VACATED by Regents of University of California v. PERB (1986) 177 Cal.App.3d 648

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,	)	
Charging Party,	)	Case No. LA-CE-94-H
v.	)	PERB Decision No. 504-H
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)	April 23, 1985
Respondent.	)	

Appearances; Reich, Adell and Crost by Glenn Rothner, Attorney for the American Federation of State, County and Municipal Employees, AFL-CIO; Edward M. Opton, Jr., Attorney for the Regents of the University of California.

Before Hesse, Chairperson; Jaeger and Morgenstern, Members.

DECISION

JAEGER, Member: The University of California (UC) excepts to the attached proposed decision finding that it violated section 3571(a) and (b) and section 3568 of the Higher Education Employer-Employee Relations Act (HEERA or Act)[1] by denying the American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME) access to banner space located on University property.

In its exceptions, the University argues that the administrative law judge (ALJ): overemphasized the exceptions to the official use of the banner space; mischaracterized

[1] HEERA is codified at Government Code 3560 et. seq.

AFSCME's efforts to communicate with the employees (implying by the use of the word "attempted" that its efforts were unsuccessful); failed to recognize UC's implied "sponsorship" of AFSCME if it permitted AFSCME to use the banner because that space is known as official University space, and failed to recognize that the University is entitled to some method of communicating which clearly distinguishes its own communications from those of others. UC further argues that its Guidelines make a reasonable distinction between official and non-official communications, and that AFSCME had other means of communication available to it.

DISCUSSION

Although I ultimately agree that UC violated section 3571(a) and (b) of the Act, I do not subscribe to the ALJ's apparent conclusion that an employer may deny access to its facilities only if such access would result in "disruption" of its mission. The cases relied upon by the ALJ in reaching this conclusion dealt primarily with general access to the employer's property and distinguished between those circumstances where access was likely to disrupt operations and those where access would have no such effect.

Here, the question is not simply one of general access to University grounds or facilities, but whether an employer is entitled to reserve to itself the exclusive use of a specific means of communication. It is, to me, beyond dispute that an

employer has such a right. For example, an employer may have its own newsletters, bulletins, and bulletin boards, and need not place these means of communication at the disposal of employee organizations.[2] Here, the University claims the right to set up an exclusive means of communication, banners, for its own or official use.

The question raised by the evidence, however, is whether the University did indeed limit the use of banner space to official purpose or whether, by discriminating against AFSCME, it unlawfully denied that organization its section 3568 rights. In some instances the pertinent evidence is ambiguous. In other instances, it simply runs against the tide of UC's legal claim.

It is uncontested that AFSCME was given permission to use the banner space until Greg Kramp, UC's labor relations manager, voiced his objections in a letter to the approving office. His specific reason was his view that AFSCME's use of the space would run against UC's no-representation campaign, although he also expressed concern over a possible unfair practice charge based on supposed support of one organization over another. It was only after this letter was received that

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[2]The employer's right to such means of communication is separate and distinct from those access rights granted employee organizations by section 3568.

UC decided that the Guidelines precluded AFSCME's use of the space.

The credibility of this explanation and of UC's disclaimer of Kramp's letter as the basis for its decision to rescind the permit, suffers when other evidence is reviewed. Three other organizations used the banner space: Israel Act Committee (which no witness was able to define with certainty, but which was clearly not an "affiliated" organization); the Gay rights message; and a fraternity-sponsored bike-a-thon for ataxia.

The University refers to these instances as "aberrations," exceptions that prove the rule. But, the banners were displayed for an appreciable period of time, at least in one instance for as long as two weeks, over a prominent entrance to the campus, yet there is no evidence that the University ordered them removed.

The Board has held that a regulation or policy which permits some outside individuals or organizations access to the employer's facilities but denies such access to employee organizations is not reasonable within the meaning of the Act and therefore violates the organization's statutory right of access.[3] In light of the virtually identical language of

[3]Marin Community College District (11/19/80) PERB Decision No. 145, interpreting section 3543.1 of the Educational Employment Relations Act. See also Win. H. Black (1964) 150 NLRB 341 [57 LRRM 1531].

section 3568, I find it appropriate to apply the Marin rule here.

In summary, I conclude that the University, by denying AFSCME the use of the Westwood-LeConte banner space but granting such use to others for non-official communications, unreasonably denied AFSCME its right of access granted by section 3568, and also denied University employees the exercise of rights granted them by the Act.

Because the ALJ properly disposed of the other matters to which the University takes exception, I find no need to address them here.

ORDER

Based upon the entire record in the matter, and pursuant to Government Code section 3563.3, it is hereby ORDERED that the University of California and its representatives shall:

A. CEASE AND DESIST FROM:

1. Discriminating against the American Federation of State, County and Municipal Employees by failing or refusing to grant the organization reasonable access to banner space located at the intersection of LeConte Avenue and Westwood Boulevard at UCLA; and

2. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by HEERA by failing or refusing to permit AFSCME to use the above-cited banner space.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE HIGHER EDUCATION EMPLOYER-EMPLOYEE RELATIONS ACT:

1. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, prepare and post copies of the Notice to Employees attached as an Appendix hereto, for at least thirty (30) consecutive workdays in conspicuous places at those locations where notices to employees are customarily posted. The Notice 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. Written notification of the actions taken to comply with this Order shall be made to the San Francisco regional director of the Public Employment Relations Board in accordance with her instructions.

