective condition generally known only to the charged party. Direct and affirmative proof is not always available or possible. However, following generally accepted legal principles, the presence of such unlawful motivation, purpose or intent may be established by inference from the entire record.

The most difficult prong of this test for the Charging Party to satisfy is the fifth, which requires a showing of motive or intent. The NLRB has recently promulgated a causation test for motivation cases in Wright Line and Lamoureux (1980) 251 NLRB No. 150 [105 LRRM 1169] as follows:

> Thus, for the reasons set forth above, we shall henceforth employ the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

It is concluded that the Wright Line test is appropriate for deciding mixed motive cases under section 3571(a) where the issue is whether the employer would have engaged in the complained-of conduct "but for" an unlawful motivation,

purpose, or intent. To hold that a violation of section 3571(a) occurs when the employer's conduct was "in part" motivated by an unlawful purpose or intent would place an employee in a better position as a result of the exercise of a right guaranteed by HEERA than he would have occupied had he done nothing. While a borderline or marginal employee should not be disciplined because of the exercise of rights guaranteed by HEERA, that same employee should not be able, by engaging in protected activity, to prevent his employer from assessing his performance record and reaching a decision on the basis of that record. Furthermore, the Wright Line test represents a recognition of the practical reality that the employer is the party with the best access to proof of its motivation. This fact is underscored by the lack of discovery mechanisms under HEERA afforded to charging parties from which they may investigate the employer's motivation.

Applying this test to the discharge of Donald Kempland, it is concluded that the Charging Party has not made a prima facie showing sufficient to support the inference that his general history of organizational activity was a motivating factor in the University's decision. The record shows that the Charging Party's superiors were concerned with the amount of time he was spending in activities unrelated to his job and with his failure to give advance notice of his absences from the workplace. The record does not show that they were concerned

about the particular activities in which the Charging Party was engaged during that time.

However, there is satisfactory evidence to support the inference that the Charging Party's request for union representation on September 6 was a partial motivating factor in the University's decision. When the Charging Party appeared with his union representative, the Department chairman became upset and stood in the office doorway to prevent the representative's entry. It is also clear that the chairman was upset by the Charging Party's previous request for union representation on June 29, and that that request was a part of the "insubordination" for which the Charging Party was suspended.[6]

Following the Wright Line causation test the burden now shifts to the University to show that the discharge would have occurred even in the absence of the Charging Party's request for representation. The record discloses that the Charging Party had a history of leaving the workplace without advance notice and of delaying the performance of his assigned tasks. Prior to the September 6 request for representation, Dr. Schane had sent him several memos concerning his performance and had

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6Although it has been found that the events of June 29 cannot form the basis of an unfair practice charge, it is nevertheless appropriate to consider them as evidence to shed light on the character of later events which can form the basis of a charge. Local Lodge 1424 v. NLRB (1960) 362 U.S. 411 [45 LRRM 3212] , Hendrix v. Operating Engineers, Local 571 (8th Cirt. 1979) 100 LRRM 2704.

prepared a letter of warning indicating the possibility of dismissal. Immediately prior to the discharge, the Charging Party was absent without approved leave for three days at the beginning of the fall quarter. Under these facts, it is concluded that the University has adequately met its burden and that the Charging Party would have been discharged even in the absence of his request for representation.

It is still necessary, however, to examine the University's conduct in this case and any resulting harm to employee rights in the light of whether there is "slight harm" or "inherently destructive harm" under the Carlsbad test. It is concluded that the University's conduct tends to or does result in "slight harm" to employee rights since, as concluded above, the University was motivated in part by the Charging Party's protected request for representation. However, the University's conduct does not rise to the level of "inherently destructive harm" because it is not conduct which "carries with it unavoidable consequences which the employer not only foresaw but which he must have intended." NLRB v. Great Dane Trailers, Inc. (1967) 388 U.S. 26 [65 LRRM 2465], NLRB v. Erie Resistor Corp. (1963) 373 U.S. 221 [53 LRRM 2121].

