STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNIVERSITY COUNCIL, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,	)	
Charging Party,	)	Case No. SF-CE-200-H
v.	)	PERB Decision No. 640-H
REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)	December 10, 1987
Respondent.	)	

Appearances: Thomas L. Dublin for University Council, American Federation of Teachers, AFL-CIO; Edward M. Opton, Jr., Esq. for the Regents of the University of California.

Before Craib, Shank and Cordoba, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both parties, The Regents of the University of California (University) and University Council, American Federation of Teachers, AFL-CIO (UCAFT), to the attached proposed decision of a PERB administrative law judge (ALJ). While dismissing all other allegations, the ALJ found that the University violated section 3571(a), (b) and (c) of the Higher Education Employer-Employee Relations Act (HEERA)[1] by unlawfully refusing to

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

bargain various negotiable aspects of a reorganization plan involving the Communications Studies Program (CS Program) and the Speech Department at University of California, Los Angeles (UCLA). We have reviewed the entire record, including the proposed decision and the parties' exceptions thereto, and, except as noted below, we affirm the proposed decision and adopt it as the decision of the Board itself.

The allegations contained in the complaint may be summarized as follows:[2]

1. Various administrators conspired to create a plan to unilaterally disestablish the Speech Department and reorganize the CS Program (jeopardizing the employment of lecturers in both academic units) in retaliation for the lecturers' protected activity in, inter alia, organizing the UCAFT, winning the election, and bargaining.

2. Various University administrators (and their supporters upon instruction) ostracized UCAFT chief negotiator Marde Gregory or, as she phrased it, "sent her to Coventry."

3. Favorable references to Gregory in a Committee on Undergraduate Courses and Curricula draft report were deleted prior to final publication.

4. Gregory's title was changed from Visiting Lecturer

---

[2]Additional allegations specifically involving two members of the UCAFT's negotiating team were withdrawn.

to Adjunct Lecturer, temporarily removing her from the unit she represented in negotiations.

5. The University's behavior regarding release time constituted interference with the negotiating team's right to release time and burdened the UCAFT's ability to conduct bargaining.

6. The reappointment of the speech lecturers for the 1985-86 year was delayed, causing the August 1985 paychecks to be late.

7. The University, at various times, refused to bargain release time.

8. The University refused to bargain over negotiable aspects of the reorganization plan, sometimes called the "Sears Plan."[3]

As noted above, it was only the last allegation that the ALJ found to be meritorious. Specifically, the ALJ concluded that the University unlawfully failed to bargain the decision to transfer the speech lecturers to the Writing Program, the effects of a contemplated de facto disestablishment of the Speech Department, and the effects of placing greater reliance on Senate faculty (and, therefore, less reliance on lecturers).

---

[3]The name "Sears Plan" is a misnomer in that it implies there was one comprehensive reorganization plan devised solely by Social Sciences Dean David Sears.

FACTUAL SUMMARY

A thorough and detailed factual summary is contained in the attached proposed decision and we will not here recount the rather voluminous set of facts underlying this dispute. However, we will provide a very brief factual outline in order to facilitate comprehension of this decision.

Prior to 1970-71, the Speech Department at UCLA included undergraduate (B.A.) and graduate (M.A. and Ph.D.) programs. In about 1970-71, all the degree programs in speech were eliminated by the Academic Senate. Eventually, most of the Speech Department's course offerings were phased out, but the Speech I and Speech II courses were preserved.

In the wake of the termination of the speech degrees, an inter-college committee was created to find alternative forms of curriculum for students with an interest in communication. As a result, there was created an interdepartmental degree program called Communication Studies staffed by faculty in the Speech Department, as well as faculty in other departments. The CS Program was housed in the Speech Department and the department's budget was used to administer, house and employ the speech faculty and the faculty assigned to the CS Program. Speech thus became a department without a degree program but with a budget, and Communication Studies was a program without a budget of its own but with an undergraduate degree program. University witnesses testified that the total elimination of

the Speech Department has always been viewed as inevitable, especially if the CS Program developed toward departmental status.

Since the reductions in course offerings in the Speech Department, the teaching of the Speech I and II courses has been done primarily by lecturers (and in the last few years before the hearing, exclusively by lecturers). The CS Program also relies heavily on lecturers. Lecturers are faculty members who are not members of the Academic Senate and are normally hired on a year-to-year basis (though in some circumstances they could be granted some job security under University policies as they then existed). They usually are not expected or required to engage in research, and for that reason they are typically assigned greater teaching duties than "regular" faculty. Also typical is the employment of lecturers at less than full time. UCLA, like the rest of the University system, limits the number of years a lecturer may be employed. At UCLA, the limit was generally eight years, though some departments or programs had shorter limits.

After an election in late 1983, the UCAFT was certified on March 6, 1984 as the exclusive representative of Unit 18, consisting of various classifications that can be termed generally as non-(Academic) Senate faculty. While the evidence indicates that the University conducted an active campaign in favor of "no representation," it was not particularly extensive

or vociferous. In fact, the testimony of administrators reflected that the results of the election were not unexpected. Job security for non-Senate faculty was a major issue around which the UCAFT organized.

The CS Program has frequently come under scrutiny through both internal and external formal reviews. The program has not always enjoyed the enthusiastic support of key administrators. Periodic real or perceived threats to the future of the CS Program have been met with firm resistance, especially from Professor Paul Rosenthal, long-time chair of both the Speech Department and the CS Program. Rosenthal's extensive knowledge of the technical rules of the University bureaucracy, especially those relating to the principle of shared governance between the administration and the Academic Senate, has aided him in fending off various actions over the years that he viewed as a threat to the program.

The first action specifically at issue in this case was the attempted removal of the three speech FTEs (full-time equivalents) used for lecturers teaching Speech I and II in the fall of 1983. Due to outcry from various segments of the campus, including the Department, students and alumni, the removal did not actually take place and the Speech I and II classes continued to be taught. The University asserts that the removal of the FTEs was just a proposal that was never implemented, while UCAFT asserts that a decision was in fact

made, but later rescinded. This conduct occurred more than six months prior to the charge and was not included in the charge or complaint. It was not considered by the ALJ as a possible violation, but only as background evidence.

As noted above, central to the dispute herein is a reorganization plan often referred to as the "Sears Plan." The core of the "Sears Plan" was agreed to in about February 1984, in a meeting of several administrators, though it was modified thereafter. The plan was precipitated in part as a response by Dean Sears to a proposal from CS Professors Rosenthal, Neil Malamuth and Patrice French to create a graduate program in CS. The plan was formally announced in a memo from Sears on September 10, 1984. As announced, the plan included the following components:

1. Transfer of the CS Program to the Division of Social Sciences from the Division of Humanities.

2. Transfer of Professor Waldo Phelps from the Speech Department to the English Department (where he had been before an earlier transfer to Speech).

3. Transfer of the Speech I and II courses to the Writing Program (in the English Department).

4. Increased participation of ladder (Senate) faculty from other departments with an interest in communications.

5. Rotation of the chair of the CS Program, beginning with the replacement of Professor Rosenthal with Professor Neil Malamuth.

Items number 1, 2 and 5 had already been implemented at the time the memo was issued. If all of the components had been implemented, it would have constituted a de facto disestablishment of the Speech Department, as its faculty and courses, as well as the CS Program housed there, would have been transferred. A related proposal not enumerated in the memo was to transfer Professor Malamuth to the Psychology Department and Professor Rosenthal to the English Department. These transfers nearly took place but were dropped after protest from Rosenthal.

The transfer of the Speech I and II courses to the Writing Program, the focal point of the controversy with respect to the lecturers, did not actually take place. However, the ALJ found that a firm decision to effectuate the transfer was made and that preliminary steps toward implementation were carried out. In an allocation letter (for the 1985-86 year) dated September 25, 1984, Provost Ray Orbach allocated the three speech FTEs for temporary faculty (lecturers) to the Writing Program. The allocation was later redirected back to the Speech Department, apparently prior to any formal action by the Writing Program. At the time the planned transfer to the Writing Program was abandoned, no one made certain that the FTEs were reallocated to the Speech Department. As a consequence, reappointment of the speech lecturers was delayed about six months and the lecturers' August paychecks were late.

DISCUSSION

UCAFT's Exceptions

UCAFT's primary exception is to the dismissal of its allegation that the reorganization plan was devised in retaliation for protected activity on the part of lecturers in the Speech Department and CS Program. The key argument underlying this exception is that the ALJ erred by drawing only a limited adverse inference from the University's failure to comply with an order to produce an audio tape of an October 15, 1984 meeting of the Executive Committee of the College of Letters and Sciences. The University refused to comply with the ALJ's order to produce the tape (though it did unsuccessfully offer various alternative forms of compliance) based on its assertions that such meetings are confidential (because they contain discussion of peers by academics) and that UCAFT was merely seeking to aid Professor Rosenthal in obtaining the tape for use in a slander suit he had filed against the University. UCAFT alleged in its charge that Rosenthal and the Speech Department were verbally attacked (presumably in a manner reflecting anti-union animus) at the meeting.

In accordance with California Evidence Code section 413, the ALJ exercised his discretion to draw an adverse inference from the University's refusal to provide evidence found to be relevant. He drew the inference that Rosenthal and the Speech Department were verbally attacked at the meeting by University

administrators, but stopped short of inferring that the verbal attack clearly established anti-union animus. He instead viewed the inference drawn as merely supporting, along with other factors, a prima facie case of retaliation. The ALJ commented that, in view of the record as a whole, he could not in good conscience draw a broader inference. While the ALJ did find that a prima facie case of retaliation was established with regard to the Sears Plan, he concluded that the University overwhelmingly demonstrated that the plan would have been developed and implemented regardless of the exercise of protected rights by the lecturers.

On appeal, UCAFT claims that the drawing of a narrow inference does not square with the ALJ's comments early in the hearing when he denied the University's motion to quash the subpeona seeking the tape. In considering the motion, the ALJ conducted an in camera inspection of the tape in order to determine its relevancy. At that time he found the tape relevant and commented that there were portions he did not understand and that it would likely be necessary for the UCAFT counsel to have assistance in comprehending the meaning and implications of what was said as well. He also commented that, given UCAFT's theory of the case, the tape might be critical in its effort to establish a prima facie case. Given the above comments, along with language in the proposed decision reflecting that the ALJ may have considered his in camera

inspection in deciding not to draw the broadest possible adverse inference, UCAFT insists that the ALJ contradicted himself and that the failure to produce the tape severely prejudiced its case. To this we have several responses.

First, we note that the ALJ's comments accompanying his ruling on the motion to quash came early in the hearing, prior to the presentation of the bulk of the evidence and prior to an opportunity to review the record and analyze and evaluate all the evidence. We agree with the University's arguments that inherent in the discretion allowed the trier of fact under Evidence Code section 413 is the consideration of both the record as a whole and the proffered rationale for noncompliance. Here, the ALJ considered both, finding that the record as a whole did not support the retaliation claim and, while not agreeing with the University's rationale for noncompliance, he did not find the University's arguments to be frivolous.

We agree that the record as a whole fails to support the retaliation claim and that the University's rationale for noncompliance, while not convincing, was of arguable merit and not pretextual. Under the circumstances, we find that the ALJ drew the proper inference from the University's failure to produce the tape. In any event, we are persuaded by the record that the Speech Department and CS Programs had been a source of controversy long before any of the protected activity

involved herein took place and that the reorganization plan (as well as other alleged retaliatory actions) were merely the latest installments in a long-term internal struggle over the future of those programs. While no doubt in the eyes of many the actions taken by the University were unfair or ill-conceived, we are convinced they were taken for academic reasons. Consequently, even if an inference of unlawful motive was raised by the University's refusal to produce the tape, we would conclude that the complained-of actions would have been taken even in the absence of such unlawful motive.

