STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION,	)	
Charging Party,	)	Case No. SF-CE-56-H
v.	)	PERB Decision No. 470-H
REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)	December 28, 1984
Respondent.	)	

Appearances: Michael R. Bogan for California State Employees' Association; Edward M. Opton, Jr., Attorney, for the Regents of the University of California.

Before Hesse, Chairperson; Tovar and Morgenstern, Members.

DECISION AND ORDER

TOVAR, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by both the California State Employees' Association (CSEA) and the Regents of the University of California (University) to the attached proposed decision of the administrative law judge. CSEA excepts to the dismissal of its charge alleging that the University violated sections 3571(a), (b) and (d) of the Higher Education Employer-Employee Relations Act[1] by

[1]The Higher Education Employer-Employee Relations Act is codified at Government Code section 3560 et seq.

unilaterally changing working conditions in the General Library and by interfering with and discriminating against library employees because of their exercise of protected rights.

The Board has carefully reviewed the entire record in this case in light of the exceptions and the response thereto. We adopt the ALJ's findings of fact and conclusions of law, and hereby ORDER the unfair practice charge in Case No. SF-CE-56-H DISMISSED.

Chairperson Hesse and Member Morgenstern joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Unfair Practice Case No. SF-CE-56-H PROPOSED DECISION (8/10/83)

Appearances: Kevin McCurdy, Elaine Ercolini and Michael Bogan, Representatives, California State Employees' Association; Edward Opton, Jr., Attorney, for Regents of the University of California.

Before: Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

On June 1, 1981, the California State Employees Association (hereafter CSEA or Charging Party) filed this unfair practice charge against the Regents of the University of California (hereafter University or Respondent). The charge alleged that the University violated sections 3571(a) and (d) of the Higher Education Employer-Employee Relations Act (hereafter HEERA or Act)[1] by unilaterally changing several working conditions in

[1]The HEERA is codified at Government Code section 3560 et seq. All references hereafter will be to the Government Code unless otherwise indicated.

the Moffitt Undergraduate Library. The charge also alleged that the changes interfered with the exercise of protected rights and constituted reprisals against employees for filing an earlier unfair practice charge as well as for engaging in other forms of protected activity. [2] Respondent filed its answer on June 23, 1981, admitting certain facts, generally denying the charge, and offering affirmative defenses, all of which will be dealt with below.

On July 13, 1981, CSEA filed an amendment, essentially restating the general allegations contained in the original charge and offering specific incidents to support its allegations. The first amendment also added section 3571(b) as an alleged violation. The University answered the first amendment on July 30, 1981. It generally denied the allegations and asserted several affirmative defenses, all of which will be addressed below.

A second amendment was filed on November 19, 1981. It included a more detailed restatement of the charge as already amended and expanded the allegations to include departments in the General Library in addition to Moffitt. The University answered the second amendment on December 7, 1981. Once again, it admitted certain facts, generally denied the allegations and

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[2]The earlier unfair practice charge, SF-CE-39-H, was settled prior to formal hearing.

offered affirmative defenses, all of which will be dealt with below.

A complaint issued on December 8, 1981. A prehearing conference was held in Berkeley on January 20, 1982. At the outset of the hearing CSEA amended the charge for the third time. By this amendment, CSEA asserted that the University had converted a temporary position in Moffitt to a permanent one in violation of past practice and in retaliation for the protected activities of Moffitt employees. The University denied all aspects of this third and final amendment.

Seven days of hearing were held between January 26, 1982, and March 10, 1982. At the close of Charging Party's case-in-chief, on March 10, 1982, Respondent moved to dismiss the case. The matter was taken under submission and a ruling denying the motion issued by the undersigned on July 29, 1982.

By written motion of October 7, 1982, and orally on the record at the resumption of the hearing on November 17, 1982, the Charging Party withdrew all allegations contained in the charge, as amended, except the following: (1) that by reducing the hours and compensation of employees in Moffitt the University interfered with the exercise of protected rights and discriminated against employees for engaging in protected activity; (2) that the University unilaterally changed the hiring/appointment practices in the General Library in violation of its obligation to meet and discuss such

changes; and (3) that the change in appointments interfered with protected activity and discriminated against employees who had engaged in protected activity. Also on November 17 the University's earlier October 13 motion to dismiss with prejudice all other allegations in the charge, as amended, was granted. The University's motion to dismiss the allegation dealing with the hiring/appointment change in the General Library as it relates to the refusal to meet and discuss was taken under submission and will be dealt with below.

Respondent completed its case on November 17, 1982. The briefing schedule was completed on March 8, 1983, and the case was submitted.

FINDINGS OF FACT

Protected Activity.

Prior to the fall of 1981, there was a great deal of well-publicized protected activity on the part of Moffitt employees.[3] This included representation of employees by CSEA in a variety of employment related matters, and the filing of Unfair Practice Charge SF-CE-39-H. The following is a summary of that activity.

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[3]There are 20-25 branches of the General Library. Some, such as Moffitt, are branch libraries. Others are administrative offices and others are support services branches. They are located in many different areas throughout the entire campus. The Main Library is adjacent to Moffitt.

Sharon Samek became a CSEA job steward in February 1980. Since that time she has represented several employees on a variety of employment related matters, including Kathy Gurvis on a shift differential grievance. She also represented Ben Cohen, described at the hearing as a union activist. In Cohen's case it was alleged that management gave his home phone number to an irate patron of the library in retaliation for his having engaged in protected activity. As a result, it was alleged, Cohen received harassing phone calls at home. Samek also helped to circulate a petition among Moffitt employees on behalf of CSEA about the failure of library management to write timely performance evaluations. Samek testified that employees passed out leaflets, wore union buttons, and posted material on bulletin boards.

Elaine Ercolini, also a CSEA steward, signed up about 25 Moffitt employees as union members. She participated in six meet-and-discuss sessions with management concerning changes in working conditions in the library, and she represented several employees in grievances prior to the fall of 1981.

Kevin McCurdy first became a member of the American Federation of State County and Municipal Employees (AFSCME). While a member of AFSCME he signed up many employees. When he became a member of CSEA in October 1979, many of these employees joined him in CSEA. After McCurdy became a CSEA steward, he represented several employees in employment related

grievances in August 1980, and again from May 1981 to August 1981. McCurdy, although a student supervisor, also represented employees in the General Library.[4] He circulated petitions and participated with two stewards from the circulation department in meet-and-discuss sessions covering working conditions and job descriptions. It was McCurdy, on behalf of CSEA, who filed unfair practice charge No. SF-CE-39-H, charging that the University failed to meet and discuss a variety of changes in working conditions in the Moffitt Library. The charge drew considerable attention from the employees who worked in Moffitt.

Paul Clanon appears to have been the most active CSEA member in the General Library. During organizing efforts, he passed out leaflets, signed up new members, distributed newspapers, and participated in meetings with Joseph Rosenthal, the head of the General Library, about budget cuts and reduced hours. In all of this he was assisted by the above-named activists from Moffitt.

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[4]Although so-called "student supervisors" arguably perform some supervisory duties, they are nevertheless treated here as employees within the meaning of the Act. The University has not challenged their status as employees and the record does not support any other conclusion. See, e.g., Unit Determination for Professional Scientists and Engineers, Lawrence Livermore National Laboratory of the University of California (3/8/83) PERB Decision No. 246b-H.

The Events Following Unfair Practice Charge No. SF-CE-39-H.

CSEA filed unfair practice charge No. SF-CE-39-H in December 1980. The charge alleged that the University, on August 27, 1980, unilaterally implemented a variety of changes in working conditions in Moffitt Library without meeting and discussing them and in retaliation for protected activities.

These changes were initiated by Janice Koyama, who became the head librarian in Moffitt earlier in 1980. They were prompted by Koyama's perception that student employees, not library management, had control over the work place. For example, upon taking over as head librarian, Koyama discovered that almost all management staff meetings were open to employees; discipline was taken largely by employee-management consensus, and was not a function of management; employees freely substituted for co-workers and thus the number of hours worked per employee was not determined by management; promotions were made only after extensive input by student employees and management's freedom to select from outside the library was severely curtailed.