Member Morgenstern's concurrence begins on page 7 and Chairperson Hesse's dissent begins on page 10.

Morgenstern, Member, concurring: While I concur with Member Jaeger's majority opinion, I take exception to some of his logic. I fully agree that, where adequate means of communication and access otherwise exist, the employer may refuse certain specific means of communication to employee organizations.[1] Member Jaeger says the question is "whether an employer is entitled to reserve to itself the exclusive use of a specific means of communication" and finds this to be beyond dispute. I find that limiting the employer's use of the specific means in question to its own exclusive use, if meant in a literal sense, is overly restrictive on the employer. It is not difficult to envision circumstances in which an employer's rules might properly and reasonably allow the use of a particular mode of communication for some causes or organizations but not others, even though employee organizations fall in the latter category. The employer and its employees' organizations have a business, sometimes adversarial business, relationship. Section 3568 does not require that the employer avail all "other means of communication" to its business relation or adversary just because these means exist, or just because some groups use

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[1]The employer may not, however, refuse all access to bulletin boards and mailboxes, use of which is expressly mandated by statute, or to internal mail systems, which we have found to be required as a traditional and essential means of communication. Richmond Unified School District/Simi Valley Unified School District (1979) PERB Decision No. 99.

them. The law simply mandates reasonable rules.[2] The statutory requirement for reasonable rules is met where restrictions are based on a good business purpose, are fairly and logically constructed and applied, and adequate access results.

Member Jaeger cites evidence to indicate that the University did not in fact reserve to itself exclusive use of this banner space. The same evidence also demonstrates that the University did not apply reasonable rules. The University alleged that the space was only to be used for "affiliated organizations" but blatantly proceeded to thrice ignore its own dictate. A rule arbitrarily applied is not a reasonable rule. Thus, while the law allows the University leeway to restrict employee organization access, it requires those restrictions be pursuant to reasonable rules. As they were not, the University erred.

However, I do feel it necessary to specifically reject the ALJ's statement that the University wanted to decide when

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[2]Section 3568 provides:

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

AFSCME had communicated sufficiently with the employees. No such evidence exists. Rather, as Chairperson Hesse's dissent correctly points out, the University was primarily interested in not contradicting its own vigorous "no representation" campaign.[3] While the Board might well find such a goal to be quite reasonable, here, it was not properly pursued and implemented.

[3]I do not find at all credible the University's other argument, that it was protecting itself against a possible unfair practice charge by a competing union.

Hesse, Chairperson, dissenting: As noted by the author of the majority opinion, an employer can restrict a union's use of facilities and limit its access as long as those regulations are reasonable and non-discriminatory. As I interpret the facts of this case, UC's restriction on the banner space was not unreasonable because of two legitimate business reasons.

First, UC logically feared that AFSCME's use of the banner space could have drawn an unfair practice charge from a competing union on the grounds that UC favored AFSCME. Because the banner space was unique, equal access to all unions was not possible. Even allotting various unions use of the space on a rotation basis would not result in equal access because use of the space the week or two just prior to the representation election is far more valuable than during a week some months earlier. That AFSCME offered to provide "releases" from other unions is immaterial. Neither PERB nor UC should be required to examine the fairness or validity of releases in this situation. Therefore, UC's wish not to favor one union over another was a legitimate concern and its response of restricting AFSCME's use of the space was reasonable.

The second, though less important reason why UC's restriction was not unreasonable is its desire not to contradict its own vigorous "no representation" campaign. The placement of the banner was on UC property and, presumably, required UC cooperation in the mere physical act of placing the

banner. Thus, an ambiguity arises: UC wants "no representation" but will help a union communicate the opposite message to its employees. Surely, UC has the right to avoid giving such mixed signals to its employees. Nor am I persuaded by the testimony or the ALJ's findings that UC's campaign was so well-known that no one could possibly misunderstand UC's position and confuse UC's permission to fly the banner with an endorsement of AFSCME. We can have no way of knowing what the average employee thought, and I do not believe that AFSCME met the burden of proof of showing that there could be no confusion.

For the above reasons, I would hold that UC's restriction was reasonable in this instance.

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-94-H, American Federation of State, County and Municipal Employees, AFL-CIO v. Regents of the University of California, in which all parties had the right to participate, it has been found that the University of California violated Government Code section 3571(a) and (b).

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:

1. Denying AFSCME rights guaranteed to it by section 3568 of the Higher Education Employer-Employee Relations Act by failing or refusing to grant AFSCME reasonable access to banner space located at the intersection of LeConte Avenue and Westwood Boulevard at UCLA; and

2. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Higher Education Employer-Employee Relations Act by failing or refusing to permit AFSCME to use the above-cited banner space.