UCAFT's remaining exceptions relate to the attempted removal of the speech FTE's in the fall of 1983. First, UCAFT excepts to the ALJ's conclusion that the attempted removal of the speech lecturer FTEs in 1983 was done for the reasons stated by Provost Ray Orbach, i.e., due to enrollment pressures on English 4, caused by its inclusion as a requirement for the economics major. UCAFT asks us to take official notice of UCLA catalogs from 1979-1985, which show that English 4 did not become a requirement for the economics major until the 1984-85 year. This demonstrates, UCAFT argues, that Orbach lied about the motivation for the attempted removal of the FTEs.

PERB Regulation 32300(b)[4] states that exceptions shall make reference only to matters contained in the record. Our

---

[4]PERB Regulations are codified at California Administrative Code, title 8, part III, section 31001 et seq.

regulations do not provide a standard for accepting new evidence on appeal from a proposed decision. However, in San Mateo Community College District (1985) PERB Decision No. 543, the Board adopted the same standard which is prescribed by regulation for requests for reconsideration (Regulation 32410). Thus, evidence offered for the first time on appeal must be:

> newly discovered evidence . . . which was not previously available and could not have been discovered with the exercise of reasonable diligence.

Here, as in San Mateo, supra, the proffering of new evidence must be denied because it is unaccompanied by any showing that the evidence was previously unavailable. Even if we were to entertain the new evidence, it would not affect the outcome of the case. While it may show that Orbach was mistaken about the source of overenrollment of English 4, the record is replete with evidence that there was serious overenrollment in English 4 at the time Orbach tried to transfer the FTEs. Whether this was due to new or planned requirements for the economics major or due to other factors is immaterial, for it was the overenrollment, not the source, that principally motivated Orbach in his actions. Our view of the record provides us no reason to believe Orbach intentionally lied about the source of the overenrollment. Nor does the fact that Orbach was mistaken as to the source of the overenrollment taint the remainder of his testimony.

Next, UCAFT quarrels with the ALJ's finding that there was no credible evidence to refute Orbach's testimony that he was

unaware of the forthcoming PERB election for non-Senate faculty when he attempted to remove the speech FTEs in November 1983. UCAFT argues, with some justification, that Orbach's testimony on this point was vague and uncertain and could best be summarized by saying he was not sure when he found out about the upcoming election. Nevertheless, our concurrence with the ALJ's finding that Orbach was not motivated by anti-union animus would not be affected even if we were to determine that Orbach was aware of the election before attempting to remove the FTEs. Other than the timing of the attempted removal, there is simply no evidence in the record that demonstrates a link between Orbach's conduct and the lecturers' protected activity.[5] As the ALJ pointed out, Orbach's action could only fuel pro-union sentiment among lecturers and thus it would be a foolish action for an opponent of exclusive representation to take.

Lastly, UCAFT objects to the ALJ's refusal to entertain the 1983 attempted removal of the speech FTEs as an actionable allegation (rather than as background evidence). Specifically, UCAFT excepts to the ALJ's conclusion that the 1983 events were not sufficiently intertwined with the later conduct alleged in

---

[5]The Board has held that timing alone is insufficient to prove the nexus between the protected activity and the adverse action that is required to raise an inference of unlawful motive. Charter Oak Unified School District (1984) PERB Decision No. 404.

the charge and complaint as to consider them part of the same course of conduct. We agree with the ALJ that this allegation is not actionable, but because it is untimely. Whether the attempted removal of the speech FTEs in the fall of 1983 is "intertwined with" or "relates back" to the conduct alleged in the original charge, the fact remains that the allegation based on 1983 conduct was untimely at the time the original charge was filed. Consequently, the 1983 allegation is untimely and it cannot be made timely under any principle of pleading or procedure.

When an unalleged violation or an amendment is entertained or allowed despite being untimely on its face, it is because it is deemed to have been filed at the same time as the original charge. See Witkin, California Procedure (1985) 3d Ed., p. 579. Thus, this "relation back" doctrine saves only allegations of conduct that occurred no earlier than 6 months (assuming a 6-month statute of limitations) prior to the filing of the original charge or complaint. This has been implicit in prior Board holdings (see, e.g., Eureka City School District (1985) PERB Decision No. 481, Gonzales Union High School District (1984) PERB Decision No. 410), and has been stated expressly by the federal courts in reviewing NLRB (National Labor Relations Board) decisions (see NLRB v. Hotel Tropicana (9th Cir. 1958) 398 F.2d 430 [68 LRRM 2726], NLRB v. Central Power & Light Co. (5th Cir. 1970) 426 F.2d 813 [74 LRRM 2268]). Otherwise, an allegation that would have been

dismissed as untimely had it been included in the original charge or complaint could become actionable if introduced instead at the hearing. This would be a truly absurd and unjust result. Thus, the earliest the allegation of the attempted removal of the speech FTEs in 1983 may be deemed to have been filed is the time of the original charge, January 23, 1985. The allegation is therefore untimely under any theory.

The University's Exceptions

To reiterate, the ALJ found violations based on the University's failure to bargain the decision to transfer the speech lecturers to the Writing Program, the effects of the de facto disestablishment of the Speech Department and the effects of greater reliance on regular (Senate) faculty. The University excepts to all these findings, as well as to various perceived implications of the proposed decision. However, the University does not except to the finding of a violation insofar as it is based solely on the failure of the University's bargaining team to respond promptly to requests to bargain effects of the Sears Plan.[6]

A main theme running through much of the University's argument on appeal is the notion that the duty to bargain

---

[6]This is a curious position to take, since the University also argues that no duty to bargain had yet arisen. While the ALJ indeed found that the University's dilatory behavior evidenced the lack of a genuine desire to negotiate, we fail to see how such conduct could be unlawful in the absence of an underlying duty to bargain.

effects prior to implementaion could not have been violated because no implementation of negotiable aspects of the plan actually took place. The University argues that bargaining need only take place a sufficient amount of time before implementation to allow meaningful bargaining to take place. A delay in implementation, therefore, delays the onset of the bargaining obligation.

PERB precedent clearly establishes that the duty to bargain effects arises when a firm decision is made. Mt. Diablo Unified School District (1983) PERB Decision No. 373. The University argues that the use of the word "when" is ambiguous in this context and could mean either "as soon as" or simply "after." The University, of course, subscribes to the latter meaning. Applied to the facts of this case, the University claims that since implementation of negotiable aspects of the Sears Plan never took place, the "window period" prior to implementation was suspended indefinitely so that no duty to bargain ever actually arose. We find this argument creative but unpersuasive.

We believe the language of Mt. Diablo, supra, is unambiguous. The duty to provide notice and a reasonable opportunity to bargain effects arises as soon as a firm decision is made, i.e., when the ultimate decision-making authority has formally adopted a course of action. A close reading of Mt. Diablo makes this clear. At p. 25, the Board

cited approvingly precedent under the National Labor Relations Act which states that the duty to bargain effects arises "once" the decision is made (NLRB v. Transmarine Navigation Corp. (9th Cir. 1967) 380 F.2d 933 [65 LRRM 2861]). At p. 27, the Board concludes by stating: "In sum, we conclude that the District did not fail to provide prompt notice and an opportunity to negotiate at the point at which it reached a firm decision . . . " (Emphasis added.) This, of course, does not mean that the employer must be prepared to sit down and negotiate the day after the decision even though implementation is not planned for many months. It simply means that once the decision is made the employer must respond to requests to negotiate in a manner consistent with its duty to bargain in good faith. Generally, good faith would not be demonstrated by refusing to negotiate until some specified length of time prior to implementation. To provide that the duty does not arise immediately would allow a "cat and mouse game" whereby the date of implementation could be postponed in order to avoid bargaining. In our view, the goals of harmonious labor relations and efficient provision of educational services are better served by requiring the parties to sit down and work toward agreement as soon as is practical after the firm decision is made.

As the ALJ noted, in this case the record reflects that a firm decision was made at least as of the issuance of the

September 10, 1984 memo and that shortly thereafter the UCAFT made demands to bargain. While the fact that the negotiable aspects of the plan were apparently later abandoned extinguished any further duty to bargain their effects, it does not excuse or obviate the illegality of the refusal to bargain prior to such abandonment. Therefore, we affirm the finding of a violation for failure to bargain the effects of the Sears Plan.

The University's next exception is to the ALJ's conclusion that the decision to transfer the speech classes and lecturers to the Writing Program was negotiable. The ALJ relied on the general proposition that transfers are negotiable, citing State of California (Department of Transportation) (1983) PERB Decision No. 361-S. The University asserts that it was an error to simply categorize the contemplated action as a transfer and, thus, negotiable. Instead, the University argues, the action must be evaluated on a case-by-case basis, taking into consideration whether imposing a bargaining obligation would significantly abridge the employer's managerial prerogatives. In fact, the University asserts, the decision in this case is more accurately defined as an academic one to reorganize the CS Program and combine writing and speech classes into the same program, while the transfer of the lecturers would merely be an effect of that decision.

We agree with the University that the decision to transfer the Speech I and II courses was not negotiable and we reverse

the ALJ on this point. While transfers are as a general rule negotiable, we believe the ALJ failed to distinguish between the transfer of the Speech I and II courses and the transfer of the speech lecturers. We view the transfer of the lecturers as analytically distinct from the transfer of the speech courses. The transfer of the lecturers is most accurately viewed as an effect of the transfer of the speech courses to the Writing Program. While the transfer of the speech lecturers to the Writing Program was the most likely consequence of the transfer of the speech courses, it was not a foregone conclusion. The lecturers could also have been offered other positions with the University or not rehired.

Here, the transfer of the speech courses was contemplated as part of an academic reorganization, based upon academic considerations dealing with the future of the CS Program and the continued viability of a speech department. As such, requiring negotiations on the decision itself would seriously intrude upon the University's managerial prerogatives in establishing and maintaining its educational offerings and organizational structure.

HEERA section 3562(q) states, in pertinent part:

> . . . The scope of representation shall not include:
>
> (1) Consideration of the merits, necessity, or organization of any service, activity, or program established by law or resolution of the regents or the directors, except for the

> terms and conditions of employment of employees who may be affected thereby.
>
> . . . . . .
>
> (3) Admission requirements for students, conditions for the award of certificates and degrees to students, and the content and supervision of courses, curricula, and research programs, as those terms are intended by the standing orders of the regents or the directors. (Emphasis added.)

We find that the decisions involved here, concerning the location of the CS Program and the speech courses and the continuation of the Speech Department, clearly fall within the express exclusions from the scope of representation. While the fact that a transfer of lecturers was a likely or even inherent part of the process is a compelling rationale for requiring effects bargaining, it does not change the fact that the possible transfer of the lecturers would spring from decisions on matters that are clearly outside the scope of representation.