After settlement talks between the parties and the representatives of PERB, SF-CE-39-H was settled on May 14, 1981. There was no admission of wrongdoing by the University. All charges were withdrawn and the settlement agreement provided in relevant part:

> Designees of the Second Party will meet and discuss with First Parties concerning

> Moffitt Library procedures as they affect First Party members in their terms and conditions of employment. Meet-and-Discuss sessions will commence five-working days from the date of the receipt of any proposals for modification of Moffitt Library procedures.

Thus, by the terms of the agreement, the parties recognized and accepted the possibility that the employer might propose additional changes in Moffitt. Shortly thereafter, on May 22, 1981, the University proposed making changes in many areas, some of which were at issue in SF-CE-39-H, and it invited CSEA to meet and discuss these proposals.[5]

Many meet and discuss sessions were held over the summer of 1981. The parties conferred about distribution of summer hours on May 29 for two hours and again on June 4, for two hours. Also discussed was a CSEA proposal about distribution of hours

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[5]CSEA takes the position that the University's post-settlement proposals were much tougher than those made in August 1980 which prompted the filing of SF-CE-39-H. The nature and timing of these proposals, according to CSEA, constitutes retaliation. There were proposals on the University's May 22 package which were not in the August 1980 package. However, given the fact that the settlement agreement in SF-CE-39-H contemplated new proposals, this fact is hardly one of significance. The May proposals and the meetings at which they were discussed by the parties during the summer and fall of 1981 are exhaustively covered in the record. However, in light of CSEA's November 17, 1982, withdrawal of major portions of the charge, as amended, only allegations dealing with those actions covering reduction in hours, compensation and substitutions, and indefinite appointments will be considered here in detail. Other items subject to the meet and discuss obligation will be treated only briefly for purposes of background.

during intersession, which was to begin about mid-June. During these meetings proposals and counter proposals were exchanged and concessions were made by both parties. Hours were distributed on June 8, 1981.[6]

At another meeting on June 19, the parties discussed the remaining items in the University's May 22 proposal.[7] The record shows that the parties engaged in a full discussion of these items for about two hours. In a letter dated July 27, 1981, McCurdy asked to meet about procedures covering the intersession which was to begin about August 14. The parties met on August 11. Although CSEA vigorously protested the initial position taken by the University at that meeting, the parties eventually reached a meeting of the minds. In the end, CSEA won several concessions. The procedures finally adopted were in many respects substantially in line with CSEA's initial proposals.

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[6]CSEA argues that McCurdy and Al Trujillo had already reached agreement during earlier discussions in February and March 1981 about distribution of summer hours, and it was therefore a sign of bad faith on the part of the University to seek to further discuss this issue on May 29. The University disputed that it had reached any agreement with McCurdy prior to May 29, taking the position that summer hours had been discussed but not finalized. There is no need to address this question, since CSEA has withdrawn all charges dealing with the refusal to meet and discuss summer hours.

[7]These were as follows: elimination of open staff meetings; elimination of the ombudsperson position; selection procedures for promotions; and expansion of the recruitment pool for new hires and/or promotions.

The parties met again on September 3 to discuss procedures, such as distribution of hours, etc., for the second intersession, which was to begin about September 8. These procedures were agreed to with little difficulty during the meeting, which lasted about one and one-half hours.[8]

Also during the September 3 meeting, the parties discussed the broader May 22 proposals, including those which are the subject of this case. The University raised for the first time the possibility of changing from indefinite to definite appointments in Moffitt.[9] This subject had not been in the May 22 proposal, and had therefore not been discussed during the summer meetings.[10] The prior meetings had focused primarily on procedures and working conditions which were to

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[8]McCurdy testified that on September 15 Trujillo announced that he was cutting back hours in breach of the agreement. However, nothing in the agreement guarantees a given number of hours.

[9]In the past, while continued employment was not guaranteed, no formal personnel action was required for a casual/restricted (student) employee to continue working under an indefinite appointment. However, a decision would have had to be made by library management that there was enough work and money to employ a given number of students. Under a definite appointment, a separate personnel action would presumably be necessary to renew the appointment. The actual decision to renew an appointment is still based on such factors as availability of work and funds. This subject, as well as the other changes at issue here, is more fully discussed below.

[10]However, McCurdy stated at one point in the record that CSEA may have been informed of this proposal as it relates to Moffitt as early as August 11.

govern employees during the summer months and intersession periods. The broader proposals, which were to be implemented in the fall, were to some extent discussed simultaneously with the summer and intersession proposals.

The subject of definite appointments in Moffitt was discussed in some detail on September 3. CSEA representatives objected to the change in the hiring procedure, stating that it was not fair to new employees who would be hired under definite appointments while current employees would continue to have indefinite appointments. According to McCurdy, CSEA stated its concern that renewal of definite appointments would require a separate personnel action on the part of library management and that different criteria would be used in making decisions to renew appointments. CSEA also stressed the negative impact the change would have on union organizing, arguing that new employees would always be subject to review on a regular basis. The University emphasized the need for the flexibility to reduce staff in a time of budgetary constraints. As will be more fully discussed below, the desire to more accurately inform employees of their employment status under such circumstances also was a key part of the University's position.

Also discussed on September 3 was the limitation on hours and the lower compensation to be paid to employees in Moffitt when substituting for co-workers in a lower class. These latter subjects had been included in the May 22 proposal and

were discussed during the summer. The University announced that these procedures would be implemented in the near future.

On about September 9 Joseph Rosenthal, University librarian, and Rita Kane, associate University librarian for public services, decided that the change from indefinite to definite appointments needed to be made in the General Library as well as in Moffitt. A memo was circulated on about September 17 announcing the change as it applied to the General Library. A copy of the memo was sent to McCurdy and other student supervisors. Also in mid-September the University began to hire student employees under definite appointments. The hiring process continued at least into October.

On September 28 McCurdy received a new draft of procedures to cover the fall quarter. This draft had emerged from the September 3 meeting. It included a reference to the change in appointments in Moffitt, but did not mention the General Library.

At the October 1 meet and discuss session CSEA again complained about the change to definite appointments. The University was not persuaded. Shortly thereafter, the union amended the instant charge to include the allegation that the University unilaterally implemented a change in working conditions. No further talks were held on this subject.

The Changes.

A. The Definite Appointment.

In the past, student employees were hired with an indefinite ending date and were usually employed from year to year and sometimes during the summer until they lost student status. Although employment from year to year was not guaranteed, an employee hired before the fall of 1981 essentially had the expectation of continued employment until he or she lost student status. This was primiarly due to the existence of enough work and funds. According to the testimony of McCurdy, even he conceded that decisions for continued employment were made on the basis of, among other things, availability of work or funds, job performance, and seniority, not because an employee had an indefinite appointment. In essence, despite the label "indefinite" on the Personnel Action Form (PAF), continued employment was based on an independent management review of the individual employee in the overall work context. This was as true in the past as it is in the present. Under the present system, the PAF's of student employees state that the appointment is for a "definite" period, usually until June 30, and their status as student employees continues to be evaluated at that time by management for purposes of future employment. As William Wenz, the personnel officer in the General Library testified, "when money begins to dry up, so do the working hours." This is true

whether the PAF says the appointment is "indefinite" or "definite."

The University's reason for making this change stems from budgetary concerns, and is as follows. In early 1981 a new budget officer reported to Rita Kane that there existed a $180,000 overrun in the General Assistance (GA) budget.[11] Wages and benefits for student employees are paid out of GA funds. According to Kane, the reasons for the overrun were as follows. Work study rates for students went from 20 percent in the previous year to 40 percent of full salary. Student employees were paid at higher rates than in the past, and those employees who worked more than one-half time were receiving benefits, such as vacation, sick-leave, etc. Money to pay those benefits came out of the GA budget. Shift differential had also been increased.

In February of 1981 the University took steps to compensate for the deficit. A hiring freeze was imposed on vacant career positions. Unit heads were instructed to develop an adjusted General Assistance budget reflecting a new estimate of necessary expenditures. Unit heads were to consider deferring certain work, if possible, in favor of doing only that which was necessary to keep the libraries open. Equipment

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[11]Janice Koyama reports to Rita Kane. Kane, in turn, reports to Joseph Rosenthal, the University librarian.

purchases were curtailed and planned renovations cancelled. In sum, the University wanted to improve control of its expenditures. Then in June 1981 to compound matters, the University informed the General Library that it was to refund $150,000 already allotted.