Dated: _____ REGENTS OF THE UNIVERSITY OF CALIFORNIA

By: _____
Authorized Agent

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

STATE OP CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, Charging Party,	)	Unfair Practice Case No. LA-CE-94-H
V.	)	PROPOSED DECISION (3/30/84)
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	

Appearances; Glenn Rothner, Attorney (Reich, Adell and Crost) for the American Federation of State, County and Municipal Employees; Edward M. Opton, Jr., Attorney for the Regents of the University of California.

Before Marian Kennedy, Administrative Law Judge.

PROCEDURAL HISTORY

On May 19, 1983, the American Federation of State, County and Municipal Employees, AFL-CIO, (hereinafter AFSCME) filed an unfair practice charge against the Regents of the University of California (hereinafter the University) alleging that the University violated section 3571(a) and (b) and section 3568 of the Higher Education Employer Employee Relations Act (hereinafter HEERA or the Act)[1] by denying AFSCME access to

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

Section 3571(a) and (b) provide that it shall be unlawful for the higher education employer to:

banner space located on University property at Westwood Boulevard and LeConte Avenue in Los Angeles. At the same time, AFSCME filed a request that the PERB seek injunctive relief to require the University to permit access to the banner space. That request was denied on May 27, 1983.

A complaint was issued on June 7, 1983, incorporating the allegations of the charge. By letter dated August 3, 1983, the parties waived informal settlement conference on the matter.

On August 3, 1983, the University filed its Answer admitting that it denied the use of banner space to AFSCME, but denying that that action constitutes a violation of HEERA.

A formal hearing was held on January 13, 1984, in Los Angeles by the undersigned administrative law judge. All parties having filed briefs, the matter was submitted for decision on March 20, 1984.

STATEMENT OF FACTS

This case arose in the context of a representation election at the University. AFSCME sought to represent employees in five system-wide bargaining units and three or four additional

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(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.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

units located at the University of California at Los Angeles (hereinafter UCLA). The election was conducted by mail ballot during the period of May 23 to June 16, 1983. It involved some 40,000 University employees, 10,000 of whom were located at the UCLA campus.

On May 9, as part of its election organizing campaign, AFSCME filed an application with the UCLA Inter-organizational Relations Office (hereinafter IRO) to use banner space located at the intersection of Westwood Boulevard and LeConte Avenue[2] during the period of May 23 to June 5, 1983. The request was routinely approved and AFSCME deposited the required service fee. AFSCME planned to hang a banner which read "Win a Stronger Voice in Your Future, Vote AFSCME." The banner was in green and white and contained no reference to the University. The UCLA colors are blue and yellow.

On May 17, 1983, AFSCME's representative was notified that permission to use the banner space had been revoked.

The Election Campaign

The banner was intended to supplement other communication techniques used by AFSCME as part of its pre-election campaign. Along with other employee organizations, AFSCME had

[2]Two vertical poles are permanently installed on either side of Westwood Boulevard just north of LeConte Avenue. The poles are used to hang banners across Westwood Boulevard.

access to the University campuses to communicate with employees during their non-working time. At UCLA, AFSCME set up tables to distribute literature on campus, met with employees at places where they gathered during their non-working time, held meetings and rallies on campus, and posted its literature on campus bulletin boards and other locations. It also employed some television, radio and newspaper advertising and put out its own local as well as state-wide newspapers which were distributed to employees. AFSCME purchased a list of mailing addresses of University employees from the University system-wide administration and attempted to communicate with employees through use of those addresses also.

Anthony Corbo, coordinator of AFSCME's election campaign in Southern California, testified that some of these means of communication were hampered by University action and that AFSCME was not able to communicate with University employees to the degree it thought necessary. In particular, Corbo testified that AFSCME was not permitted to meet with employees at the UCLA Medical Center in those places where they gathered during their non-working time[3] nor in UCLA's communication

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[3]Another employee organization filed unfair practice charges regarding this denial of access and won an order requiring the University to permit access to some UCLA Medical Center locations in Regents of the University of California, University of California at Los Angeles Medical Center (8/5/83) PERB Decision No. 329-H.

center. AFSCME characterized its communications with employees at these two locations as being "hit or miss." In addition, Corbo testified that the mailing list supplied by the University had serious inaccuracies and omissions which interfered with AFSCME's communications with employees through that medium.[4]

The University also engaged in a pre-election campaign to communicate its position opposing unionization. It published a monthly newsletter called "News and View" which was distributed to all supervisors and managers and discussed campaign issues. Some supervisors and managers posted the publication for employees to see. The University also sent out bi-weekly "Supervisors' Updates" to all supervisors during the four months preceding the election and distributed about 15 issues of an "Employee Fact Sheet" to employees on an irregular basis during the eight or nine months preceding the election. About three thousand copies of each issue of the Fact Sheet was made available to employees at various places on campus.