Two of the University's exceptions pertain to the ALJ's discussion at pp. 118-119 of the proposed decision, where he concludes that UCAFT was denied timely notice and a reasonable opportunity to bargain prior to implementation of the Sears Plan. This is based upon the UCAFT receiving notice indirectly via the September 10, 1984 memo from Sears to all faculty after implementation of some aspects of the plan had already taken place. The University makes two objections: (1) UCAFT received actual notice on or about September 10, 1984, so formal notice was unnecessary; and (2) only wholly nonnegotiable

aspects of the plan had been implemented; thus these actions were unrelated to any possible bargaining obligation. The University asserts that the ALJ's conclusion muddles negotiable and nonnegotiable aspects of the plan and carries the implication that HEERA employers must first bargain with employee organizations before implementing wholly nonnegotiable decisions as if the actions were announced in the same document as negotiable actions, even though the two sets of actions are independent of one another.

First, we agree that the record reflects that UCAFT received actual notice of the Sears Plan on or about September 10, 1984 (the date of the memo from Sears); thus, the failure to give formal notice is of no legal import. See Victor Valley Union High School District (1986) PERB Decision No. 565. We also agree with the University that the aspects of the plan which were implemented were not negotiable in any respect. These were: (1) moving the CS Program under the auspices of the Division of Social Sciences (from Humanities); (2) transfer of Professor Waldo Phelps back to the English Department; and (3) installation of Professor Malamuth as the new chair of Speech and CS. All of these reflect nonnegotiable decisions in that they are clearly outside the scope of representation with regard to lecturers. Further, there is no evidence in the record, nor any reason to suspect, that these actions would have foreseeable negotiable effects (See Mt. Diablo Unified

School District (1983) PERB Decision No. 373). Further, these actions are not inextricably linked to the aspects of the plan that would have negotiable effects. The two sets of actions are not interdependent and each could be justified on academic grounds in the absence of the other. Consequently, we find the University's actions with regard to the three above-listed items to be of no effect with regard to bargaining obligations. As we conclude that the implementation did not touch upon negotiable matters, we reverse the ALJ's finding of a separate violation based upon implementation of portions of the plan prior to notice and an opportunity to bargain.[7]

The remainder of the University's exceptions are based on an overly expansive reading of the proposed decision. For example, the University appears to object to a perceived

---

[7]Though it is not entirely clear, the ALJ also may have found that the implementation reflected that a firm decision was made well before actual notice was given, and that the delay in giving notice was unlawful. In any event, we find no such violation. While the genesis of the Sears Plan was in early 1984, the plan was subject to re-examination and revision thereafter. The September 10, 1984 memo was the first formal announcement of the plan to anyone. Since nonnegotiable aspects of the plan had been implemented by the time of the memo, a firm decision as to those matters may have been reached some time prior to September 10. However, the record does not reflect how long before September 10 such a decision was made nor whether negotiable aspects were also decided upon at the same time. Therefore, with respect to negotiable matters, we find that September 10, 1984 is the most fair and reasonable date in fixing the time of a firm decision.

finding of the ALJ that the University unlawfully failed to bargain the decision to lessen reliance on lecturers. In fact, the ALJ, in his discussion of failure to bargain allegations (at pp. 113-120), concludes that a decision was negotiable only with regard to the transfer to the Writing Program. Therefore, this exception is unfounded.

Similarly, the University contends that the ALJ improperly found a violation based upon the planned termination of two CS lecturers in 1985. The University adamantly asserts, and quite correctly, that the termination of the two lecturers was never decided upon and was merely an idea communicated by Sears to Vice-Provost for Planning and Administration Gerald Kissler, and that mere ideas or proposals discussed by administrators but not yet agreed upon are not negotiable. However, the ALJ made no such finding. He merely considered the memo as evidence that termination was one of many foreseeable effects of the decision to reduce reliance on lecturers.

Lastly, the University asserts that the ALJ's conclusion that it violated its bargaining obligations was based in part on an erroneous finding that the speech lecturers were actually transferred temporarily to the Writing Program, causing the delay in the lecturers' reappointment and paychecks. The University argues that no transfer took place and that the delay was simply the result of bureaucratic error. This, we believe mischaracterizes the ALJ's decision.

Nowhere did the ALJ find that an actual transfer had taken place. He did find, based primarily upon the testimony of University witness Patricia Topper, an administrative analyst in Provost Orbach's office, as well as upon documentary evidence, that the speech lecturer FTEs had been allocated temporarily to the Writing Program for the 1985-86 year. No further implementation had taken place, such as appointment of lecturers by the Writing Program, so it never became more than a paper change in FTE allocations. Implicit in the ALJ's analysis is the conclusion that preliminary steps were taken toward implementation which violated the duty to bargain, a direct result of which was the delay in reappointment and paychecks. Our reading of the record supports this conclusion. While the delay could have been avoided had the decision to withdraw the allocation to the Writing Program been communicated promptly to the appropriate University staff, the delay would not have taken place but for the steps taken to allocate the speech lecturer FTEs to the Writing Program.[8]

---

[8]The proposed order states that the lecturers shall be reimbursed for "all losses incurred" from the delay in reappointment, which in turn caused a delay in issuance of August 1985 paychecks. Because we find that the vagueness of this could lead unnecessarily to a compliance dispute, we will clarify the order so as to provide payment for any loss of wages or benefits due to the delay.

CONCLUSION

In sum, we affirm the attached proposed decision, except insofar as it holds that the decision to transfer the Speech courses to the Writing Program was negotiable and that the University unlawfully failed to provide notice and a reasonable opportunity to bargain prior to September 10, 1984.

ORDER

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

A. CEASE AND DESIST FROM:

(1) Failing to meet and negotiate in good faith with the University Council, American Federation of Teachers, AFL-CIO over the effects of those aspects of the "Sears Reorganization Plan" that have foreseeable impact upon the terms and conditions of employment of Unit 18 members.

(2) Denying the University Council, American Federation of Teachers, AFL-CIO its right to represent Unit 18 members by failing to meet and negotiate about matters within the scope of representation.

(3) Interfering with Unit 18 members' right to select an exclusive representative by failing to meet and negotiate about matters within the scope of representation with the University Council, American Federation of Teachers, AFL-CIO.

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

(1) Suspend further implementation of the "Sears Reorganization Plan" and, upon request, meet and negotiate with the University Council, American Federation of Teachers, AFL-CIO concerning the effects of those aspects of the Plan which have a foreseeable impact upon the terms and conditions of employment of Unit 18 members.

(2) Reimburse the lecturers in the Speech Department of the UCLA campus for all loss of wages and benefits incurred as a result of the delay in receiving their pay during the summer of 1985, including interest at 10 percent per annum.

(3) Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post copies of the attached Notice marked "Appendix," signed by an authorized representative of the University, in conspicuous places where notices to employees are customarily placed at the headquarters office and at each of the campus sites for thirty (30) consecutive workdays during the regular academic work year. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

(4) 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.

Members Shank and Cordoba joined in this Decision.

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. SF-CE-200-H, University Council, American Federation of Teachers, AFL-CIO v. Regents of the University of California, wherein all parties had the right to participate, it has been found that the Regents of the University of California violated Government Code section 3571(a), (b) and (c) by

(1) Failing to meet and negotiate in good faith with the University Council, American Federation of Teachers, AFL-CIO over the effects of those aspects of the "Sears Reorganization Plan" that have foreseeable impact upon the terms and conditions of employment of Unit 18 members.

(2) Denying the University Council, American Federation of Teachers, AFL-CIO its right to represent Unit 18 members by failing to meet and negotiate about matters within the scope of representation.

(3) Interfering with Unit 18 members' right to select an exclusive representative by failing to meet and negotiate about matters within the scope of representation with the University Council, American Federation of Teachers, AFL-CIO.

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

(1) Suspend further implementation of the "Sears Reorganization Plan" and, upon request, meet and negotiate with the University Council, American Federation of Teachers, AFL-CIO concerning the effects of those aspects of the Plan which have a foreseeable impact upon the terms and conditions of employment of Unit 18 members.

(2) Reimburse the lecturers in the Speech Department of the UCLA campus for any loss of wages and benefits incurred as

a result of the delay in receiving their pay during the summer of 1985, including interest at 10 percent per annum.

Dated:

REGENTS OF THE UNIVERSITY OF CALIFORNIA

By _____
Authorized Representative

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

UNIVERSITY COUNCIL, AMERICAN FEDERATION OF TEACHERS, AFL-CIO, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Unfair Practice Case No. SF-CE-200-H PROPOSED DECISION (12/19/86)

Appearances: David S. Averbuck, Esq. and Taylor, Roth & Bush by Christopher D. Cameron, Esq. for University Council, American Federation of Teachers, AFL-CIO; Edward M. Opton, Jr., Esq. for the Regents of the University of California.

Before Manuel M. Melgoza, Administrative Law Judge.

I. PROCEDURAL HISTORY

The University Council, American Federation of Teachers, AFL-CIO (AFT, UCAFT, Union or Charging Party) filed the above-captioned Unfair Practice Charge on January 23, 1985 making various allegations that the Regents of the University of California (UC, University, or Respondent) violated Higher Education Employer-Employee Relations Act (HEERA or Act) sections 3571(a), (b), and (c).[1] A First Amended Unfair

[1]The Higher Education Employer-Employee Relations Act is codified at Government Code section 3560, et seq. Section 3571 reads, in pertinent part:

> 3571. UNLAWFUL PRACTICES: EMPLOYER
>
> It shall be unlawful for the higher education employer to:

Practice Charge was filedon about March 12, 1985. On March 25, 1985, the Public Employment Relations Board (PERB or Board) issued a Complaint, incorporating the Unfair Practice Charge by reference.

Respondent filed its Answer to the Complaint and to the First Amended Charge on April 15, 1985, admitting certain allegations, asserting certain affirmative defenses, but denying that it had violated any portion of the HEERA.

An informal conference held on April 18, 1985 before an administrative law judge of PERB failed to result in a settlement of the underlying disputes.

On May 15, 1985, the parties filed a mutual request to place the proceedings in abeyance so that they could explore settlement possibilities in conjunction with ongoing collective bargaining negotiations. The case was placed in abeyance on May 28, 1985.

On July 5, 1985, the Respondent notified the PERB that the settlement negotiations had failed to result in a settlement, and requested that the case be placed on the hearing calendar.

> (a) Impose of 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.
>
> (c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

A Notice of Hearing was issued on July 18, 1985. Thereafter, a formal evidentiary hearing was conducted before the undersigned on the following dates: September 30, 1985; October 1 and 2, 1985; December 5, 6, 9, 10, 11, 12, and 13, 1985; January 17, 18, 19, 29, 30, and 31, 1986; March 24, 25, and 26, 1986.

On about October 18, 1985, the Charging Party withdrew paragraphs 8a through 8f from its First Amended Charge. Those paragraphs contained allegations of unlawful conduct directed by UC against Sally Sutherland. A Notice of Partial Withdrawal, with prejudice, was issued by the undersigned on October 28, 1985.

During the formal hearing, the parties reached a settlement of a portion of the Charge related to the UC San Diego campus. Consequently, the Charging Party withdrew, with prejudice, paragraphs 5 and 6 of the First Amended Charge. A second Notice of Partial Withdrawal was issued by the undersigned on April 29, 1986.

On June 16, 1986, the Charging Party filed a written request for an extension of time in which to file its post-hearing brief. The request was granted, and the deadline for filing an opening brief was changed from June 23 to July 23, 1986.

Opening post-hearing briefs were received by the PERB on July 23 and 25, 1986.[2] Responsive post-hearing briefs

---

[2]Respondent's brief was inadvertently filed in the PERB's

were filed by the parties on August 8, 1986. The case was then submitted for proposed decision.