Upon investigating the budget problem further Kane discovered among other things, that two-thirds of the student employees had indefinite appointments and one-third had appointments with definite ending dates. By changing the PAF's for new hires to reflect that the appointment was for a definite period, the University more accurately described the nature of the appointment and clearly communicated to employees that employment was not guaranteed.[12] In other words, by this action, the University demonstrated that it retained the authority and flexibility to reduce hours or layoff employees if the situation necessitated it, and, during a period of continuing budgetary difficulties, there was an increasing likelihood of this occurring.[13] This action, according to Kane, brought the library into conformity with University-wide

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[12]Staff Personnel Policy (SPP) section 720.1, provides that casual and casual-restricted employees (student employees) are the first to be reviewed when lack of work or lack of funds necessitates a decrease in staffing levels.

[13]The change in the PAF's applied only prospectively to new hires and transfers. The PAF's of student employees already on the rolls were not changed.

policy with respect to appointments. As section 720.1 of the SPP states,

> ...casual and casual/restricted positions are usually established as part time or for temporary periods.

B. The Limitation on Hours and Compensation.

In the past, student employees, other than library assistants II, were normally scheduled to work 12-18 hours per week.[14] However, through free substitutions and special arrangements for emergencies, some employees worked more than one-half time; that is, more than 20 hours per week for an indefinite period of time. The head of a library had the authority to authorize employees to work more than 20 hours per week, not including substitutions.

Under the new rule, student employees are generally prohibited from working more than one-half time. However, the rule states that, as under the old rule, exceptions can be made by the section head on a case-by-case basis. Thus, the new policy, as now written, does not represent a major change from the past practice. In fact, at least three CSEA activists, Ercolini, McCurdy, and Clanon, on occasion worked more than one-half time after the so-called change.

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[14]Student employees at the library fall into three classifications: (1) library assistant II, (2) library assistant I, and (3) clerk. Library assistants II are considered student supervisors.

In a related matter involving hours, the University moved to retain the flexibility to reduce hours during any given academic quarter to accommodate fluctuating needs in a particular section. Management had the authority to take such action in the past, but, according to McCurdy, never exercised it. McCurdy testified that CSEA objected to this action, not because it constituted a change, but because it represented a management attempt to emphasize its authority in this area.

The next management action dealt with substitutions. This also related to the hours change. In the past, the substitution policy at Moffitt was very liberal. Lists were posted whereby employees could designate hours they wanted to give up (i.e. not work) and hours they wanted to substitute for another worker. An employee who wanted to substitute could choose hours from the list, cross them off, fill out a substitute slip, and put it in the substitute slip box. The employee would then proceed to substitute the hours he or she had chosen. This system had been encouraged in the past to accommodate student employees whose schedules varied. Although the procedure was administered by management officials who had the authority to intervene on any given substitution, monitoring the program was time-consuming and burdensome.

The basic substitution system has not changed. However, substitutions are now limited in two ways. First, an employee cannot substitute for another employee when in doing so he/she

would end up working more than one-half time, in violation of the one-half time rule discussed above. Second, an employee who substitutes for someone in a lower class is now paid at the rate applicable to the lower class. In other words, a library assistant II who works in place of a clerk would be paid at the clerk's rate. Without this change more money would have to be paid out of GA funds than had been initially budgeted to perform the work.

The University, through the testimony of Janice Koyama, explained the reasoning behind the changes in hours, substitutions, and compensation limitation for substitutes. Budgetary constraints, apparently necessitated by the overall financial difficulties in the General Library, were paramount in her thinking at the time of the changes in Moffitt. In this regard, she explained her budget related reasons as follows:

> The funds that allocated to a library unit for a student employees are called general assistance or G.A. funds. With the money that is available to any library unit, one would need to pay wages for those students for the hours worked. And for any students who worked over twenty-hours, vacation and sick leave benefits on a pro-rated basis can then be accrued and or paid at the same general assistance funds. In other words, salaries and benefits for student employees come out of the same money or monies. To restrict the number of hours of the student can work then, to below 20 hours, would mean that for any manager for any library unit you could use all the money available to you for work hours and you could control the amount of money paid for nonwork hours. It was my choice to do the later.

Koyama had begun a review of the ratio of student salaries to benefits soon after she took the position in Moffitt.[15] It was this review which at least in part prompted her to make the complained of decisions, particularly because employees working more than one-half time accrued University benefits.

In addition, Koyama testified that her desire to achieve consistency with University-wide policy regarding hours played a role in her decision to institute changes in this area.[16] In the General Library for example, student employees were generally assigned 12-18 hours per week, and Koyama wanted to achieve the same in Moffitt.

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[15]She noticed that several student employees were severing their employment relationship with Moffitt and cashing out the benefits, e.g., vacation time, they had earned. One employee, for example, cashed out $500 worth of benefits. Koyama, while realizing the employee was entitled to the money, determined that it was a substantial amount that could grow into a significant expenditure if student employees were permitted to accrue benefits as they chose. She therefore moved to gain control over when student employees could earn benefits. Also, Koyama testified that she estimated the savings in this area to be considerable, although she could not state exactly how much was at stake because Moffitt had no internal auditing procedures. In the fiscal year 1981-82, after an internal auditing procedure was implemented, it was determined that $10,000 was spent on benefits, a lower amount than would have been paid out if the change had not been made.

[16]Respondent takes the position that Staff Personnel Policy (SPP) section 110, limits student employees in casual-restricted positions to less than one-half time. The language of this section is by no means clear on this point. However, the fact that the SPP does not expressly require that casual-restricted employees work less than one-half time does not detract from Koyama's good faith interpretation of that provision or her stated intention to make the practice in Moffitt consistent with the practice in the General Library.

Lastly, Koyama sought more managerial flexibility in distributing hours, especially to student employees. She testified that one goal of the University is to employ as many students as possible. In a period of limited federal and state funds, campus jobs become more important. By limiting hours to below one-half time, she reasoned, more students could be employed. Also, Koyama felt that the goal of students at the University should be to focus on academics and working more than one-half time presented an obstacle to achieving that goal.

Allegations of Unlawful Motive.

At the hearing and again in its brief the Charging Party argued that the trier of fact should infer an unlawful motive from one or more of the following incidents. I have carefully considered all of these incidents, and, as more fully discussed below, decline to infer such a motive.[17]

A. Whitson-McCurdy Conversation.

In late 1980 or early 1981, William Whitson, then acting head of circulation in Moffitt, saw and overheard McCurdy talking to a fellow employee about a grievance. Apparently thinking McCurdy was supposed to be working, he pulled him

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[17]Also in its brief, the Charging Party appears to argue that some of these incidents constitute unlawful retaliation and thus separate violations of the Act. None of these incidents were charged as separate violations and, having not been fully litigated, cannot be considered as such. San Ramon Valley Unified School District (8/9/82) PERB Decision No. 230.

aside and said he could be repirmanded for engaging in such activity. McCurdy asked for a representative and Whitson said he didn't need one. The conversation lasted only a few minutes. Apparently Whitson, who had just attended a lecture on access and other organizational rights under HEERA, felt McCurdy was in violation of some rule.

It turned out that McCurdy was not on work time and was in the bulding to see another employee about a grievance. McCurdy was never reprimanded, nor was his protected activity curtailed by Whitson at any point in the future. Whitson's comments, though arguably improper under the circumstances, appear to represent an isolated incident during which he believed McCurdy was on work time and he (Whitson) was properly following some access or other rule which was the subject of the recent lecture. For these reasons, I attribute no unlawful motive to him by virtue of the conversation with McCurdy.

B. The Library Carts.

Another incident cited by CSEA to show unlawful motive, in the form of a threat by a supervisor to a CSEA activist, involved library carts upon which someone had written "CSEA" and "Janice and Al are paying their rent this summer, are you?" Trujillo had the carts cleaned. Later, at a staff meeting during the summer of 1981 shortly before Trujillo went on vacation, he said that if the carts were written on when he came back, "You, Kevin (referring to McCurdy), will clean them

up." He also said that, alternatively, the library assistants II would have to clean them up in alphabetical order.