Under the "slight harm" prong of the Carlsbad test, a balance must be struck between employee rights and the University's business justification. Under the facts of this case, it is found that the University's operational necessity outweighs the slight harm to employees' representational ...

rights. The University discharged an employee who had performed unsatisfactorily at various times, had been repeatedly absent without giving advance notice, and had received informal memos and a formal letter of warning which made him aware that he needed to improve. It is therefore concluded that the University's discharge of the Charging Party did not violate section 3571(a) and that the charge should accordingly be dismissed.

REMEDY

Section 3563.3 provides that:

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

In this case, the University violated section 3571(a) by denying an employee the right to be represented upon request by an employee organization at a confrontation with his department chairman and others involving a significant potential impact on his employment relationship with the University. In Kraft Foods, Inc. (1980) 105 LRRM 1233, the NLRB concluded that there had been no showing of a nexus between an employee's request for union representation and his eventual discipline and that accordingly although the denial of representation was wrongful, the evidence demonstrated that the employer's decision to

discipline was not based upon any information obtained at the unlawful interview. The NLRB therefore limited the remedy in that case to a cease and desist order. Having concluded in this case that Kempland would have been discharged even in the absence of his request for representation and no evidence appearing in the record that the University's decision to discharge Mr. Kempland was based upon any information obtained at the said meeting, it is concluded that an appropriate remedy in this case is to order the University to cease and desist from denying union representation when requested under facts similar to those at hand.

It is also appropriate that the University be required to post a notice incorporating the terms of the order. The notice should be subscribed 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 such a 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. It effectuates the purposes of HEERA that employees be informed of the resolution of the controversy and the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69. In Pandol and Sons v. ALRB and UFW (1979) 88 Cal.App.3d 580, the California District Court of Appeal approved a posting requirement. The U.S. Supreme Court

approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this case, it is hereby ordered that:

I. The Regents of the University of California, its representatives and agents shall:

A. CEASE AND DESIST FROM:

Refusing or failing to accede to the request of employees to be represented by an employee organization at a meeting held by the University to discuss a performance evaluation which contains a warning that unless improvement in performance is made the employee will be disciplined.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS DESIGNED TO EFFECTUATE THE PURPOSES OF THE HIGHER EDUCATION EMPLOYER-EMPLOYEE RELATIONS ACT:

1. Within fifteen (15) calendar days after this decision becomes final, prepare and post a copy of the Notice to Employees attached as an appendix hereto, for thirty (30) workdays at its San Diego campus in conspicuous places at the locations where notices to employees are customarily posted. It must not be reduced in size, and reasonable steps should be taken to see that it is not defaced, altered, or covered by any material;

2. Within twenty (20) workdays from service of the final decision herein, notify the Los Angeles Regional Director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this ORDER. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on the charging party herein.

II. For the reasons discussed in the foregoing opinion, all other allegations included in unfair practice charge LA-CE-13-H are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on August 25, 1981 unless a party files a timely statement of exceptions within twenty (20) calendar days following the date of service of the decision. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on August 25, 1981 in order to be timely filed. (See California Administrative Code, title 8, part III, section 32135.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed

with the Board itself. (See Administrative Code, title 8, part III, sections 32300 and 32305, as amended.)

Dated August 5, 1981

Kenneth A. Perea
Hearing Officer

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-13-H, as amended, Donald E. Kempland v. Regents of the University of California, in which all parties had the right to participate, it has been found that the Regents of the University of California, violated Government Code section 3571(a).

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

1. CEASE AND DESIST FROM refusing or failing to accede to the request of employees to be represented by an employee organization at meetings held by the University to discuss a performance evaluation which contains a warning that unless improvement in performance is made the employee will be disciplined.

DATED: _____ University of California, San Diego

By _____
(Authorized Representative)

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