II. INTRODUCTION

The portions of the First Amended Complaint that remain at issue contain a lengthy recitation of alleged conduct broadly characterized as threats of reprisals and reprisals for engaging in protected activity, denials of collective bargaining rights, failures to engage in good faith in meeting and conferring with the exclusive representative, and released time interference and harassment. Although each of the allegations was greatly amplified through argument and evidence during the hearing, they are summarized below as follows:

1. Following a representation election at which the University Council, AFT was selected as the exclusive representative of a unit of non-Academic Senate instructional employees (Unit 18)[3], and after the selection of Marde Gregory as UCAFT's chief negotiator, the University of California undertook a concerted effort at UCLA to unilaterally disestablish the Department of Speech, reorganize the Communications Studies Program (both places where she worked)

San Francisco office, and later forwarded to the Los Angeles Regional Office.

[3]The University faculty consists of "regular" or "ladder rank" faculty - assistant professor, associate professor, and professor (who are members of the Academic Senate) - and non-ladder, non-senate faculty who are referred to as visiting lecturers, adjunct lecturers, or temporary faculty. The latter category, at issue in this case, will be referred to collectively as "lecturers."

and to separate Gregory from her colleagues.

2. Since on or about October 1984 and continuing thereafter, the University, through, inter alia, Dean David Sears and Provost Raymond Orbach, has made numerous attempts to create difficulties for Marde Gregory and her colleagues in the hope of minimizing the time she could devote to collective bargaining. This included attempts, during December 1984 and early 1985, to condition granting released time for negotiations upon having Gregory's department chairperson, Neil Malamuth, sit in on every one of the sessions in one course.

3. On October 15, 1984, the Speech Department and its former chairperson, a close colleague of Marde Gregory, were verbally attacked at an academic committee meeting as part of an effort by the University to harass Gregory and her colleagues who are sympathetic to her activities as chief negotiator for the AFT and to make it difficult for her to carry out her meet-and-confer obligations.

During the hearing, the AFT argued and presented evidence in support of an additional issue - i.e., that, during the Unit 18 election campaign, the University undertook, and subsequently aborted its efforts, to remove three full-time equivalents (FTE's) from the Speech Department, as part of a unilateral effort to eliminate the jobs of all the Unit 18 members in that department. Both parties presented extensive evidence on this question. The AFT now argues that, because the University has failed to raise the statute of limitations

as a defense, it should be found that the Respondent committed an unlawful unilateral change and it discriminated against, and interfered with the rights of, employees who were supporting AFT in its organizational efforts. This issue will be dealt with further below.

III. FACTS

A. Background

The facts underlying the above disputes relate almost exclusively to the University of California's Los Angeles campus (UCLA). That campus is organizationally comprised of two colleges and several schools (e.g., the School of Law, School of Social Welfare, School of Medicine, etc). By far the larger college is the College of Letters and Science, which is the primary focus of this proceeding[4]. That college is the primary academic unit for educating UCLA's undergraduates and has the most faculty and students.

The current chief administrative officer of the College of Letters and Science (hereafter L&S) is Raymond Orbach, bearing the title of Provost. Prior to Orbach's appointment to the position effective July 1982, the chief administrative officer of the College of L&S was entitled "Dean of the College of L&S" (Dean Webber). Only Executive Vice-Chancellor Bill Schaefer, Vice-Chancellor for Faculty Relations Hal Horowitz and Chancellor Charles Young rank above Provost Orbach within the

---

[4]The other is the College of Fine Arts.

UCLA administrative staff. In addition to Orbach, the Office of the Provost consists of Vice-Provost Gerald Kissler, and the various divisional deans - including Dean Herbert Morris (Humanities), Dean David Sears (Social Sciences), and Dean J. D. O'Connor (Life Sciences), and Dean Clarence Hall (Physical Sciences). Each divisional dean reports directly to Orbach.

Each of the deans has responsibilities that include overseeing the work of chairpersons of the various departments comprising each division - e.g., the Department of Speech within the Humanities division. The chair of a department or program (e.g., Communications Studies Program) is the immediate administrative officer between rank-and-file faculty and the administration.

Prior to 1970-71, the Speech Department included undergraduate (B.A.) and graduate (M.A. and Ph.D.) programs. In about 1970-71, all the degree programs in speech were eliminated by the Academic Senate. By the 1972-73 academic year, the Speech Department's course offerings had been phased out, and only Speech 1 and Speech 2 courses were deliberately preserved.

In the wake of the termination of the speech degrees, an inter-college committee was created to find alternative forms of curriculum for students with an interest in communication. As a result, there was created an interdepartmental degree program called Communication Studies staffed by some faculty in the Speech Department and faculty in other departments.

By now Speech was a department without a degree program, but with a budget, and Communication Studies was a program without a budget of its own, but offering an undergraduate degree. In part because of these circumstances, from 1973-1984 the Communication Studies Program (CS Program) was housed in the Speech Department and that department's budget was used to administer, house, and employ the speech faculty and the faculty assigned to the CS Program.

Paul Rosenthal served as the chairman of the Speech Department from 1972-1980, and again in 1983-1984. In 1973 he was appointed chairman of the CS Program and served in that position continuously until 1984. So, for a long period, he simultaneously chaired both entities.

1. The Academic Senate

Relevant to the issues of the locus of authority for granting and negotiating released time and to the issues of alleged unilateral and discriminatory elimination of departments and reorganization of programs, is the existence of a body known in public higher education systems as the Academic Senate. The Regents of the University of California, the highest administrative body within the system, have delegated authority over courses and curricula to the Academic Senate. The Regents have delegated to the administration (President, Chancellors, etc.) authority over resources (e.g., personnel, space, etc.).

Only the Academic Senate can create or eliminate courses,

curriculum, degree programs, or the academic content of degree programs. A principle referred to as "shared governance" between two independent bodies usually means that without administration consent to faculty (who largely comprise the Academic Senate), the Senate cannot have courses taught. Without Senate approval of courses, the administration and the faculty cannot fulfill the University's teaching mission.

Disestablishment is a term used to describe the termination of either a program (i.e., a degree program) or a unit (i.e., department, a school, a college, or any of the academic units that constitute the academic administrative structure of the University). The final authority with respect to the disestablishment of a degree program or the elimination of a course is the Senate's, inasmuch as it involves control over curricular matters. The final authority with respect to the disestablishment of an administrative unit rests with the administration.

Because the practical effects of disestablishing a department are to simultaneously disestablish programs and/or courses housed in a department, the "shared governance" principle and presidential guidelines require that specific, codified procedures be followed prior to effectuating a disestablishment. These procedures include broad and extensive consultations between the two entities prior to the action. For example, if the Senate decided it wanted to eliminate a degree program, it is obliged to first consult with the

administration regarding the effects of that action on the faculty, students, and resources. Conversely, if the administration wanted to eliminate a degree program, or a unit, it must engage in similar consultations with the Senate. There is a systemwide mechanism which sets forth disestablishment procedures, with more detailed procedures adopted by each campus.

2. The Speech Department and Communication Studies Program Faculty

Since the phasing out of the degree programs in speech and the decision to retain Speech 1 and 2 courses, the teaching of those courses has been done primarily by lecturers. Two of the remaining three regular faculty members were assigned to the CS Program. By 1980-81, the only regular faculty member teaching courses in speech was Waldo Phelps, who taught one or two courses of Speech 1. The other 22-24 speech sections were taught by lecturers.

As of the 1983-84 academic year, the Speech Department had an allocation of the equivalent of three full-time faculty positions (3.0 FTE's) which were filled by approximately five people on a percentage-time basis - some had .5 FTE, 2/3 FTE, etc. Four of these lecturers, Sonia Packer, Steven Doyle, Jeannie Dye and Marde Gregory, had been members of the department for at least 6-8 years. In the fall of 1983, a

fifth lecturer, Paul Von Blum was hired after having been a lecturer at UC Berkeley for almost 11 years.[5]

Since the 1983-84 academic year, Rosenthal, Patrice French, and Neil Malamuth have been the only full-time Senate faculty assigned to the CS Program.[6] Like the Speech Department, the CS Program has relied heavily on lecturers to teach courses. Therefore, the program was allocated FTE from which to support teaching of CS courses by four lecturers. Those lecturers, as of the 1984-85 academic year, were Janet Weathers (.5 FTE), Diana Meehan (.5 FTE), Geoffrey Cowan (.5 FTE), and Jeffrey Cole (1.0 FTE).

Marde Gregory, who normally had a .5 FTE appointment in Speech, was simultaneously the Student Affairs Officer (SAO) in the CS Program. Although the SAO position was a part-time (25%) staff, not a teaching, position, she had traditionally taught a CS course (CS 185) by special arrangement between her and former chair, Paul Rosenthal. Teaching the CS course was thereby considered part of her duties as an SAO within the CS Program.

B. Unit 18

On about March 6, 1984, the PERB designated, for purposes

---

[5]At the time of the hearing there were no speech courses being taught by regular faculty.

[6]The CSP has no ladder FTE of its own. Its ladder-rank faculty are housed in other departments - Patrice French in Psychology, Neil Malamuth and Rosenthal in Speech. Its lecturers are supported by "soft money FTEs."

of collective bargaining under HEERA, as Unit 18, a category of University employees occupying titles such as visiting lecturers, "Associate in_____", senior lecturer, visiting senior lecturer, coordinator of field work, etc. Systemwide, the unit consisted of roughly 2,000 employees. Of these, approximately 450 were employed at UCLA.[7] The record does not reflect the relative numbers or concentrations of Unit 18 members in departments and programs at UCLA outside of the Speech Department and CS Program.

Activity related to union representation began to occur at the University of California years prior to the acitivity in question in this case. For example, the campaign for and against representation of the Senate faculty took place in late 1980 and in 1981, culminating in a runoff election where the employees voted not to be exclusively represented by an organization. Elections for tens of thousands of other University employees, distributed among some 14 other bargaining units, were scheduled throughout late spring and summer of 1983.

By September 1983, while anticipating that elections for Unit 18 would be occurring in the late fall of that year, or

---

[7]The testimony and documentary evidence conflicts somewhat on the actual numbers. Marde Gregory testified that, at the time of the Unit 18 election, there were 2,536 unit members, of whom 550 were employed at UCLA. The tally of ballots indicates that there were 1,877 eligible voters in the Unit. The difference in the numbers is not significant to the determinations made herein.

early winter 1984, the University was preparing for collective bargaining negotiations with tens of thousands of staff employees who had already voted for representation. This preparation included consultations with managerial personnel on the various campuses in order to develop bargaining positions.

Although there is reason to believe that the UCLA administration was aware as early as May 1983, that Unit 18 elections would be held sometime that fall, there is scant evidence that any overt organizing activity occurred at that campus until the late fall of 1983.

Marde Gregory, who would later become UCAFT's chief negotiator, testified that her first attendance at a UCAFT organizing meeting occurred in late November or early December 1983, when union official Howard Kimmeldorf visited the campus to discuss matters of importance to the speech lecturers. According to Gregory, about eight people attended. At that time, neither she nor any of the lecturers in Speech and Communications Studies had yet become members of UCAFT.