McCurdy interpreted this as a threat, since he and the other library assistants II were either CSEA activists or CSEA members. I decline to interpret this as an illegal threat. It seems to me more likely that Trujillo, during a staff meeting, simply told McCurdy and the other library assistants II, who were student supervisors, that he did not want to see the carts marked up when he returned from vacation, and he would hold them responsible if that happened. Granted, Trujillo may not have phrased his directive in the best possible way. Nevertheless, under the circumstances it was not improper for Trujillo to hold the student supervisors responsible. Protected activity or union membership did not shield them from this responsibility.

C. Trujillo-Ercolini Conversation about SF-CE-39-H.

The morning after SF-CE-39-H was settled, Al Trujillo, who had taken over for Whitson as head of the circulation department in Moffitt, expressed dissatisfaction with the settlement to Ercolini as several employees looked on. Trujillo was distressed because the discussion occurred early in the morning, the settlement having been reached late the prior afternoon. Trujillo, who despite his position as head of circulation did not take part in the settlement talks, was upset that he had learned of the settlement from Ercolini rather than from a University representative. Also, Trujillo

appeared visibly upset over the substance of the settlement agreement to the point of threatening to resign.

It is well-established that the employer is entitled to express his views on employment-related matters over which he has a legitimate concern as long as there is no threat of reprisal or force or promise. In my view, Trujillo did not violate this principle during the conversation with Ercolini. He may have been justifiably upset because he was excluded from the settlement talks, and his behavior represented only a means of ventilating his anger. This does not automatically translate into anti-union sentiment. Also, Trujillo's dissatisfaction with the terms of the agreement, without more, does not add up to unlawful motive. He had no obligation to "like" the agreement. His only obligation was to live up to its terms, which he did. He met with CSEA on request, participated in the meet and discuss sessions contemplated by the very terms of the settlement, and otherwise lived up to the substance of the agreement. And his threat to resign can hardly be taken as a threat against employees. In fact, under the circumstances, it appears that at least some employees would have been delighted to see him go. While one might question Trujillo's judgment, his statements for purposes of this case were a legitimate expression of concern about an employment-related matter and carried no threat of reprisal, force, or promise.

D. Trujillo-McCurdy Lunch Break Conversation.

Another incident in late summer 1981 involved a conversation between McCurdy and another employee who had been told by her supervisor not to take lunch because there was a staffing problem in the billing office. Within earshot of Trujillo, she facetiously asked McCurdy if employees are entitled to a lunch break. The two began a light exchange about the subject, with McCurdy responding in a joking manner that only library assistants III and library assistants IV get lunch these days, and maybe she would get to take lunch if she became a library assistant III. These are supervisory positions, of which there are only two in the library, and Trujillo was the only library assistant IV. Trujillo immediately called McCurdy into his office, otherwise known as the "cage," and said his behavior was "unacceptable." Trujillo told McCurdy,

> I've had it with sly remarks and your statements. They're loud and people can hear them all over.

Apparently having heard the same complaint about his voice on other occasions, McCurdy agreed that Trujillo's comment on that point might have been justified, but objected to the substance of what was said. Trujillo said that he was documenting such incidents and action "can be taken." McCurdy said he wanted a union representative if Trujillo intended to discuss the matter further. He then left the room and the matter was never raised again.

Once again, I decline to interpret this exchange as illegal or tainted by an unlawful motive. In effect, McCurdy, along with another employee, teased Trujillo in a loud voice about the right to take lunch because of his supervisory status, while implying that the right was limited or nonexistent for non-supervisors. What ensued was a sharp exchange where Trujillo spoke his mind, telling McCurdy that, in his view, the comments were improper. This represents to me nothing more than a heated routine shop floor discussion between a union representative and a supervisor about a matter of disagreement. And since the matter was never raised again, nor was McCurdy ever documented, it can hardly be taken seriously as evidence of an unlawful motive.[18]

E. Trujillo-Iskow Conversation.

Summer hours were to be distributed at about the time the parties were negotiating for a settlement on SF-CE-39-H. Some employees, including Rachel Iskow, began to get a little anxious waiting for the hours to be distributed. Iskow went to Trujillo and asked when summer hours would be announced. She was under the impression that the distribution would be based

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[18]Another confrontation between McCurdy and Trujillo occurred when these two met on a BART train a few days before the hearing in this matter began. Since the conversation occurred so long after the conduct which forms the basis of this charge, it cannot be used to determine Trujillo's state of mind at the time of the complained-of conduct. Therefore, the BART train discussion will not be considered.

solely on seniority. Trujillo said he was a proponent of assigning hours based on seniority, and he was prepared immediately to make the assignments on that basis. But he said he could not do so because the issue was not in his hands, nor was it in Koyama's hands. According to Iskow's impression, Trujillo made it sound like CSEA was holding up the distribution of hours, and he further suggested that if she could find employment elsewhere she should take it because he did not know with certainty when the hours question would be resolved.

In fact, Trujillo's comments were not inaccurate. The hours question was being talked about in conjunction with the settlement negotiations in SF-CE-39-H, apparently with the consent of both parties. And Trujillo in fact may have been prepared to distribute hours immediately based on seniority if the matter were left to him. Further, even Iskow admitted that at the time she spoke to Trujillo she was under the impression that management and CSEA were discussing the hours issue, presumably with an eye toward reaching agreement, not delaying it. The record is replete with documentation that CSEA was pressing to get the summer hours question resolved in a manner favorable to employees, and this was well known throughout Moffitt. It seems unlikely that anyone, even Trujillo, would claim CSEA was "holding up" hours, and it is even more unlikely that anyone, including Iskow, would believe such a claim. It

appears that Trujillo merely described the situation to Iskow as he saw it; that is, hours were not being distributed because the subject was being discussed by the parties along with SF-CE-39-H. For these reasons, Trujillo's statements were not improper, and I decline to attribute an unlawful motive to him because of the comments.

F. Whitson Memo to Trujillo.

Whitson, now associate librarian in Moffitt, previously served as acting head of circulation for about a year. Upon stepping down in the spring of 1981, he wrote a memo to Trujillo, his successor. The complete memo reads as follows:

> Problems to Watch For
>
> 1. Schedules, time cards.
>
> a. Some people always try to work with friend or on certain nights or weekends, especially one group, Kevin McCurdy, Jim Donato, Lori Patterson, Karen Landau. Lisa Mednick and Elaine Ercolini.
>
> While I've little evidence that this means they work less, there is a strong possibility that they are inclined to chat more although it's also possible they work better when together (enjoy it more when with friends).
>
> The other problem is that you may never see these people or that their work can only be evaluated by one or two supervisors who happen to be close friends (and their union leaders).
>
> b. Many people have taken to working more than six hours without clocking out. People like Kevin McCurdy, Jim Donato, definitely know better, but still do it with impunity, also, Richard Rosario, other supervisors and LA I's to some extent.

c. It is frequent practice to make a special exception and clock someone out after they've left, allowing them to take a break at the end of a shift.

d. Write-ins are commonplace, Kevin McCurdy especially a problem.

e. We need better guidelines on subbing. It's useful to use, but people can almost work as many hours as they choose without our knowing anything about it until a month later. They also earn benefits.

f. There aren't any clear rules about LA I's and LA II's subbing for clerks and LA I's. There used to be an understanding that it couldn't be done except in emergencies.

Whitson testified that the memo represented his effort to familiarize Trujillo with the problems and practices in the unit. The memo contained a list of problems which had developed over the last year, but Whitson had not addressed them directly because he felt "uncomfortable" raising such matters, especially with McCurdy. He testified that he wanted to minimize the number of problems where he was forced into confronting McCurdy. The result was that Trujillo inherited a laundry list of undiscussed and unresolved problems.

Whitson testified as follows about his reasons for the statements in the memo. In the course of his duties he became aware that certain groups of students developed a pattern where they frequently worked together, usually under the same student supervisor. This presented problems in evaluating these students. The evaluation process involved meetings where Whitson, along with six supervisors, commented on and rated

students. Whitson was ultimately responsible for preparing the evaluation, signing it and meeting with the employee. According to Whitson, at some evaluation meetings supervisors were unable to comment on the employees because they had had no contact with them. When this happened, Whitson had to rely on only one or two supervisors who had had contact with the student being evaluated. This made Whitson uncomfortable because he was not getting the broad-based supervisory input he felt he needed to complete a fair and objective evaluation.