In addition, the University conducted training sessions for supervisors and managers two to three times per week for two or three months preceding the election in order to train each

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[4]The UCLA labor relations office suggested to AFSCME that it also purchase an employee address list from UCLA because that list was more accurate than the University's system-wide list. AFSCME declined because the system-wide list was the one to be used for mailing ballots.

supervisor and manager to communicate the University's position with respect to the election to their rank and file employees. Finally, the University sent approximately 15 letters to employees at either their work or home addresses explaining the University's "no unionization" position.

UCLA Labor Relations Manager Greg Kramp testified that despite these communications, some employees at University-sponsored meetings indicated by their questions that they did not understand such election issues as what an agency shop is, how a majority necessary for an election victory is calculated, and how the bargaining process works.

Denial of Banner Space

The University's decision to deny AFSCME the use of the requested banner space was initiated by Kramp. Kramp testified that IRO director Dean Robert Ringler notified him that AFSCME had made the banner space request and that Ringler had approved it.[5] Kramp objected on the ground that permitting AFSCME to post a pro-union banner at the entrance to UCLA was contrary to the policy of the University to oppose unionization of its employees and it might subject the University to unfair practice charges from other employee organizations involved in the election on the theory that, by permitting the banner, the

[5]Although the labor relations office is not responsible for approving requests to use University facilities, Kramp testified that Ringler sometimes notified him regarding facilities requested by employee organizations.

University was demonstrating favoritism toward AFSCME over the other organizations.

Permission to use the banner space was subsequently revoked by James Klain, director of the Campus Activities Service Office, on the ground that AFSCME's banner did not fall within the UCLA Activities Guidelines limiting the use of the LeConte-Westwood banner space to promotional material for official University events. Klain told Corbo, however, that permission was revoked because of objections raised by the labor relations office.

Corbo contacted Kramp and demanded to know why the use of the banner space was denied. When Kramp indicated that the University might be subject to an unfair practice charge for favoring AFSCME over other unions, Corbo offered to obtain waivers of potential unfair practice charges from the other employee organizations involved in the election. According to Corbo, Kramp replied that obtaining waivers would not solve the problem since the University also objected to AFSCME's posting the banner on the ground that it conflicted with the University's "no unionization" policy. Kramp testified that he did not recall any offer by Corbo to obtain waivers from the other employee organizations.

University Regulation of the Use of Banner Space

The UCLA Activities Guidelines provide in relevant part as follows:

> 9. Posters, signs or banners may only be placed in the following authorized locations on campus:
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> . . . . . .
>
> b. Banner Placement Locations
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> 1) Banners may be placed in the following locations with prior approval of the Organizational and Inter-organizational Relations Office
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> a. The Kerckoff Hall - Ackerman Union overhead walkway.
>
> b. The banner poles on Bruin Walk.
>
> 2) Banners or signs advertising official University functions may be placed in other locations[6] with the authorization of the Campus Activities Service Office. . . .

The definitions section of the Activities Guidelines defines official University functions as:

> Scheduled academic classes, research and activities; normal daily operations of University units; and programs or activities sponsored by University units in the course of fulfilling their University mission.

A University Unit is defined as:

> Any academic or nonacademic department or division or any other official University entity.[7]

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[6]The "other locations" for banners are the LeConte-Westwood and the Sunset Boulevard - Westwood entrances to the UCLA campus.

[7]Separate definitions are also included for a "Registered Organization" and an "Employee Organization." A Registered Organization is "[a]n organization whose membership is limited to UCLA students and/or personnel which has complied with the registration procedures specified [in the guidelines]." An

Kramp testified that he had participated in the drafting of the Campus Activities Guidelines and that one purpose of the guidelines was to separate the means of communication available for official University functions from those available for other matters. He testified that the posting of banners at "other locations" under action 9.b.2 was intended to be limited to "those things contained in the definition of official University function, academic classes and other things related to the academic mission."

Evidence was introduced with respect to other requests for use of the LeConte-Westwood banner space which had been approved in the past. Banners have been permitted carrying messages regarding Gay and Lesbian Awareness Week sponsored by a UCLA gay and lesbian group, a Bike-a-thon for Ataxia sponsored by a fraternity, an unspecified message[8] by the Israel Act Committee, the UCLA Mardi Gras sponsored by UCLA Associated Students, the UCLA Spring Sing sponsored by the fraternity/sorority council, the California Special Olympics

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Employee Organization is "[a]n organization which has as its primary purpose the representation of University employees in their employment relations with the University. . . ."

[8]In its brief, AFSCME represented that the content of the banner message in this case was a Hebrew New Year greeting and invited the ALJ to telephone the rabbi representing the group to confirm the information. Counsel for AFSCME was notified by telephone that its representation would be disregarded as not constituting admissible evidence.

sponsored by the University Institutional Relations Office, a Blood Drive sponsored by Associated Students, a Gymnastics Invitational apparently sponsored by UCLA Men's Intercollegiate Athletics, Summer Session Registration, a Volleyball Competition sponsored by Intercollegiate Athletics, the Preservation Hall [Jazz Band] sponsored by the Department of Fine Arts, McDonald's-UCLA Pre-Olympic Gymnastics Meet and the UCLA-Pepsi Invitational Track Meet.