This is consistent with testimony and documentary evidence suggesting that the University's responses to UCAFT's efforts began to manifest themselves in November and December. Specifically, administration officials Carol Hartzog, Ray Orbach, Harold (Hal) Horowitz, and Gerald Kissler, testified that during mid-November 1983, meetings among UCLA administrators took place at which the upcoming election was discussed. The specific topics discussed related to

permissible election-related conduct under HEERA, appropriate management positions and responses during the campaign, what subjects would be within the scope of bargaining, etc. These topics became regular items of discussion during weekly meetings called the "Chancellor's Coffee Hour." Additionally, the status of the organizing drive was discussed at weekly dean's meetings convened by Orbach.

Provost Orbach, who had overtly opposed the unionization effort among Senate faculty during 1980-81, wrote to Unit 18 members in the College of L&S on November 18, 1983, urging them to vote against exclusive representation. He issued a second letter on December 8 regarding the election, inviting unit members to attend a meeting on December 15 to discuss the issues regarding what a vote for or against representation might mean to the lecturers.

Such a meeting occurred, but was poorly attended. Only seven lecturers from the College of L&S were present, among them Marde Gregory and Jeannie Dye. Consequently, this was the only such meeting Orbach held.

On about December 14, 1983, Hartzog issued a memorandum to the Writing Program faculty urging a "no" vote in the upcoming election. A meeting was scheduled for the same purpose as the one held by Orbach. However, no one attended.

A simlar letter urging a "no" vote was issued to the Writing Program lecturers by Vice-Chancellor Bill Schaefer during December. Although similar statements may have been

issued by deans to their respective department members, there is no evidence of any other specific attempts. And, although general reference was made to other attempts by administrators to arrange meetings in other units (i.e., School of Dentistry), the aforementioned incidents appear to comprise the bulk of UCLA's overt efforts to dissuade lecturers from voting for the UCAFT.

There was little evidence regarding the pro-union campaign. Paul Rosenthal had a general recollection of seeing election materials posted at the campus. Neil Malamuth, then a regular faculty member, vaguely recalled discussions among others regarding whether or not exclusive representation was a good idea or not. Marde Gregory testified about only one organizing meeting she attended prior to the ballots being issued by PERB. That meeting appeared to have been convened as a response to an effort by Orbach and Morris to reallocate three FTE's from the Speech Department to other units within the Division of Humanities, as discussed in more detail below.

C. The Removal of Three Speech FTE's

In support of its theory of retaliation and discrimination against advocates of unionization and lecturers, the UCAFT has argued that the University's efforts to remove three FTE's from the Speech Department during the fall of 1983 were part of that anti-union scheme. During the summer of 1983, Ray Orbach, Pat Topper (Director of the Budget in the College of L&S), and Gerald Kissler met on several occasions to discuss the College

budget. Of major concern was the increasing enrollment pressure in areas such as English and economics.

The number of English majors and the enrollment in English classes had been increasing over the previous three to four years. According to Orbach, English 4, a literature-based core course, was so oversubscribed that students who would normally have taken it in their freshman year were having to take it at the sophomore or junior level. English 4 is the first course beyond the minimum required courses to satisfy English major requirements and is offered through the Writing Program. According to reports considered by Kissler and Orbach, there were 24-30 unstaffed sections of English 4 in 1983. The situation had been exacerbated by an Economics Department decision in 1982 or 1983 to make English 4 one of its required courses. Consequently, enrollment took a big jump.[8]

Speech 1 and 2, however, were also in heavy demand and historically oversubscribed. Nevertheless, Kissler, Morris and Orbach made a decision that English 4 was more important academically than Speech 1 and 2 and that the loss to the academic University from cutting the Speech courses would be minimal.

There was conflicting testimony between University

---

[8]There was a great deal of testimony regarding other factors that caused enrollment pressures in English 4 and other courses. However, it is clear that the Economics Department's decision to include the course as one of its' requirements was the primary factor influencing Orbach's later decision to remove the FTE's.

witnesses and UCAFT witnesses over whether Speech 1 and 2 and English 4 were required for any major. In support of its position that the purported justifications for removing the speech FTE's were a pretext for the real reason (i.e., retaliation against lecturers and diminuation of the unit), the UCAFT offered testimony that the targeted speech courses satisfied requirements in some majors and/or that Speech 1 is used as an important "option" in the business designation series, which can "accompany" a major curriculum at UCLA. University witnesses uniformly testified that Speech 1 and 2 were not required for any major and were exclusively electives. With respect to English 4, there was testimony from Marde Gregory that it was not a requirement for economics majors in 1983-84, but was an option for an English or writing requirement in preparation for the economics major. Therefore, a student might take English 30 or two English 100-W writing-intensive courses to satisfy the economics requirement. The fact remains, however, that English 4 was one of the courses that the Economics Department decided would fulfill its writing requirement.

After deliberating with Kissler, Morris and Topper, Provost Orbach decided, on about October 7, 1983, to recommend the removal of all three FTE's from Speech and to allocate them to English via the Writing Program. According to Pat Topper's testimony, Orbach's yearly allocation letter to the divisions reflected the removal of those FTE's (Exh. XX). Although

Orbach attempted to describe his actions in furtherance of the removal of the speech FTE's as a tentative proposal, I am satisfied from the testimony of Topper, Rosenthal, and Gerald Kissler that the decision to remove the FTE's was firm as of November 17 or 18, 1983.

When they met on the above date, Kissler informed Rosenthal that the Speech 1 courses were being terminated by the elimination of the three FTE's that had been supporting those courses. When asked why this was being done, Kissler simply responded that the resources were needed elsewhere in the College. Kissler intentionally declined to state where the resources would be used, in keeping with his practice of never discussing with a particular chair where reallocated resources would go in order to avoid inevitable bickering among chairpersons over the importance of one department versus another. Instead, Kissler simply told Rosenthal that the FTE's would be used to alleviate enrollment pressures in other areas.

Rosenthal tried unsuccessfully to persuade Kissler that the speech courses were in heavy demand, that waiting lists for them were at least as large as the classes themselves. Kissler told Rosenthal that, if he wanted to do something about the FTE removal, he had better write to Morris quickly.

Believing the removal decision to be violative of the shared governance principle - it amounted to the eradication of a complete area of instruction not offered anywhere else on the campus and therefore involved an extreme change in curriculum

which required Senate consultation and approval - Rosenthal began to organize opposition to the decision.

During the next 3-4 weeks, he met with many of the non-Senate faculty who could have lost their jobs as a result of the planned removal of the FTE's, and mobilized opposition to Orbach's and Morris' decision.[9] Letters and calls from legislators, alumni, faculty, and students, in protest of the move, flooded the University. The school newspaper, The Daily Bruin, publicized the event as front page news.

Even Vice-Chancellor Schaefer opposed the elimination of the speech courses, and indicated, to Kissler's surprise, that he felt the courses were a valuable resource to the University and should be retained. The opposition was so pronounced that the decision to remove the FTE's was withdrawn prior to mid-December 1983.

What was ultimately done to solve the overenrollment problems in English - something Orbach believed was academically wrong - was to increase the size of upper division courses in that subject, refrain from filling a vacancy in the Geography Department due to retirement, and to use those savings to hire a lecturer in English. The net result was a

---

[9]Although Orbach had made his decision, one in which Morris concurred, Morris had the final say as to where in his division the FTE's would be used. The intent had been to utilize the resources to alleviate overenrollment in English, though Morris could theoretically have decided to distribute those FTE's elsewhere. The removal would not have been effective until the 1984-85 academic year.

small increase in the resources for English, and an increase in the class size of upper division English courses.

The UCAFT's visibility in the whole scenario was all but non-existent. The only evidence of its involvement was Gregory's testimony that the first organizing meeting held at the UCLA campus was initiated at least as a partial response to the planned FTE removal.[10] One professor had written a letter to Orbach in late November accusing him of attempting to eliminate some lecturers "before their terms and conditions of employment could possibly be an issue in an adversary bargaining relationship." Orbach quickly responded in writing to explain that his decision was strictly academically based.

During Orbach's December 15 campaign speech to the lecturers, he had not mentioned the FTE controversy until one lecturer asked him during a question-and-answer period about the dispute. Orbach explained that the proposal to remove the FTE's had been withdrawn, and that such withdrawal should not be interpreted as a promise in light of the upcoming election.

The evidence indicates that Orbach blamed Rosenthal for the "flap" over the FTE issue and with forcing him and Morris to reverse their earlier decision. The articles in the Daily

---

[10]Gregory testified that the AFT was writing letters to the Provost in protest of the action. No letters were produced. The unidentified authors of such letters were not called to testify about them. None of the administrators who were asked about the issue recalled receiving such letters from AFT. Gregory's uncorroborated hearsay testimony regarding such letters cannot be credited.

Bruin focused on academic considerations, and failed to make any reference to a possible connection between the FTE issue and the upcoming election. The overwhelming correspondence and telephone calls related to subjects other than the election or the AFT.[11] There is no credible evidence to refute the testimony that, when Orbach met with Kissler in the summer of 1983 to discuss the overenrollment problems in English, he was unaware of the AFT election.

D. The Unit 18 Election

The Unit 18 election proceeded after the conclusion of the speech FTE controversy. Ballots containing the choices of "UCAFT" and "No Representation" were mailed by the PERB beginning December 30, 1983 to all eligible voters. Each was instructed to mail the completed ballots early enough to be received by PERB no later than January 31, 1984. The tally of ballots conducted on February 3, 1984 resulted in 707 votes in favor of UCAFT, 447 votes for "No Representation" and 70 challenged ballots. The UCAFT was officially certified as the exclusive representative of the unit on March 6, 1984.[12]

---

[11]Indeed, although warned by fellow administrators that his proposed action to remove the FTE's might have the inevitable effect of causing the lecturers to give their support to AFT in the upcoming election for fear of losing their jobs, Orbach nevertheless proceeded with his decision in the belief that it was the only academically sound option, union issues notwithstanding.

[12]Official notice is taken of PERB's representation File #SF-HR-18.

E. The "Sears" Reorganization Plan

The UCAFT has argued that its efforts to secure collective bargaining rights for lecturers touched off a furor among administration officials who later embarked on a coordinated campaign to diminish the unit by unilaterally eliminating positions in the Speech Department and CS Program. As part of that conspiracy, it is asserted the University concocted and began implementing a plan to reorganize the CS Program which had the foreseeable effect of eliminating lecturer positions and terminating employment of unit members. In support of its theory, the UCAFT offered testimony that the Speech Department and CS Program are characterized by a heavy concentration of lecturers who have been teaching at UCLA for an unusually long period of time, that they house the Union's chief negotiator Marde Gregory, and that the Speech Department's lecturers are 100% AFT members. The University has argued that the efforts to disestablish the Speech Department began in about 1970 or 1971 when the degree programs were first eliminated, that the plan to reorganize the CS Program and Speech Department were part of a gradual plan preceding the collective bargaining election and unrelated to it.

Unrefuted testimony reflects that administration officials knew that one election campaign issue, and perhaps the most important, was the UCAFT's goal to obtain security of employment for the lecturers. Most Unit 18 members held job titles that did not come with, nor lead to, security of

employment. Instead, they were appointed for one-year terms with no promise that their contracts would be renewed for the following year, and without a possibility of obtaining tenure.

One obstacle to UCAFT's announced goal was the University's so-called "eight-year rule." The rule reflected an established policy that non-Senate faculty could not occupy positions in excess of 50% time for more than eight years. Although the rule's arbitrary limit was eight years, some departments within the campus had used other, shorter, terms. At least within the Speech Department, and to some extent in the CS Program, most lecturers were near the limit at more than 50% time, or beyond the eight years but with less than 50% appointments at the time negotiations got underway in the Spring of 1984. Therefore, one of the Union's announced aims was to negotiate the abolition of the eight-year limit. The UCAFT apparently concludes that, by unilaterally implementing a plan ("Sears Plan") that would eliminate a block of long-time lecturers, unit support for UCAFT's bargaining position would be undermined.