He summed up his reasons as follows:

> Well, where I had not basis for evaluating the quality of the supervisory input. I had six people there to give me input. But getting back to, you know, this memo, the reason that I was concerned about this work pattern, and I think it may be less important in the overall scheme of things than this session seems to make it, but I think one of the reasons that I thought of this as somethings to be concerned about was simply that where I was so dependent on getting a range of comment from six different people, if some of those people said they couldn't comment and I had to rely just on a couple of people's input, then I felt less secure. And it was a natural thing. And then if there was some reason to think that the two people say that did have comment were close friends or that they were involved in an organizational activity, that that would make me feel a little less secure, even. And it wasn't that they were involved in the union, it was just simply that where people are working together, have things in common or their friends or associates, there may be, you know, you may prefer to have a little bit more objective comment, as well, to ensure that there isn't any bias operating.

As he stated in the memo, Whitson testified that his concerns were only for potential problems. He had no evidence of actual wrongdoing.

Employees named in paragraph "a" of the memo regularly worked on the Sunday night shift which was supervised by McCurdy. In fact, he recalled employees expressly requesting to be assigned to the shift supervised by McCurdy. Further, the employees named in paragraph "a" were the only ones whose schedules had formed the pattern about which Whitson was concerned.[19]

Under these circumstances, Whitson's comments in paragraph "a" cannot be viewed as carrying an unlawful motive. While it may have been better to confront the named employees directly with this problem, the fact that he did not is not fatal. In my view, Whitson was simply passing on some employment-related information concerning the evaluation process to an incoming supervisor. He was legitimately concerned about bias in the evaluation process. And, since the employees named in the memo were the only ones who caused this concern in Whitson's mind, it cannot be concluded that the comments were discriminatory. This conclusion is supported by

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[19]Also, Ercolini and Donato were also student supervisors. This meant that the Sunday night shift, supervised by McCurdy, had three student supervisors, an undesirable situation in Whitson's view.

Whitson's recognition that these employees may work more efficiently together, thus implying that maybe nothing needs to be done.

Whitson wrote in paragraph "b" that many people had been working more than six hours without clocking out. He cited McCurdy and Donato as individuals who had done it with "impunity." When asked about this comment, Whitson, without contradiction, said he used the word "impunity" because they had been doing it with increasing frequency and had made no attempt to correct the practice. McCurdy and Donato were CSEA activists, but Richard Rosario, who was also named in the memo, was not.

Paragraph "b" simply reflects Whitson's legitimate concerns about employees properly clocking out. Based on the record it appears that McCurdy and Donato frequently did not do what was expected in this regard and thus Whitson was justified in describing them as individuals who had acted with impunity. Also, the fact that Rosario was mentioned indicates that Whitson's comment was not discriminatory.

In paragraph "e" Whitson again named McCurdy, this time as "a problem" when it comes to write-ins. Employees are supposed to punch in when starting work and punch out when stopping. If there is an error or if an employee forgets, he or she can go to the time clock supervisor, who can authorize an exception and write in the correct time. When this happens, however, the

supervisor cannot be sure of the correct time and has to take the employee's word for it. Whitson testified, again without contradiction, that McCurdy had an unusually high number of write-ins. While other employees occasionally used the write-in method of clocking in and out, McCurdy had such high numbers in this practice that Whitson felt compelled to include his name in the memo. Hence, McCurdy was mentioned specifically.

Once again, Whitson had legitimate concerns about McCurdy's conduct regarding the use of the write-in procedure. McCurdy had apparently abused the procedure to the extent that he drew Whitson's attention. Whitson, in turn, communicated this problem to Trujillo via the memo. There is nothing improper in this action. An employee is not insulated from such attention and even eventually from appropriate corrective action because he has engaged in protected activity.

With regard to his comment about substitutions in paragraph "e," Whitson described the problem as follows:

> The problem was that if most of the substitution focused on a few people, they could then be [sic] quickly accumulate much more than the 18 hours a week that we have as our understood maximum. And so, there was a kind
> of conflict developing between, on the one hand, we have a rule nobody works more than half-time or than 18 hours, but on the other hand, there are people that, through substitution, are able to work quite a few more hours. There's one month that I remember noticing that a woman had worked, you know, 35 hours or something like, and because she had really gone out and made a

big effort to, she wanted to earn more money right then and it was fine. Within our rules as they were presently structure, [sic] that was acceptable, but that's why I brought this up as needing better guidelines because it meant that effectively, we didn't have control in terms of the number of hours people would work or when they would work those hours, that there was a great deal of sort of modification of the administrative decisions in terms of the actual practice and that people had a great deal of latitude to design their own schedules and work as many hours as they felt they wanted to.

Whitson further testified about potential problems associated with trying to monitor hours under the then current procedure.

Q. Were these subbing lists and subbing slips accessible to you?

A. Yes.

Q. So you could, at any time you wanted, go in and look at them and find out how many hours someone was going to work or planning to work or who was subbing out a lot of hours, something such as that, was that possible?

A. That was possible if I were to monitor individual cases, but that was 75 or 80 employees, you know, to keep up with that on a daily basis would have been out of the question. There was no way that I could review all those things and keep track, week by week, of how much somebody was working. And the only time it would come to my attention was when I was reviewing the budgetary statement the month after that. And I would see that certain people had worked, you know, an unusual number of hours that last month and I had been totally unaware of it.

With regard to substitutions, Whitson testified that there

had been numerous occasions when library assistants II substituted for clerks. Because there was no clear rule on substitutions, Whitson felt uneasy about prohibiting them, but he perceived it as a problem nevertheless. Thus, when Trujillo took over, Whitson felt compelled to call this situation to his attention.

As more fully discussed in other parts of this proposed decision, the University had legitimate business reasons for making changes in substitutions and compensation. Whitson's comments in the memo to Trujillo simply restate some of these reasons. Therefore, they cannot realistically be construed as carrying an unlawful motive.

G. Release Time to Attend an Informal Conference.

A question about granting release time to union representatives to attend an informal conference arose shortly after the informal conference in SF-CE-39-H. Koyama was unsure as to whether McCurdy and Donato claimed release time to attend, so she wrote Whitson a memo asking him to "discretely" determine if these two employees clocked in on the day of the conference. No evidence was presented to show what, if anything, was done about the time issue after Whitson checked on it. Nor was any evidence presented to show that Koyama's actions were discriminatory.

McCurdy obtained a copy of the memo. He contended at the hearing that checking the records evidenced an unlawful motive. In the alternative, according to McCurdy, if the

records were to be checked at all, it should not have been done "discretely," but rather he and Donato should have been confronted directly; by acting discretely, library officials evidenced an unlawful motive.

CSEA's assertions about Koyama's memo really stretch the point. Under the circumstances, I find that the memo represented nothing more than a legitimate attempt by a manager to check on the time of two employees for whom she was responsible. She even had a right to do it "discretely." And the fact that the time was spent in an informal conference is of no consequence, for it has been established that there is no absolute right to paid release time to attend such a conference. Regents of University of California (Berkeley) (12/22/81) PERB Decision No. 189-H.

H. Testimony of Sharon Samek.

In its brief, Charging Party points to the testimony of Sharon Samek to support its assertion that library officials harbored an unlawful motive and retaliated against employees for engaging in protected activity. First, CSEA cites events during the Kathy Gurvis reclassification complaint, arguing that Gurvis was demoted and the grievance denied after she sought union representation by Samek. In fact, Gurvis' claim was denied, but the mere denial of a reclassification attempt hardly constitutes evidence of an unlawful motive. Also, Gurvis was not demoted. She was simply told to stop

keypunching because she was not classified as a keypuncher, and, if she continued to do key punching she would not be paid for it, but rather would be paid at the lower rate applicable to the classification she actually held. Thus, the contention that Gurvis was demoted is a bit strained.

CSEA also claims that library officials bypassed the union and attempted to deal directly with Gurvis during her grievance. Management representatives did make a few attempts to contact Gurvis at the beginning of the case and again at about the time the matter was coming to a close to ask if she would assist in training her replacement. It appears that the employer met with CSEA and Gurvis on several occasions and the matter was eventually resolved. The evidence shows only that library representatives made a few routine job-related contacts with Gurvis and did not persist in attempting to deal with her on an ongoing basis to the detriment of CSEA. The contacts appeared harmless. Under these circumstances, I conclude that the University's conduct was not improper and decline to infer an unlawful motive from these events.