Kramp testified that the Pepsi sporting event was a University-sponsored activity and the University generated income from it. Ray Gonzales, senior public event manager for CASO, testified that the University received a percentage of ticket sales for the McDonald's event.

There was also substantial testimony regarding the use of other University facilities for both commercial and political purposes. In particular, University records subpoenaed by AFSCME showed that during the course of a single month in 1983 some 17 permits were issued for the use of various campus locations for photographs or filming for commercial purposes. The only restrictions which the University imposed upon granting these permits were the payment of substantial fees and the limitation that neither the towers of Royce Hall nor the name of the hall appear in any of the photographs or films taken. Gonzales testified that the reason these restrictions were imposed was because the name and towers of Royce Hall are

recognizable to the public as symbols of UCLA and UCLA wants to prevent those symbols from being appropriated for commercial purposes. The parties stipulated that the University makes a profit by permitting the commercial use of its facilities.

During the same one month period, permits were granted for the use of University facilities for the following political events: an arms control symposium sponsored by the League of Women Voters, an Israel Programs Fair sponsored by the Israel Action Committee, an Israel Memorial Day celebration by the same sponsor, a South African Solidarity Day sponsored by the South African Task Force, and an Israeli Independence Day Celebration sponsored by the Israel Action Committee. The facilities used in those cases were principally campus buildings or outdoor locations.

ISSUE PRESENTED

Did the University violate section 3571(a) and (b) by denying AFSCME access to banner space located on University property at Westwood Boulevard and LeConte Avenue at UCLA?

DISCUSSION AND CONCLUSIONS OF LAW

HEERA section 3568 gives employee organizations the right to access to University communication facilities. The section provides:

> Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and

> other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of rights guaranteed by this Act.

In Regents of the University of California, Lawrence Livermore National Laboratory (4/30/82) PERB Decision No. 212-H (hereinafter Lawrence Laboratory), the PERB found that HEERA accords employee organizations a presumptive right of access. Where an employer seeks to impose restrictions on that right, it must establish that those restrictions are necessary to avoid disruption of its mission and that the restrictions are narrowly drawn so as to avoid overbroad and unnecessary interference with access rights. Id. at p.15.

The Lawrence Laboratory case involved an attempt by the University to exclude non-employee organizers from portions of the Lawrence Livermore National Laboratory on national security grounds. The Board held that national security concerns are a weighty factor to be considered in reaching an accommodation between the right of access and the University's operational needs. The Board held that consideration of the factual setting and the specific operational needs of the laboratory was necessary to determine whether the restrictions on access which the University sought to impose were reasonable and not overbroad.

A similar question was presented in Regents of University of California, University of California at Los Angeles Medical

Center, (8/5/83) PERB Decision No. 329-H (hereinafter UCLA Medical Center). In that case, the University sought to exclude non-employee union organizers from access to employee lounges in patient care areas of the UCLA Medical Center. The Board applied the same balancing of employee organizations' presumptive right of access against the particular needs of the workplace. It concluded that the presumptive right of access to areas other than immediate patient care areas can be rebutted by evidence that a ban on access is necessary to prevent disruption of health care operations or disturbance of patients. Applying that standard, the Board determined that access to employee lounges was appropriate while other access sought by the union involved was not appropriate.

PERB has also had the occasion to consider access rights in a different context in San Ramon Valley Unified School District (10/29/82) PERB Decision No. 254. In that case, the school district refused to permit an employee organization to distribute its newspaper through the District's mail system. PERB held that the access provision of the Educational Employment Relations Act, which is identical to the HEERA's access provision, grants employee organizations the right to use employer mail facilities subject to reasonable regulations. The Board affirmed the conclusions of the administrative law judge that the burden is upon the school district to show that restriction of that right is necessary

and that regulations limiting access must be "narrowly drawn to cover the time, place and manner of activity without impinging on the content unless it [the access sought] presents a substantial threat to peaceful school operations."[9] Furthermore, such regulations must not be vague and subject to unfettered discretion in their interpretation and application. Id.

AFSCME argues that the above-cited cases and section 3568 give it a presumptive right of access to the University's institutional means of communication, subject only to reasonable regulation. That presumptive right can be overcome only by proof of legitimate business reasons for denying access, and AFSCME argues, the University has not met that burden of proof.