As noted earlier, the CS Program was created almost simultaneously with the termination of the degree programs in speech. There was a conscious decision by the administration and the Academic Senate to retain the courses of Speech 1 and Speech 2. However, within about three years following its creation, the continued existence of the CS Program was placed in jeopardy by Dean Burke, who succeeded Dean Trueblood as the

Dean of the College of L&S in 1974. Burke placed the program under review by two committees (one of which criticized the academic quality of the program), attempted unsuccessfully (due in part to Rosenthal's opposition) to eliminate the program, and removed two FTE's that had been used to its benefit. Rosenthal, then chair of the CS Program, vigorously opposed each attempt to diminish the program, and became what was described as a "thorn in the side" of Burke.

Eventually, the Academic Senate, through its Committee on Undergraduate Courses and Curricula, also reviewed the program (1977 and 1978) and recommended its continuation and development toward department status. Burke resigned at about that time, then Dean Webber took over and restored the two FTE's that had been removed.

After the restoration of the FTE's, Rosenthal attempted to fill them with full-time faculty. One of those FTE's was filled as a result of Rosenthal's recruitment of Professor Neil Malamuth, hired as a ladder faculty member in 1982 as a CS professor. Malamuth accepted the job in reliance upon representations that the CS Program would expand and develop graduate programs which would enable him to interact with graduate students and allow him to continue his research efforts. By early 1982, Rosenthal had not yet filled the second FTE.

Ray Orbach was then appointed as Provost of the College in July 1982. Noting the failure to fill or utilize the fourth

FTE for some three years, one of Orbach's immediate actions in the summer of 1982 was to withdraw that FTE from Speech and CS. According to Rosenthal "we were now reverting back to what I considered to be an anti-Comm Studies policy by a new provost."

With respect to the Speech Department, Rosenthal testified that, when he became chairman in 1972-73, there were 10 regular FTE's and a variety of courses. Since then, as regular faculty left (through retirement or resignation), they were not replaced, and the courses they used to teach ceased to be offered. The decline of the Speech Department was, in Rosenthal's view, pursuant to a plan adopted by the administration back just before he became chair and which the administration has continued to adhere to in spite of his efforts.

The "Sears Plan" is a misnomer implying that there was one, all-inclusive scheme developed solely by Dean David Sears. In reality, the plan was an amalgam of ideas and goals of various individuals including Sears (the major proponent), Orbach, Kissler, Horowitz and Morris. Although the core of the plan was agreed upon in a meeting in about February 1984 between Orbach, Kissler, Chancellor Young, Vice-Chancellors Schaefer and Trask, components were added and modified after that date, and implementation actually began almost immediately, prior to its formal announcement on September 10, 1984.

The plan came about in part as a response by Sears to a proposal for a PhD program in Communications Studies submitted by Professors Rosenthal, Malamuth, and French in September 1983. David Sears, who had been appointed Dean of Social Sciences during the previous summer, was on sabbatical in Washington D.C., and was available on campus during short visits throughout the 1983-84 academic year. The proposal for a graduate program was submitted to Dean Morris.[13]

Nevertheless, one of the first things that crossed Sears' desk in his new post was that proposal, which was apparently forwarded to Kissler and to him by Morris. Upon seeing it, Sears studied the situation, found the proposal lacking specificity in a couple of key areas, and requested further detail. Sears and Morris did not immediately reject the PhD proposal. Instead, steps were taken to explore and develop the idea further. In Sears' absence, Vice-Provost Kissler became Sears' "ears and eyes" on the campus. Kissler met with Rosenthal in mid-November, in part to discuss which other faculty might support a PhD program.[14] Discussions regarding what faculty and resources were available to mount the program continued throughout that academic year, many such discussions being initiated with individual professors by Kissler.

---

[13]Morris had also just been appointed Dean of Humanities in July 1983.

[14]This was the same meeting at which Rosenthal discovered that the Speech FTE's were to be cut.

By mid-January 1984, Kissler, Orbach, Sears and Morris were actively planning to move forward with a Communications Studies plan to present to the Chancellor, unbeknownst to Rosenthal, French and Malamuth, who were still attempting to gather support for their proposal. Sears was given the primary responsibility for developing such a plan.

On January 17, 1984, Sears, Morris, and Kissler met with Rosenthal, French, and Malamuth to discuss the graduate program in CS. Sears led the discussion by going over the proposal and indicating that it was being rejected. There followed a discussion about other changes that could be made within the CS Program. There is no evidence that the UCAFT, the lecturers, the recent election, or Marde Gregory, were topics of discussion at that meeting.

In about late February 1984, a meeting was held which included Chancellor Young, Vice-Chancellors Trask and Schaefer, Provost Orbach, and Deans Sears and Morris. According to Orbach it "set the course for subsequent college action." A series of options were presented by Sears, some of which were accepted by the Chancellor, and which Orbach and his staff then "attempted to carry out."

The enumerated items that were agreed upon at that meeting were: (1) to split CS from Speech; (2) move it to the division of Social Sciences; (3) replace Rosenthal as chair of the program with Malamuth; (4) increase the role of the advisory

committee to the program by adding other faculty from the campus; (5) cross-list courses with other departments and increase the participation by other departments in CS; and (6) if the five steps above worked, move to a PhD program in CS. Although these provided a skeleton for what was much later to be formally announced to the faculty, there were several subcomponents that needed to be set in motion immediately.

According to Kissler, these included: moving the ladder faculty in Speech to other departments; separating the budget earmarked for the CS program (but administered through Speech) from the Speech Department; involving other faculty in the CS Program; and taking preliminary steps to appoint Malamuth as chair of the Speech Department and CS Program. As these and other preliminary components of the plan were being carried out during the spring of 1984 and later that year, the Sears Plan developed further.

Orbach's testimony revealed that the administration's plan included the introduction of more ladder-rank faculty to teach the core courses in Communications Studies; the movement of the speech lecturers to the Writing Program (thus creating an "empty shell" in the Department of Speech and/or a "de-facto" disestablishment of Speech); and the gradual reduction of the heavy reliance on temporary faculty (lecturers).[15]

---

[15]Morris testified that the transfer of the Speech lecturers to the Writing Program was part of an overall ideal plan which was a joint product of himself and at least Kissler and Orbach.

Regarding the last enumerated component, there was much testimony as to whether terminations or non-reappointments were going to be used to achiive the actual goal of reducing reliance on lecturers. Orbach and other University witnesses testified that, while reducing reliance on lecturers could have included non-reappointment, it was not their intention to deny reappointment in the near future, but was a consideration for the future.[16]

Dean Sears, however, testified that such reduction was in fact contemplated in 1985. Specifically, he initiated the idea not to reappoint CS lecturers Diana Meehan and Janet Weathers. His reasons were that a permanent program should not depend on temporary faculty to any great extent, and that a university ought to staff that curriculum with ladder faculty. As detailed further below, there was an attempt (later aborted) to prevent the re-appointment of CS lecturers, including Meehan and Weathers.

In a letter dated June 26, 1984 from Orbach and one dated July 20, 1984 from Sears, Professor Rosenthal was given an ouline of the policy set in motion beginning with the February meeting between Chancellor Young and administrators from the College of L&S. These letters were responses to Rosenthal's relentless efforts to prevent the administration from

---

[16]The reasoning was that, in the immediate future, lessening reliance on lecturers could be accomplished by adding ladder faculty to the program, thus decreasing only the percentage of lecturers.

disestablishing the Speech Department and CS Program and from rotating the chairmanship to someone (Malamuth) who Rosenthal felt had questionable loyalty to those entities.

On September 10, 1984, via letter from Sears, the reorganization plan was more widely circulated to the college faculty. Most of the skeletal components agreed-upon in the February Chancellor's meeting were included.

Although there was some hesitancy on the part of University witnesses to concede that implementation of the Sears plan was actually begun even before its formal announcement on September 10, 1984, the record abounds with evidence of pre-notice implementation.

As specified in his September 10 letter, Sears announced that the CS Program had already been moved to the Division of Social Science. Further testimony evinces that the move was accomplished the previous summer and became effective during the fall quarter of 1984.

Professor Phelps (Senate Faculty), who had been teaching a speech course, was moved to the English Department. Similar efforts were made to move Malamuth to the Department of Psychology during the Spring and Summer of 1984 and to move Rosenthal to the Department of English. The latter two attempts were fought off successfully through Rosenthal's protests.

In a letter dated July 20, 1984, Sears informed Rosenthal that, as part of the plan's provision for increasing

ladder-rank faculty participation in teaching the CS courses, one faculty member from outside Speech and CS had already indicated interest in teaching in 1985-86, and he (Sears) "was committed to providing some temporary funding to permit that arrangement." He also indicated he had reserved another full temporary FTE to attract other faculty to the program for the same period in anticipation of negotiating similar arrangements with other ladder faculty.

In his allocation letter to Morris dated September 25, 1984, Orbach allocated the three temporary FTE's formerly used to support the speech lecturers to the Writing Program. University witness Patricia Topper testified that, in 1984, Morris instructed her to send those FTE's to the Writing Program. Carol Hartzog, previous director of the Writing Program and currently Assistant to Vice-Chancellor Schaefer, testified that prior to an informal meeting in October 1984 with Marde Gregory, she had met with Kissler and Herb Morris and thereby concluded that the move of the speech lecturers would indeed be made, and that later the move was delayed.

Patricia Topper's testimony, supported by documentation,[17] that the temporary speech FTE's were indeed allocated originally to the Writing Program in October/November 1984, is credited over Kissler's testimony that such allocation was not made and over Morris' testimony that he did not think

---

[17]See Charging Party's Exhibit 111.

such an allocation was made. Topper's job is to supervise staff in the Provost's office. She has the major administrative responsibility in the area of FTE and budget allocations. She testified that, although the College administration apparently reversed the October allocation action sometime during the academic year, she was not informed of this latter decision until about June 1985, when she took part in the administrative aspects of reallocating the FTE's to Speech and in ensuring that the lecturers were compensated.

In comparison, Kissler's testimony regarding the allocation of the FTE's was based not on personal knowledge, but on his review of documents and after going over a chart he constructed for the purposes of the hearing. During Morris' testimony regarding the same subject, he appeared to be unsure of exactly what happened with regard to the allocations.

The final material component of the Sears Plan that was implemented and/or attempted was the removal of Rosenthal and his replacement with Malamuth as chair of the Speech Department and the CS Program. Administrators dissatisfied with Rosenthal's leadership, including Orbach and Sears, made attempts to replace Rosenthal through the chair of the Faculty of the College of Letters and Science. Rosenthal was able to stave off these efforts throughout the summer and fall of 1984, but was eventually replaced as chair of Speech in about July or August 1984 and as chair of the CS Program in mid-October

1984[18].

Any lingering doubt as to whether implementation of the Sears plan was begun prior to its announcement in September is removed in view of Orbach's testimony that his intent was to accomplish these "administrative" changes by July 1984 and to put the program into effect by the fall of 1984. The same conclusion is supported by Morris' statements to Orbach in a letter dated June 29, 1984, indicating the transfers of Rosenthal, Phelps and Malamuth were part of the provisions to disestablish the Speech Department and to move the lecturers to the Writing Program, were intended to be accomplished by July 1, 1984.