To show unlawful motive, CSEA next asserts that Samek, a CSEA activist, received only a "satisfactory" evaluation which contained "disparaging" remarks; the evaluation was prepared by a supervisor, Hans Franke, with whom she had little contact and should have been prepared by a student supervisor; and, after a meeting, Franke wrote additional comments on the evaluation and

Whitson attached a letter to it. These facts, concludes the CSEA brief, add up to unlawful retaliation. What the brief does not point out is that Samek eventually grieved the evaluation. As part of the resolution of the grievance, a new evaluation was prepared by Whitson and his first letter and all derogatory information removed from her file. Samek was satisfied with the second evaluation, but continued to feel it was more appropriate for a student supervisor, rather than Whitson, who was head of circulation, to prepare the evaluation. Moreover, the record does not contain sufficient evidence to support the conclusion sought by CSEA. Necessary information, such as the grieved evaluation, was not presented. Past evaluations of Samek or of other employees were not presented for comparison purposes. Specifics about the contents of the first evaluation or about the comments in Whitson's letter were not presented. Conclusory statements which show no more than Samek was not happy with the first evaluation or the fact that Franke, rather than a student employee, prepared it cannot support the conclusion CSEA seeks.[20] Even if Franke acted out of turn when he evaluated

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[20]Samek seemed to be especially unhappy about the fact that the evaluation was, in her view, poorly written and contained grammatical and spelling errors. She claimed that other employees who had earlier circulated a petition about evaluations had similar mistakes on their evaluations, but

Samek, this fact, standing alone, is of little probative value in showing that an unlawful motive was present in the library. And the fact that the evaluation was later redone to her satisfaction and Samek's file expunged of all derogatory information hardly adds to the CSEA position.

The last piece of Samek's testimony advanced by CSEA in support of its claim of unlawful motive involves her unsuccessful applications to vacant positions in 1981. She applied for several positions, but received only one interview.[21] Regarding the other positions, she received what she described as untimely rejection notices, usually about one month after applying, stating that she was not qualified for the slot.[22] Samek filed grievances on all these

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employees who did not assist with the petition received evaluations which did not include similar mistakes. No supporting evidence was presented to support her conclusory claim of disparate treatment.

[21]The record is unclear as to exactly how many positions Samek applied for. It appears, however, that it was approximately seven. Further, at the time she applied for these positions in 1981, she worked at the Institute of Industrial Relations, having left Moffitt in 1980.

[22]Although Charging Party raises the timeliness issue in its brief, at the hearing Charging Party expressly stated that timeliness was not an issue. (TR:Vol.I, p. 114.) In any event, no unlawful motive can be inferred from Samek's testimony regarding timeliness. She conceded on cross-examination that there is no set time-table to receive a rejection, and actual receipt varies on a case-by-case basis.

rejections. None of the grievances were finally resolved at the time of her testimony.[23]

The Charging Party has failed to produce sufficient evidence to support its conclusory claim that Samek's unsuccessful attempts to secure another position add up to an unlawful motive or retaliation. And the CSEA argument gets even weaker when one considers that Samek, after only about seven attempts, was eventually selected for a position in the Institute of Industrial Relations, thus undermining any argument that she was being systematically rejected because of her union activity.

ISSUES

1. Whether the University interfered with protected rights and/or discriminated against employees who had engaged in protected activity by making changes in hours, the substitution procedure, compensation while substituting, or length of appointments?

2. Whether the University breached its obligation to meet and discuss changes in working conditions by switching from indefinite to definite appointments in the General Library?

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[23]Refusal to process her grievances and nonselection is the subject of another unfair practice charge.

DISCUSSION

A. Introduction.

Section 3571(a) of the Act prohibits interference with protected activity and discriminatory action against an employee for engaging in conduct protected by the HEERA including,

> . . . 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. (Sec. 3565.)

In Carlsbad Unified School District (1/30/79) PERB Decision No. 89, the Board set forth the test for determining when employer actions interfere with the rights of employees under the Act. That test is summarized as follows. Where there is a nexus between the employer's acts and the exercise of employee rights, a prima facie case is established upon a showing that those acts resulted in some harm to the employee's rights. If the employer offers operational necessity in explanation of its conduct, the competing interests of the parties are balanced and the issue resolved accordingly. If the employer's acts are inherently destructive of employee rights; however, those acts can be exonerated only upon a showing that they were the result of circumstances beyond the employer's control and no alternative course of action was available. In any event, the charge will be sustained if unlawful intent is established either affirmatively or by

inference from the record. Under this test, unlawful motive is not necessary to sustain an interference charge. See also Santa Monica Community College District (9/21/79) PERB Decision No. 103.

Subsequently, in Novato Unified School District (4/30/82) PERB Decision No. 210, the Board clarified Carlsbad by setting forth the standard by which charges alleging discriminatory conduct under section 3571(a) are to be decided. The Board summarized its test in a decision under HEERA issued the same day as Novato:

> . . . a party alleging a violation . . . has the burden of making a showing sufficient to support the inference 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 protected conduct. As noted in Novato, this shift in the burden of producing evidence must operate consistently with the charging party's obligation to establish an unfair practice by the preponderance of the evidence. (California State University, Sacramento (4/30/82) PERB Decision No. 211-H at pp. 13-14.)

The test adopted by the Board is consistent with precedent in California and under the National Labor Relations Act (NLRA) requiring the trier of fact to weigh both direct and circumstantial evidence in order to determine whether an action would not have been taken against an employee but for the

exercise of protected rights. See, e.g., Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 729-730; Wright Line, Inc. (1980) 251 NLRB 150 [105 LRRM 1169] enf., in part, (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513].[24]

Hence, assuming a prima facie case is presented, an employer carries the burden of producing evidence that the action "would have occurred in any event." Martori Brothers Distributors v. Agricultural Labor Relations Bd., supra, 29 Cal.3d at 730. Once employer misconduct is demonstrated, the employer's action,

> . . .should not be deemed an unfair labor practice unless the Board determines that the employee would have been retained "but for" his union membership or his performance of other protected activities. (Ibid.)

The distinction between "interference" and "discrimination" cases is often blurred. Discrimination against employees for engaging in protected activity certainly interferes with the right of employees to form, join and participate in activities of employee organizations. Thus, the facts of this case lend

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[24]The construction of similar or identical provisions of the NLRA, as amended, 29 U.S.C. 151 et seq., may be used to guide interpretation of the EERA. See, e.g., San Diego Teachers Assn. v. Superior Court (1979) 12 Cal.3d 1, 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616. Compare section 3571(a) of the Act with section 8(a) (3) of the NLRA, also prohibiting discrimination for the exercise of protected rights.

themselves to either a Carlsbad or a Novato analysis. Coast Community College District (10/15/82) PERB Decision No. 251.

Interference.

Assuming a nexus exists between the protected activity and the complained-of conduct, the record indicates that the University's actions tended to cause at most slight harm to employee rights under the Act.[25] Employees in Moffitt Library had engaged in a considerable amount of protected

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[25]CSEA argues in its brief that the switch to definite appointments may result in new hires never becoming eligible for certain grievance rights because they will never have "thirteen consecutive months" in a "pay status," a prerequisite to acquiring such rights under the SPP section 280.4. CSEA also argues that acquired grievance rights will be lost under the definite appointment scheme because SPP section 280.4 provides that eligibility continues only until there is a "break in service," which is defined by the SPP as "any separation" from employment. Under this argument, the end of a definite appointment signifies a break in service, even if the employee is rehired the next day. The University argues in its brief that, regardless of the type of appointment, a casual/restricted employee whose work was unsatisfactory could be terminated without the "formalities of civil service." The University's argument is as follows. Under SPP section 720 casual/restricted employees are the first to be reviewed for purposes of "termination" when the "lack of funds or lack of work necessitates a decrease in staffing levels." Under SPP section 730, casual/restricted employees are entitled, among other things, to a warning and a written notice before being "released" for "unsatisfactory performance or lack of suitability for University employment." SPP section 740 provides a procedure for "dismissal" of regular status employees, and SPP section 280.2(b), scope of the grievance procedure, states that "dismissals" may be grieved. That section says nothing about being "released" or "terminated." Therefore, argues the University, the section 280 grievance procedure is not applicable to casual/restricted employees because they are not "dismissed," but rather are either

activity during the period leading up to the complained of changes. Union membership increased and there were several employees who became active in the union in addition to simply joining. It is therefore true that the changes affected a large number of CSEA members and activists. Also, the nature of the changes was significant. Hours were cut back and modifications in substitutions and compensation when substituting under certain situations were made. Appointments were switched from indefinite to definite status. Coming on the heels of the settlement in SF-CE-39-H and other protected activity, the University's actions were of the kind which tend to chill the exercise of protected activity, thus causing slight harm to employee rights.[26] Having reached this conclusion, I now turn to the University's reasons for its actions.