The University makes two separate arguments that its denial of access to the banner space was justified. First, the University argues that LeConte Avenue-Westwood Boulevard banner space is, by University regulation, reserved for official University communications only. Moreover, the prominence of that location as the principal entrance to the UCLA campus and its use for official University functions only, together create

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[9] See Proposed Decision of the administrative law judge at p. 7 [~~San Ramon Unified School District~~ (4/13/81) Case No. SF-CE-324 affirmed by ~~San Ramon Valley Unified School District~~, supra, PERB Decision No. 254] , quoting from R~~ichmond Unified School District~~ (8/1/79) PERB Decision No. *99*,

the impression in the minds of persons viewing a banner at that location that the message hung there is one sponsored by the University. The University argues that to post a banner urging employees to vote for AFSCME at that location would, therefore, constitute a misrepresentation of the University's position, since the University is opposed to unionization of its employees. Moreover, such a banner would be interpreted by viewers as an endorsement of AFSCME by the University, which would subject the University to possible unfair practice charges for favoritism[10] from other employee organizations involved in the June elections.

Secondly, the University argues that the section 3568 access provision establishes a rule of reasonableness which it does not require that every conceivable means of access through institutional communications be opened to employee organizations. Since AFSCME had fully adequate alternative means of communicating with employees, both through alternative banner spaces and through a variety of other media, section 3568 does not require that the University also permit AFSCME to use this particular banner location.

The question of the right of access of an employee organization to employer controlled banner space as a means of

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[10]Section 3571(d) prohibits an employer from taking action to encourage employees to join one employee organization in preference to another.

communication to employees appears to be unique. The PERB decisions discussed above, however, which interpret section 3568 to provide that employee organizations have a presumptive right of access, are nonetheless applicable here. In particular, San Ramon Valley Unified School District, supra, holds that the presumptive right of access applies not only to access by non-employee organizers to the workplace, but also to use of other institutional means of communication. There is no question that the disputed banner space is an established institutional means of communication at UCLA, used by both the University itself and various organizations as a means of communication with the University community.

The University argues that the Activities Guidelines above limit the use of banner space at the LeConte-Westwood location to official communications of the University. Section 9.b.2 provides that only banners "advertising official University functions" may be placed at "other locations," Which include the LeConte-Westwood location. The University argues that since "official University functions" are limited to: 1) scheduled academic classes, research and activities; 2) normal daily operations of a University unit; and 3) programs or activities sponsored by University units in the course of fulfilling their University mission, a banner urging employees to vote for AFSCME does not constitute an official University function. The Activities Guidelines therefore constitute

reasonable regulation of use of banner space which should be respected in determining section 3568 access rights.

AFSCME responds that the exercise of rights accorded University employees by HEERA is part of the "normal daily operations" of the University and, therefore, a banner urging employees to exercise their right to vote in a representation election and to vote in favor of one of the employee organizations contesting the election is part of the normal daily operations of the University. Moreover, AFSCME argues that an examination of past permitted uses of the LeConte-Westwood banner space indicates that such use has not been limited to those activities defined as official University functions. AFSCME points to the banners for gay and lesbian awareness week and the unspecified message of the Israel Act Committee, as well as banners advertising the McDonald-UCLA Pre-Olympic Gymnastics Meet and the UCLA-Pepsi Invitational Track Meet as uses of the banner space which fall outside of "programs or activities sponsored by University units in the course of fulfilling their University mission."

The evidence does support a conclusion that the use of the LeConte-Westwood banner space has not been limited in the past to official University functions as they are defined in the Activities Guidelines. Specifically, the banners sponsored by the Gay and Lesbian Awareness Committee and the Israel Act Committee were not ones related to scheduled academic classes,

normal daily operations or programs or activities sponsored by University units. In those two cases, the organizations sponsoring the banners were registered organizations, but certainly were not University units acting "in the course of fulfilling their University mission."[11] The definition of University units in the Activities Guidelines is "any academic or non-academic department or division or any other official University entity." Registered organizations are defined separately in the Activities Guidelines and do not appear from those definitions to be considered "official University entities." Thus, the University's contention that use of the LeConte-Westwood banner space in the past has been limited strictly to those uses permitted by the Activities Guidelines is not supported by the record.[12]

The University argues that it is also the prominence of the LeConte-Westwood banner space at the "front door" of UCLA which makes this banner space unique and communicates a message of University sponsorship. The evidence in the record, as well as the undersigned's observation of the area, indicates that the LeConte-Westwood banner location is indeed a uniquely prominent

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[11]Query whether fraternities and sororities, the ad hoc Spring Sing Committee, and even the Associated Students are "University units in the course of fulfilling their University mission" within the meaning of the Guidelines.

[12]In fact, this was not a concern originally expressed by Kramp when he sought to have permission for the banner revoked.

one spanning the main pedestrian and vehicular entrance to the UCLA campus. While the banner poles do not carry any UCLA identification, the street over which the banner would have been hung is flanked on both sides by stone walls which carry the name UCLA. The University argues that the very prominence of this location indicates that a message hung there must be one sponsored or endorsed by the University.