1. Reaction to the Plan by UCAFT

At about the time the Sears Plan was more widely disseminated, Rosenthal and the UCAFT reacted. Rosenthal resisted its implementation by, inter alia, filing protests with the Academic Senate's Committee on Rules and Jurisdiction, alleging that certain procedural steps taken or contemplated were in violation of established procedures and of the principle of shared governance.

The UCAFT had been engaged in sytemwide negotiations with the University since May 1984, and was actively pursuing job

---

[18]Rosenthal was originally replaced by an interim chair of CS in October after his successful appeal on a procedural irregularity to the Academic Senate. Malamuth replaced the interim chair on about January 1984.

security for the lecturers through its proposals. Marde Gregory had been elected as UCAFT's chief negotiator in about March 1984. Sometime after September 10, 1984, Gregory initiated an informal meeting with Carol Hartzog. The focus of the discussion was Gregory's concern, having read the Sears Plan, over what, if any, effects the plan might have on the lecturers if they were moved to the Writing Program.

The most controversy arose over the impact of the eight-year rule on the speech lecturers. The Writing Program had been using a more restrictive four-year rule that prevented any lecturer with an appointment of over 50% time from teaching beyond four years. According to Hartzog's testimony, this four-year rule was applied in the Writing Program simultaneously with a policy of hiring lecturers with only 100% time appointments - the Writing Program was based upon full-time appointments. Thus, Gregory told Hartzog that most, if not all, of the lecturers would have been up against the limit. Since the combined policies would have prevented the current speech lecturers from transferring to the Writing Program, Hartzog stated the problem "would have to be dealt with." Hartzog indicated a preference for using a six-year rule rather than eight, which Gregory opposed because it would have had the same effect, and would have meant her own termination.[19]

---

[19]Hartzog testified that if transferred to the Writing Program under full appointments, and there were a six-year

Disturbed by the implications of the Sears Plan, Gregory and other UCAFT officials (including local grievance officer Gloria Busman) met with Horowitz, Kissler, and Greg Kramp (University attorney) on about October 16, 1984. According to Horowitz' testimony, the Union representatives opened the meeting by expressing the lecturers' concerns of what might happen to them as a consequence of what Sears had proposed, and challenging whether there had been appropriate meeting and conferring on the plan.

A dispute ensued about what was or was not within the scope of representation. In summary, UCAFT had taken the position that the implementation of the plan was within the scope and that it should be dealt with at the systemwide bargaining table. Gregory insisted that no unilateral changes occur until she was conferred with. University representatives argued that the plan itself was not within scope, but was a management right. They asserted their only obligation was to meet and confer if any implemented parts of the plan had an impact on the terms and conditions of employment of the unit.

There was a conflict in testimony about whether the University spokespersons promised to cease implementation of the plan until all meet and confer sesions were concluded. Gregory testified that Horowitz directed the other University

---

rule, those particular people with no remaining eligibility would not have been eligible for reappointment. (Gregory's unrefuted testimony indicated that this was not a meet and confer session.)

officials present to arrange meet and confer sessions with UCAFT before any further actions regarding Speech and Communications Studies lecturers were taken.

Horowitz testified no such statement was made. Instead, he related that the University agreed it would notify the UCAFT representatives of any moves that were going to take place so they would have an opportunity to meet and confer about any possible impact of those moves.

The most plausible version of the meeting, supported by notes taken at or near the time of the meeting and consistent with the University's later actions, is that testified to by Kissler, which I credit in the areas where it conflicts with either Gregory's or Horowitz'. According to Kissler, Gregory asserted that the reorganization plan was negotiable, she objected to the component of the plan calling for the transfer of lecturers to the Writing Program inasmuch as there had not been any notice to AFT prior to Sears' September 10 letter. She expressed concern over the intent to "decrease dependency upon non-Senate members."

Kissler testified further that a University spokesperson responded that there was no duty to meet and confer while reorganization plans were being prepared and that the duty only arose before the actual transfer of a unit member took place. With regard to whether Horowitz directed that plans stop until all meet and confer sessions had been completed, Kissler denied that such was given, stating that, instead, Horowitz had said

that "if Herb [Morris] is really going to proceed with this, that there would have to be some notice to the Union, and then, that there should be meet-and-confer sessions . . . ." Similarly, Horowitz testified that, with regard to item 3 in Sears' September 10 letter calling for the transfer of lecturers to the Writing Program, since the item had not yet taken place, there just was no reason for any further discussion about possibly meeting and conferring as to its consequences.

Horowitz told Morris at that meeting that he should issue a statement about when and where speech lecturers would be moved, then meet with the Union to discuss possible impacts on teaching loads, new department chairs, space, etc. No such statement was ever issued and no such meetings were attempted.

Respondent seems to argue in its brief that, because Marde Gregory never specifically detailed her complaints about unilateral changes in Speech and CS at the bargaining table, that there was no demand to bargain and/or that the University did not breach its duty to bargain. The testimony of Marde Gregory and even that of University witnesses Barbara Davia and Robert Bickal support a contrary conclusion - i.e., that Gregory made repeated demands to negotiate the reorganization plan as it pertained to speech and CS lecturers, and that the University was aware of her demands.

Barbara Davia, a member of the University's bargaining team, testified that, on November 8, 1984, at a

regularly-scheduled bargaining session, Gregory brought a list of six alleged unilateral changes - one involving the reorganization of Speech and CS at UCLA - that the Union felt had been made, and that the Union desired these subjects be brought to the bargaining table. According to Davia, although Gregory did not give too much detail about the unilateral changes at that meeting, the subject of the reorganization was raised by Gregory at perhaps several bargaining sessions after that.

Davia and University chief negotiator Bickal, testified that the reorganization was news to them when Gregory brought it up and, although UCLA management representatives at the bargaining table (Jean Giovannoni) probably knew about it, this was the first time the rest of the management team had heard of the Sears Plan. Bickal testified Gregory told him she wanted the list of alleged unilaterals brought to the bargaining table and she wanted a response to each of the issues.

Bickal's response to Gregory's demands at the November 8 session was that he was concerned with whether the unilaterals were in violation of his statutory obligations, would investigate and respond as soon as he had more information. Bickal testified that, being concerned that the reorganization plan might have the effect of displacing or replacing lecturers, he made inquiries of several academic administrators -- Kissler, Orbach, Sears, and Giovannoni -- over an unspecified time period, in order to make a determination as to

whether the plan involved the conditions of employment of unit members.

There was a question over when, if at all, Bickal responded to the UCAFT's demands to bargain and how many times the Union repeated its demands. Bickal's and Davia's testimony was very vague and equivocal about the subject. Davia testified that she remembered Bickal responded to the listed items, but did not recall his response to the Speech and CS issue. She did not testify as to when, after November 8, he made such a response.

Similarly, Bickal failed to testify as to when he responded to the Union's demands, although he did state that a response was given. According to him, he told Gregory there had been a proposal to disestablish the Speech Department and to put it under the Writing Program. He added that, by this time (date unspecified), that plan had since been abandoned and was no longer under consideration. With respect to CS, at some point, it had been moved from the Humanities to the Social Sciences division, and he (Bickal) was satisfied that the Sears Plan's proposed increase in ladder faculty in CS courses was not intended to replace the number of lecturers.

Conceding that Gregory may indeed have reacted to Bickal's response by enumerating the foreseeable effects of the Sears Plan and stating that her own job was at stake, Bickal testified that he could not recall what, if any, response he may have given.

While I credit Bickal's and Davia's testimony that Bickal finally gave Gregory a response to her November 8 demands, I credit Gregory's unimpeached testimony: that she raised the issue of the reorganization again at the November 29, 1984 session; that, when she repeated her requests at the March 21 1985 session, Bickal answered he was still gathering information and would have a response later; that Gregory insisted on a response to her demand again at the sessions of April 11 and 12, 1985, whereupon Bickal said he and another University representative (Gilpin-Bishop) were "making progress" on the issue and would soon respond; that Gregory again repeated her inquiries at the sessions of April 25 and 26, and that Bickal had yet failed to respond during the May 2, 3, 16, 17, and 23 sessions.

After the May 23 session, a series of side meetings took place where Gregory reminded the University representatives that she still had no response to her demands regarding the alleged unilateral changes. Considering Bickal's testimony that he was not sure whether his ultimate response was given at or away from the bargaining table, and viewing it together with Davia's and Gregory's accounts, I conclude that his response was indeed given sometime in June 1985. This conclusion is consistent with, and supported by, Bickal's testimony that, by now, the move of the lecturers to the Writing Program had been abandoned. Further support is evidenced by the fact that the FTE's for the speech lecturers (originally allocated by Orbach

to the Writing Program) were not formally reallocated to Speech until June 1985, according to the testimony of Pat Topper and Herbert Morris. If Bickal had made a statement about the abandonment of the move of the lecturers prior to June 1985, it would run contrary to the cumulative testimony of Morris, Kissler, and Topper, and would suggest that only Bickal had a clear understanding of the status of the lecturers' FTE's prior to that date.

It is determined, therefore, that the UCAFT made several specific demands to meet and confer regarding the impacts of the Sears Plan upon the unit at several occasions during October 1984 through June 1985 and that the University failed to respond until June 1985. Whether the response fulfilled the University's obligations under HEERA to meet and confer with the UCAFT will be addressed further below.

It cannot seriously be denied that the Sears Plan had foreseeable impacts on the terms and conditions of employment of the lecturers in Unit 18. Carol Hartzog's testimony clearly established that, in order to avoid the Sears Plan's consequences of automatically terminating the speech lecturers, there would have to have been a negotiation and change in the University's eight-year rule, in the Writing Program's four-year rule, and/or in the program's policy of employing lecturers only on the basis of 100% time. Indeed, Bickal testified that displacement or replacement of lecturers was of concern to him as well, and Gregory clearly articulated that

possible impact to both of the above. The effects of reducing reliance on lecturers has already been described above.

Gregory gave testimony regarding other foreseeable impacts of moving lecturers from one department to another. Included where such things as workload standards, the provision of work space, and evaluation criteria. Her unrefuted testimony shows that the Writing Program lecturers had full-time appointments which were designed for people who were to be on campus all the time. They were thus given additional responsibilities to work on various committees. However, because of the committee work, Writing Program lecturers were sometimes released from teaching courses. Lecturers in speech had a marked difference in workload responsibilities, requiring some negotiated adjustment before the programs could be merged. Similarly, with respect to office space, the speech lecturers had private offices shared by two individuals, whereas lecturers in the Writing Program were all housed in one large room divided only by partitions. Little specific testimony was given regarding evaluation criteria, other than a general reference that the reorganization plan's component of moving CS to the Social Sciences division would subject those working previously for the Humanities Division to a set of expectations of a different dean, and subject those who had been working in Speech to the expectations of a Writing Program director rather than their previous department chair.

Apart from the potential impacts noted above, there was an actual impact that resulted from the attempted, although later abandoned, move of the speech lecturers. As noted earlier, Orbach reallocated the Speech temporary FTE's to the Writing Program in September 1984. Morris, who yet had final say as to where within his division he could allocate those FTE's, then directed Pat Topper to send them to the Writing Program. Topper testified that she could not recall whether she indeed informed the Writing Program of the allocation. Morris testified that he did not think they were ever allocated to the Writing Program. There are no documents, other than Orbach's September allocation letter, to indicate whether the Writing Program acted to fill their recently acquired FTE's.