"terminated" under section 720 or "released" under SPP section 730. Both parties rely exclusively on selected portions of the SPP to support their respective positions. The SPP cannot be interpreted in a vacuum. The record is almost totally devoid of evidence which would shed light on the meaning of the terms in the SPP relied on by the parties. Therefore, I am unable to render a decision that the change in appointments constitutes more than slight harm to CSEA members and activists, especially given the availability of other means of review under the SPP. CSEA has simply not proved that the grievance rights have been limited.

[26]To show actual harm to employee rights in Moffitt Library, CSEA points to the fact that union membership rose in 1980 and declined in 1981, as did employee interest and overall representational activity. Ercolini, a CSEA witness, gave the following testimony about CSEA membership in Moffitt. There

The University had valid business reasons for making the changes. There is no doubt that Koyama wanted to get control of the operation in Moffitt. Upon taking over as head librarian, she immediately concluded that employees had as much, if not more, of a decision-making role as management representatives on matters which are traditionally left to the employer. That she sought to develop a more efficient operation and to exercise her managerial authority in making changes does not automatically translate into unlawful activity.

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are about 80-90 employees in Moffitt. During the period October to December 1980 about 20-25 employees joined CSEA. By December 1980 there were about 40-45 CSEA members in Moffitt. As of June 1, 1981, CSEA membership had increased to about 60-65. About 10-15 new members were signed up between October and December 1981, but as of December 1981 CSEA had about 40-45 members. While it may be argued that this information indicates a correlation between the University's actions and the decline in CSEA membership, there are other factors which might lead one to question that the changes in working conditions had anything to do with this decline.

Even accepting that some decline in union activity occurred simultaneoulsy with the employer's actions, under the record developed here timing alone is insufficient for Charging Party to sustain its burden of showing actual harm. Next, it does not necessarily follow that the University's actions caused the decline in union interest. There are other reasons, equally logical and persuasive, and unrelated to the University's actions, for this decline. There may have been a lull in employee activity between the spring and fall quarters due to summer vacation and the fact that fewer numbers of student employees were employed at the library. During the summer sessions in 1981 there were approximately 32 casual restricted employees working at Moffitt, whereas about 60-70 employees worked there during normal periods. In fact, CSEA complained throughout the summer meetings and at the hearing about the University's decision to conduct these meetings during a period

Koyama had concerns about the budget. In the face of a $189,000 overrun, she decided to reduce costs by limiting hours to less than 20 per week, thus lowering the amount she would have to pay out of the General Assistance fund for benefits accrued by employees who worked more than 20 hours per week. This, in turn, required that she limit substitutions so that employees would not go over the 20 hour limit via the

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when many union members and/or employees were not available to participate in the process. This complaint indirectly concedes that the workforce was lighter during the summer. There is a fairly good chance that a substantially reduced workforce might generate less activity. Further, some students may have graduated or permanently moved on for other reasons. According to Ercolini, there are in fact fewer employees now employed in Moffitt than there were in 1980 when CSEA membership began to increase. In 1981 when CSEA membership began to decline, there were approximately 15 employees who were known to have left the CSEA membership rolls because they ceased working at Moffitt. And, given the temporary nature of the student workforce, this number may have been much higher. Despite this, by Ercolini's own admission, CSEA signed up 10-15 new members between October and December 1981, immediately following implementation of the complained of changes, thus suggesting employees at that time were responsive to CSEA. Lastly, as conceded by Sharon Samek, a CSEA witness, union activity may ebb and flow for a variety of reasons, all unrelated to the University's actions here, and sometimes without apparent explanation. It follows that, during certain periods, some activity might become the center of attention, while other activity might subside. During the summer of 1981, this is precisely what happened. The parties were involved in intense meet and discuss sessions which were time-consuming and the focus of the attention of employees who were on the payroll at that time. SF-CE-39-H and SF-CE-56-H also represented a lot of activity in 1981 and 1982. It is not, therefore, entirely accurate to say that union activity slacked off during 1981. With respect to the General Library, CSEA presented no credible evidence to show that employees there suffered actual harm.

substitution route.[27] Additionally, these changes brought Moffitt into conformance with what Koyama understood to be the practice in the General Library. The related change regarding compensation for substitutes was also motivated by budgetary reasons. Koyama sought to pay salaries only in that amount which had been budgeted to accomplish the work. Thus, higher paid employees would be paid at lower rates when substituting for employees who were scheduled to do the same work at the lower rate.

Furthermore, Koyama had legitimate concerns about spreading the available number of hours around to the greatest number of employees possible. In view of the limited state and federal money for students, she reasoned, employing more employees would satisfy the University's overall goals as they relate to the academic and employment needs of students. Koyama wanted the flexibility to distribute hours to meet these goals.

With respect to the switch to definite appointments, the University took steps to demonstrate to employees that it had the authority and flexibility to determine whether to renew or not renew an appointment or to cut back on the hours of

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[27]Also, Whitson testified that monitoring the former substitution system on a daily basis would have been "out of the question" as overly burdensome. CSEA never produced any credible evidence to rebut this testimony. The Charging Party established only that management in the past had ultimate control over the process, a point which is not directly in issue here.

employees if the circumstances necessitated such action. In the face of increasing budgetary difficulties, it was certainly understandable that the University clarified its position with respect to its authority to renew an appointment. And it seems that, in doing so, it acted fairly towards its new hires by informing them from the outset that, given the current financial situation, employment was not guaranteed. In fact, the action becomes all the more understandable when one considers that section 720 of the SPP states that casual/restricted employees are the first to be considered in the event of a staff reduction. Moreover, Koyama was acting to bring the library into conformance with University policy, which states that casual/restricted are usually established as part-time or for temporary periods. (SPP 720.1.)

In sum, there is no indication that Koyama's thinking underlying the changes was prompted by anything other than good faith assessments of what needed to be done to efficiently manage the library. She wanted consistency with library policy. She wanted more control over the operation in Moffitt. She was faced with a financial situation which, she concluded, required some action. To reach this goal she limited hours and modified the substitution rule with respect to hours and compensation to address the financial difficulty. This was done after meeting and discussing the subjects with CSEA. In the end, CSEA activists and members were permitted to

work a reasonable number of hours per week and substitute for co-workers within certain limitations. It also set the stage to hire more employees and spread the work around. In addition, the switch to definite appointments did not apply to current employees. It was made to more accurately inform new hires of their employment status and to reemphasize the library's authority to cut back on hours in the face of a shortage of money or work. It is not unusual for an employer to take such action, especially in times of financial difficulties, in order to adequately staff and efficiently manage the operation.

It has been concluded that employee rights were slightly harmed by the University's actions. The University has come forward with valid business reasons for its actions. At this point, then, the competing rights of the parties must be balanced and the charge resolved accordingly. Carlsbad Unified School District, supra.

It is well established that employees must be permitted to participate in protected activity in an environment free of coercion or interference. However, it is inescapable that "inherent managerial interests" coexist with these rights vested by statute in employees. Carlsbad Unified School District, supra, p. 9. Even though the actions taken by the University in this case tended to infringe on employee rights, they were nevertheless not unlawful. The reasons advanced by

the University were not pretextual. While CSEA might not agree with the justification offered by the University, or even with the fact that the changes needed to be made at all, it is indisputable that the changes were based on good faith business judgments with an eye toward running the library operation more efficiently. The fact that they were made in a setting where the union was active does not, in the absence of an unlawful motive, render them any less valid or illegal. The employer acting without an unlawful motive must be permitted to make such changes, lest its right to pursue the "legitimate managerial interests" referred to in Carlsbad be totally eroded.