The prior usage of the LeConte-Westwood banner space has been predominately by University departments or such organizations as fraternities and sororities and the Associated Students. Two banners announced sporting events jointly sponsored by the University and a commercial enterprise (McDonald's and Pepsi), and included the commercial sponsor's name and logo as part of the banner. The "Gay and Lesbian Awareness Week" and the unspecified message by the Israel Action Committee are examples of use of the banner space for political purposes by organizations whose message is likely to be controversial in the University community. The use of the banner space by those organizations exemplifies the University's fulfillment of its role of encouraging free speech but it would be unlikely that such banners would be interpreted by reasonable people as an endorsement by the University of the particular political positions advocated by the sponsoring organizations.[13]

13Certainly reasonable people would not interpret the

Although the LeConte-Westwood banner space has been used predominately by the University and associated social or service organizations, given its other commerical and political uses, I am not convinced that the message on a banner hung at that location would be interpreted by viewers as a message endorsed by the University. Particularly in the context of a representation election among University employees in which the University took the well-advertised position that it opposed unionization, it is difficult to imagine that employees could misinterpret a "Vote for AFSCME" banner as being sponsored by the University. Although Kramp testified to questions asked by some employees indicating that they did not have a full understanding of the election and collective bargaining process, there was no evidence that the University's message opposing unionization did not reach employees at UCLA. In these circumstances, I conclude that the record does not support an inference that the AFSCME banner would have been misinterpreted as an endorsement by the University of unionization and of AFSCME as an employee organization.[14]

McDonald's and Pepsi banners as University endorsements of those products.

[14]Indeed, had the University been concerned about possible misrepresentation, the text of the banner could have been revised to accommodate that potential problem. The University, however, did not make any effort to accommodate its concerns by any less drastic method than denying banner access entirely.

Alternatively, the University argues that permitting AFSCME to hang a banner at the LeConte-Westwood location would be seen by employees and other unions as an endorsement by the University of AFSCME over the other unions. Such an endorsement would subject the University to potential unfair practice charges under section 3571(d). The evidence indicates that no employee organization other than AFSCME requested the use of LeConte-Westwood banner space during the three weeks of the representation election nor had any employee organization ever requested the use of banner space at the UCLA campus. The University offers no precedent, however, to support the proposition that it would have been guilty of an unfair practice had it permitted one employee organization to use a particularly effective means of communication which had not been requested by nor denied to other organizations.

The University speculates that if it had permitted AFSCME to post its banner, other organizations would then have demanded use of the same banner space. If the potential for conflicting requests for the LeConte-Westwood banner space had been the University's principal concern in denying AFSCME that banner space, it could have conditioned the approval upon some accommodation in the event that other employee organizations should request the same space. Alternatively, the University could have followed whatever its standard practices are for the allocation of University facilities in the event of conflicting

requests for their use.[15]

AFSCME argues that the University's alleged concern about unfair practice charges from other unions was unfounded since Corbo had offered to obtain waivers of charges on that ground from other employee organizations involved in the representation elections. Corbo testified that when he made the offer of waivers to Kramp, Kramp rejected it on the ground that it would not resolve the University's other concern that AFSCME's message conflicted with the University's position against unionization of its employees.[16]

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[15]In Azusa Unified School District (11/23/77) EERB Decision No. 38, the Azusa School District rented a school building to the Azusa Educators Association (AEA) for a rental fee of one dollar per year. Upon protest by the Azusa Federation of Teachers (AFT), a competing employee organization, that the District was showing favoritism towards AEA by renting it the building at below market value, the District offered to permit AFT to share the building with AEA. The Board affirmed the finding of the administrative law judge that the Azusa School District had discriminatorily favored the AEA over the AFT by providing it with a school building and that discrimination was not remedied by offering to permit AFT to share the building, since the physical layout of the building did not permit sharing by the two rival organizations. The Board ordered that any future rental of the building be at fair market value. In the instant case, the University has not demonstrated that it could not have so limited or conditioned AFSCME's use of the banner space as to avoid potential irreconcilable conflicts with other employee organizations.

[16]Although Corbo testified in some detail to his offer to Kramp of waivers from other unions, Kramp testified that he did not recall that part of their conversation. Since Corbo's recollection was quite clear and Kramp does not deny that any discussion of waivers by the other organizations took place but asserts only that he does not recall such a discussion, I credit Corbo's testimony on this point.

For all these reasons, I conclude that the University did not have reasonable grounds to fear that permitting AFSCME to hang its banner at LeConte-Westwood would have subjected the University to unfair practice liability.

The University's second line of argument is that section 3568 is a rule of reasonableness which does not require that an employee organization be accorded every conceivable means of access to institutional means of communication. The University argues first, that under a reasonableness standard AFSCME would not be permitted "to print 'Vote for AFSCME[1] on the margin of Respondent's letterhead stationery . . . or tape 'Vote for AFSCME' leaflets to patients' charts . . . or attach 'Vote for AFSCME[1] bumper stickers to University vehicles." Such means of communication would be unreasonable, according to the University, because they are media which have traditionally been controlled by the University. The University would equate use of banner space with the examples just cited.

This aspect of its reasonableness argument amounts to a restatement of the argument, discussed above, that use of the LeConte-Westwood banner space would create the impression that the University endorsed AFSCME's banner message. That argument is again rejected for the reasons discussed above.