Therefore, it is concluded that the University's reasons for its actions under the circumstances outweighs the slight harm done to employee rights.

Discrimination.

Application of the criteria established in Novato inevitably lead to the same conclusion. The argument that the University's actions were taken because of union activity and that they had a heavy impact on CSEA activists and members and were therefore discriminatory is unpersuasive. The simple answer to this argument is that there happened to be a number of CSEA activists and members in the Moffitt and the General Library at the time of the changes, and thus the changes affected them.

Further, there is no independent evidence that the changes were aimed at union activists, or were otherwise connected to

the fact that employees chose to join CSEA or become active in the union. And the changes applied equally to employees who chose not to become active in CSEA or even join the union. Also, the timing of the University's actions, standing alone, is insufficient evidence from which to infer an unlawful motive. California State University, Sacramento, (4/30/82) PERB Decision No. 211-H.

In sum, there is simply no concrete evidence from which an unlawful motive can be inferred.

But even accepting that CSEA has established unlawful animus on the part of library representatives, the question remains under Novato whether the University would have made the decisions to change certain working conditions in any event. This question must be answered in the affirmative. As more fully discussed above, the University had many legitimate and substantial business reasons for its actions. Under these circumstances, it is concluded that CSEA has not met its burden of proving that but for an unlawful animus which flows from the exercise of protected activity the changes would not have been made.

Refusal to Meet and Discuss Indefinite Apointments

As a non-exclusive representative, CSEA has the right to meet and discuss with the University changes in matters of "fundamental" interest to employees. Professional Engineers in California Government (3/19/80) PERB Decision No. 118-S;

California State University, Sacramento (4/30/82) PERB Decision No. 211-H. A change in the student employee appointments is a matter of fundamental interest which would trigger the obligation to meet and discuss. However, before this can occur, it must be demonstrated by CSEA that a change was proposed or occurred which affects employees. Modesto City Schools (3/8/83) PERB Decision No. 291, p. 13. CSEA has not done so in this case.

In the past, despite the fact that the Personal Action Form described the appointment as "indefinite," employment from year to year was not guaranteed. The overall employment situation was evaluated each year and individuals were reemployed based on factors such as availability of work or funds, job performance and seniority. As it turned out, it was not uncommon for student employees to keep their appointments for the duration of their status as students. But this was due to the presence of other external factors, such as availability of work or funds, and not because the PAF carried the label "indefinite."

The same conditions exist under the new system. CSEA's argument that the change affected grievance rights has been rejected earlier. There is still no guarantee of continuous employment. At the beginning of each term or intersession employment needs are evaluated, presumably on the same factors

as in the past--availability of work, availability of funds, etc.--and staffing decisions are made accordingly. Contrary to CSEA's argument, it appears inconsequential that, under the old system, the library needed to execute no new forms in order to continue to employ a student, while under the new system the library would presumably need to fill out a new PAF indicating that a student was to be reemployed for another term under a definite appointment. Moreover, there is no indication that these decisions have been or will be based on anything but the factors cited above. Further, whether the University needs or does not need to execute a new PAF for continuous employment has no impact on employees.[28]

Based on the foregoing, I conclude that the switch from the "indefinite" to "definite" appointments in the General Library did not constitute a change which triggered the obligation on the part of the University to give notice and, upon request, meet and confer with CSEA. At most, the switch constituted a paper change involving the label on a personnel form. A unilateral act which does not change a condition of employment is not unlawful. Alum Rock Union Elementary School District (6/27/83) PERB Decision No. 322, pp. 22-23.

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[28]Obviously, if the employer decides not to reemploy an individual or group of individuals based on protected activity, rather than on the factors cited above, that would give rise to a new unfair labor practice charge.

Even assuming that the switch to definite appointments amounted to a change in a working condition which was subject to the meet and discuss requirements set forth in PECG, the evidence presented here does not lead one to the conclusion that the Act has been violated. Whether an employer has breached this obligation is an issue which is to be decided on a "case-by-case basis." Regents of the University of California, Lawrence Livermore National Laboratory (4/30/82) PERB Decision No. 212-H. Under the PECG principle, the employer must meet and discuss in good faith, but, unlike the employer's duty to meet and negotiate with an exclusive representative, good faith requires neither an obligation to reach agreement nor to continue to meet until impasse. Regents of the University of California, UCLA (12/21/82) PERB Decision No. 267-H, p. 6. In fact, under some circumstances, providing the union an opportunity to present its alternatives along with supporting rationale to the proposed change satisfies the obligation. See State of California, Franchise Tax Board (7/29/82) PERB Decision No. 229-S. When these principles are applied to the instant case, it becomes clear that the University has not breached its obligation to meet and discuss the change in appointments of student employees.

CSEA, through the meet and discuss sessions, had notice of this change as it applied to Moffitt at least by September 3 and possibly as early as August 11, according to McCurdy. At

the September 3 meeting, CSEA presented its views on the subject, and management responded with its rationale for the change. (See p. 11, supra.) It appears from the record that the matter was fully explored in an open and frank discussion. CSEA requested no further talks on the subject. There is no credible evidence that library representatives acted in bad faith, nor is there credible evidence that library representatives at the meeting lacked the authority to meaningfully meet and discuss this change. Koyama was present for Moffitt, and Deborah Harrington was there from the office of employee relations. It is therefore concluded that the University satisfied its obligation to meet and discuss this change as it applied to Moffitt by affording CSEA an opportunity to meet and present its proposals and rationale therefor. See State of California, Franchise Tax Board, supra.

During the meet and discuss sessions, CSEA was under the impression that the changes under discussion would occur only in Moffitt. However, on or about September 9, Rosenthal and Kane decided that the same change concerning appointments needed to be made in the General Library. A memo was circulated in the library on or about September 17 describing the change as it applied to the General Library. McCurdy, as a student supervisor, received a copy of the memo and thus had actual notice of the change in the General Library. Also at about this time, the University began to hire student employees

under definite appointments. Thus, CSEA was not given adequate advance notice and an opportunity to meet and discuss this change as it applied to the General Library.

Another meeting was held on October 1. CSEA again complained about the change at the October 1 meeting and amended the instant charge shortly thereafter to allege a breach of the obligation to meet and discuss the change, a position it has maintained throughout.

It is arguable that the University, by not affording CSEA a separate opportunity to meet and discuss the change in the General Library, technically breached its obligation under PECG. However, I am not persuaded by the argument. Such a decision would, in my view, elevate form over substance and reach a conclusion contrary to that intended by PECG and its progeny.

The appointments issue was fully discussed as it applied to Moffitt employees. CSEA raised its concerns. University representatives, at least one of which was from the office of employee relations and who presumably had the authority to speak for the General Library as well as for Moffitt, were present at the discussions. They responded with the employer's position. There has been no evidence to show that the proposals or alternatives advanced by CSEA on behalf of Moffitt employees did not apply equally to employees in the General Library. Nor has there been any indication that additional

arguments existed and needed to be made on behalf of employees in the General Library. In short, the parties met and discussed the issue but the University was not persuaded by the CSEA arguments.[28] The University had no obligation to agree with the CSEA position or to meet and discuss the matter to impasse. Since the fall term was about to begin, new employees needed to be hired. The University, having already met and discussed the matter once, was entitled to take steps to implement the change.

While it is understandable that the CSEA representatives were upset over the turn of events, this does not automatically translate into a breach of the obligation to meet and discuss in good faith. Under the facts of this case, it would serve no useful purpose to find such a violation and order the parties back to the table to meet and discuss a change that has already been discussed in considerable detail.

PROPOSED ORDER

Based on the foregoing, all aspects of the unfair practice charge and complaint are hereby ORDERED DISMISSED.

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[28]Although not directly addressed by the parties in their written arguments, at least one CSEA concern was met by the University. On September 3, CSEA raised the concern that library management would apply different criteria considering whether or not to renew a definite appointee. As it turns out, these decisions are made on the basis of availability of work or funds, job performance and seniority. Whether a student has a definite or an indefinite appointment appears to be irrelevant.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on August 30, 1983, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board at its headquarters office in Sacramento before the close of business (5:00 p.m.) on August 30, 1983, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing 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 California Administrative Code, title 8, part III, sections 32300 and 32305.

Dated: August 10, 1983

Fred D'Orazio
Administrative Law Judge