The University also argues that banners on the premises of an employer are not a usual or traditional means of communication and, therefore, it is not unreasonable to

restrict their use. A similar argument was made and was accepted by the administrative law judge, in Richmond Unified School District, supra. On review, PERB expressly overruled the administrative law judge on this point and said that organizational access to school mail systems is not limited to those situations where past practice by the District has "opened the forum." The Board found that the statute does not restrict organizational access to previously used communication media but rather permits use of any means of communication, subject to reasonable regulation. Thus, the fact that banners are an unprecedented means of communication in the general labor context and more specifically, that no employee organization at UCLA had ever previously requested the use of banner space does not affect AFSCME's right to the use of that space under section 3568. Moreover, the University's argument is not factually supported since the evidence makes clear that banner space is a normal, frequently-used means of communication at UCLA.

The University also argues that, since AFSCME had sufficient, adequate, alternative means of communicating with University employees, section 3568 should not be read to require that every potential means of communication be made available. The University cites record evidence that AFSCME communicated with employees through meetings, leaflets, two AFSCME newspapers, advertisements in public media and obtaining

home addresses. Moreover, AFSCME ultimately hung the banner which it wanted to put at LeConte-Westwood at two other locations during the election period. The University argues that those banner sites, located in Westwood Village adjacent to the University, were adequate alternative means of communicating the message on the banner.

In Regents of the University of California, University of California at Los Angeles Medical Center, supra, PERB held that the availability of alternative means of access was a consideration to be weighed in striking a reasonable balance between the needs of an employee organization to obtain access of a particular type and the University's concern for disruption of its operations by the granting of access. Thus, the absence of alternative means of communication is not a precondition to establishing the right of access under section 3568 since that section establishes a presumptive right. Rather, the availability of alternative means of access is a factor to be weighed when considering whether the reasons advanced by an employer for denying access are sufficiently weighty to justify that denial.

In UCLA Medical Center, the reasons the University put forward for denying access were prevention of disruption of health care operations and disturbance of patients. Similarly, in Lawrence Laboratory, the University's reasons for denying access were based on national security concerns and its

obligations to exclude persons without the appropriate national security clearances from restricted areas. In both those cases the Board weighed the employee organization's alternative means of communicating with employees as one factor in deciding the degree to which the legitimate concerns expressed by the University should be found to justify limits on access.

In the instant case, the University has established no such legitimate grounds for denying AFSCME access to the banner space since each of its reasons for doing so has been found to be groundless. Therefore, the fact that AFSCME had substantial other means of access to employees at UCLA does not justify the University's denial of banner space access. It is not for the University to decide when an employee organization has communicated sufficiently with employees in an election campaign. The University's argument in this regard is essentially that "enough is enough." In the absence of legitimate business reasons for denying AFSCME the use of the banner space, however, the fact that AFSCME had alternative means of access does not eliminate its right under section 3568 to use still other means of access.

For all the foregoing reasons, I find that the University's failure to permit AFSCME to use the LeConte-Westwood banner location for its election banner interfered with AFSCME's access rights under section 3568 and constituted a violation of section 3571(b). Interference with an employee organization's

access rights constitutes a concurrent interference with rights granted employees under HEERA; therefore, the denial of access also violated section 3571(a). UCLA Medical Center, supra.

REMEDY

Section 3563.3 provides:

> 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.

The University will be ordered to cease and desist from denying AFSCME access to the LeConte-Westwood banner space. It also is 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 the HEERA that employees be informed of the resolution of the controversy and the University's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69; Pandol and Sons v. Agricultural Labor Relations Bd. (1979) 98 Cal.App.3d 580, 587; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case and pursuant to Government Code section 3563.3, it is hereby ORDERED that the University of California and its representatives shall:

A. CEASE AND DESIST FROM:

1. Denying AFSCME rights guaranteed to it by section 3568 of HEERA by failing or refusing to grant AFSCME reasonable access to banner space located at the intersection of LeConte Avenue and Westwood Boulevard at UCLA; and

2. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by HEERA by failing or refusing to permit AFSCME to use the above-cited banner space.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE HIGHER EDUCATION EMPLOYER-EMPLOYEE RELATIONS ACT:

1. Within five (5) workdays after this decision becomes final, prepare and post a copy of the NOTICE TO EMPLOYEES attached as an Appendix hereto, for at least thirty (30) consecutive workdays at conspicuous places at those locations where NOTICES TO EMPLOYEES at UCLA are customarily posted. The Notices must not be reduced in size and reasonable steps should be taken to see that they are not defaced, altered or covered by any material.

2. Within twenty (20) workdays from service of the final decision herein, give written notification to the Los Angeles Regional Director of the Public Employment Relations Board of the actions taken to comply with this Order. Continue to report in writing to the Regional Director thereafter as directed. All reports to the Regional Director shall be concurrently served on Charging Party herein.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on April 19, 1984, 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 itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on April 19, 1984, 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, section 32300 and 32305.

Dated: March 30, 1984

Marian Kennedy
Administrative Law Judge