Sometime during the Spring of 1985, Morris told Kissler that, upon further reflection, moving the lecturers to the Writing Program was not a good idea. However, instead of getting an acknowledgement from Kissler that he agreed and that the move would be reversed, he simply assumed the proper "corrective" steps would be taken. He also failed to direct Topper to allocate those FTE's back to Speech until June 1985.

Only as a result of inquiries by Gregory was Morris apprised of the failure to reallocate. By the time he discovered this and Topper made the adjustments, the deadline had passed for timely submission of the required personnel forms to the payroll and personnel departments.

Although the lecturers were informed, via memo from Malamuth on about June 12, 1985, that the deans had recently approved their reappointments, the bureaucratic process prevented the lecturers from being paid on time. Marde Gregory was paid three weeks late (August 22, 1985) and the remaining lecturers were also paid late (either one or three weeks). Aside from lecturers' having to have the University's contribution for health benefits deducted from one of their summer checks, the delay caused Marde Gregory to borrow money to meet her financial obligations. Eventually, the University paid the lecturers the amounts they would have received had the move to the Writing Program never been attempted.

An attempt was made to reduce the number of CS lecturers in 1985. In May of that year, Sears proposed, via memorandum addressed to "Deans," but delivered only to Kissler for his comments, that ladder faculty from other departments replace the four CS lecturers. Specifically, he wrote that Weathers and Meehan should be replaced because they were "weak," that Cowan should be replaced with Professor Shiffrin of the law school and, because lecturer Cole's status could not definitely be maintained at his current 100% time appointment, that his position be placed in an annual national search (presumably to be filled by a ladder faculty recruit).[20]

---

[20]Sears' disingenuous attempt to dismiss his memo draft as a "joke" was unconvincing. Kissler's testimony regarding the memo and his meeting with Sears about the memo, indicates otherwise. Kissler took the memo as a very serious matter.

Before distributing his proposal to the various administrators, Sears met with Kissler regarding its contents. Kissler convinced him that the proposal was unwise, and the plan was set aside. However, later that year, according to Kissler, the idea, or a portion of it, resurfaced. In that instance, Kissler made efforts to determine whether Weathers and Meehan should not be reappointed. After making inquiries, including whether they were members of UCAFT and whether the issue required prior negotiations with the Union, the proposal was again dropped.[21]

F. The Chaffee/Clarke Review of CS

During the time the University administration was engaged in implementing the Sears Plan, the CS Program was due for its regularly scheduled review by the Academic Senate's Committee on Undergraduate Courses and Curricula (CUCC). The UCAFT has argued that, during the review process, Professor Steven Chaffee (one of two professors composing a subcommittee which had been called in to gather data and make recommendations to the CUCC) unlawfully conveyed a message to Marde Gregory from the administration to the effect that if she gave up her bargaining table efforts to obtain job security for lecturers, the CS Program could have everything it wanted. The subcommittee's work and its report are also asserted to be

---

[21]Apparently, at least some of the lecturers became aware of Sears' May 30 memo because Malamuth was asked about his knowledge of a "hit list" designed to terminate the CS lecturers.

relevant in other respects, including determining whether the administration's efforts to reorganize the CS Program were truly based upon legitimate academic considerations.

The CUCC had scheduled a review of the CS Program to take place during the 1984-85 academic year. As part of that review, the CUCC called in two outside experts in the field of Communications. These, Peter Clarke and Steven Chaffee, gathered data by, inter alia, interviewing those on a list of professors, students, and administrators on the UCLA campus.[22]

According to the testimony of Marde Gregory, when Chaffee came to interview her, he told her that he had just come from a long meeting with Dean Sears, that he had become aware she was acting as chief negotiator for the non-Senate faculty, and (after giving Gregory his views of the undesirability of unionization in academic atmospheres based on his experiences at the University of Wisconsin) that:

> didn't I understand that there was nothing that could happen in the development of the com studies program, as long as there was this heavy percentage of non-Senate faculty involved in the program.

After Gregory responded that the percentage of lecturers could be reduced by simply hiring more ladder faculty rather than eliminating lecturers, she allegedly was told that the CS

---

[22]Chaffee had been a visting lecturer at UCLA several years prior to his visit. At the time of the review, Chaffee was employed at Stanford University and, previously, he had been at the University of Wisconsin.

Program could have anything it wanted, including departmental status, a graduate program, prestige in the University, faculty, funding and support from the University, if only "I would surrender my interest and position in the job security area of the negotiations for the non-Senate faculty." Gregory further testified Chaffee told her that the future of the CS Program was in jeopardy as long as there was dependence on non-Senate faculty. After stating her disagreement, Gregory continued, she told Chaffee that they were going to have to agree to disagree. Chaffee allegedly told Gregory that he felt it was important that this conversation be kept between the two of them.[23]

There is a sharp factual conflict as to Gregory's meeting with Chaffee which occurred on about November 1, 1984. According to Chaffee, he had not just come from a long meeting with Sears when he visited Gregory, but had come directly from the office of Professor Patrice French, whom he had known previously, and he was disturbed because of her apparent change in attitude over the years. French's office was a few doors from Gregory's and, when Chaffee began the conversation, he asked her, "What's with Patrice?" Having gotten no definitive

---

[23]Gregory's account appears in at least three separate parts of the transcript. In each instance, the version of the meeting is somewhat different. The above is a compilation of her testimony regarding it.

answer from Gregory, he testified that he talked about other subjects.

Chaffee testified that most of the meeting was devoted to exploring what to put into his report to the CUCC and to getting Gregory's reactions to things they were thinking of recommending. He did talk to her about his views regarding unions in academia, having heard either from Paul Rosenthal or Jeff Cole that Gregory was spending a lot of time with union activities. Gregory's response was some general disagreement with his views.

According to Chaffee, he had not spoken to Sears or the administration about labor unions prior to meeting with Gregory and, at a previous lunch he had with a group of people that included Sears, her name was not mentioned. He added that he had no discussions prior to the meeting about Gregory's attempt to obtain job security for lecturers, he did not even know about those efforts, nor about Gregory's role as negotiator until shortly before the unfair practice hearing. During their meeting, Gregory did not mention her role at the bargaining table, and Chaffee did not ask her about it.

Most significantly, Chaffee testified that he did not tell Gregory that if she would drop her efforts at job security for lecturers, the CS Program would benefit, nor that the conversation should remain just between the two of them. His explanation for not doing so was: he had no knowledge that she

was involved in efforts to get job security for lecturers; if she was, it was his (Chaffee's) opinion that job security for lecturers was indeed a good thing, something he had personally undertaken to achieve at the University of Wisconsin and something he felt ought to be done and commended; he simply could not and would not engage in an inappropriate "deal" where academic decisions were being traded off against union activity; he had no power to make or effectuate such a "deal," inasmuch as all he and Clarke could do was to submit their report to the CUCC, which would, in turn, incorporate it into its own report. Chaffee had no power to fulfill the needs of the CS Program outside of this.

Chaffee's testimony, considering its substance and his demeanor, was clearly the more credible. Each time Gregory described the account, the facts altered in some way.

Other disturbing details in Gregory's testimony support a credibility finding in favor of Chaffee's account. Specifically, Gregory testified that, upon hearing Chaffee's proposed deal, she was very "shaken" by the conversation and found it very disturbing. Yet, she added that after she told Chaffee they would have to agree to disagree, they had "a very good and collegial discussion from that point on." Following the meeting, she did not complain to anyone about it and did not attempt to find out whether indeed Sears had used Chaffee to transmit such a deal.

Chaffee's account had a ring of truth to it. At the time of the interview, he was a professor at Stanford University. At the time of his testimony, he was on leave from Stanford and teaching at the University of Wisconsin (Madison). He was not an employee of the UC system and there is no evidence that he had any interest in the outcome of the case.

Consistent with his testimony, the report he and Clarke submitted to the CUCC did recommend a gradual upgrading of the CS Program (Exhibit RRR) by the addition of ladder faculty FTE's, not elimination of temporary lecturers. Of the three alternatives considered for the program - maintain the present level of support, improve the scope and depth of CS, or allow the program to wither - they recommended the second choice and specified that elimination of CS was the least palatable alternative.

During his testimony, Chaffee freely gave testimony that arguably favored the UCAFT. Specifically, he ventured his expert opinion that moving the ladder faculty in Speech to other departments, even if the other departments were told those FTE's had to be filled for CS courses (in the event either of the two resigned or retired), the result would be a weakened program. His explanation was that, in order for CS to remain a strong program, it needed to have its central decision-making apparatus concerned with the field of CS, and not psychology.

Chaffee's views were philosophically opposed to the Sears Plan and he freely explained them. His reputation as one of the top-ranking authorities in the field of communications studies, justifying his selection by the Academic Senate, make it highly unlikely that he would have allowed himself to be used to deliver an improper and unlawful message to Gregory.

G. Other Allegations of Reprisals Against Gregory

The UCAFT has alleged that, after Gregory became its chief negotiator, the University "sent her to Coventry," deleted a favorabe reference to her in a CUCC draft report, changed her title from visiting lecturer to "adjunct lecturer" without her knowledge (thereby moving her out of the bargaining unit), threatened to take away her duties as instructor of Communications Studies 185, and interfered with her attempts to arrange released time for negotiations. Inasmuch as the last two issues are factually related to the issue of released time, those will be discussed below in conjunction with the analysis of other released-time negotiations.

Gregory testified that, soon after she filed the instant unfair practice charge, and after she had engaged in negotiations on behalf of UCAFT, certain members of the administration, including Neil Malamuth (then chair of the Speech Department and CS Program) and Carol Hartzog, shunned, avoided, and otherwise ostracized her. Specifically, she recounted that Malamuth refused to speak with her and, whenever she said "Hello" to him he said nothing in return.

With respect to Carol Hartzog, Gregory testified that on one occasion when they were walking towards each other, Hartzog crossed the street and, when Gregory had passed, Hartzog crossed back to the other side. On another occasion, when Gregory was walking with Tom Miller, a colleague, Hartzog allegedly approached, took Miller by the arm and left Gregory standing alone.

According to Gregory, Paul Rosenthal told her that Malamuth told him that he (Malamuth) and others had been instructed by the administration not to speak with her. Gregory finally brought the incidents to the attention of Robert Bickal, claiming that the refusal to talk to her was as much harassment as talking to her. Allegedly, the ostracizm suddenly stopped after that.

Hartzog and Malamuth both denied intentionally harassing Gregory by avoidance or ostracism and denied they were ever instructed to do so or to refrain from doing so. According to Malamuth's testimony, although he was initially outraged at seeing that the Unfair Practice Charge accused him of certain inappropriate conduct, he did not stop speaking to Gregory. While conceding he was not especially seeking opportunities to speak to Gregory and that his non-intended, non-verbal manner may not have seemed especially warm, he was cordial to her and made salutory remarks. He testified he never told Rosenthal that he had been instructed not to interact with Gregory, and

he did not even know Bickal, much less talk with him about the subject.

Although called to testify on behalf of the UCAFT regarding other matters, Rosenthal never corroborated Gregory's hearsay testimony about the alleged instructions not to interact with her. Unquestionably, Rosenthal was a friendly witness for the UCAFT. Tom Miller, Gregory's colleague and only other witness to the "snubbing" incident involving Hartzog and Gregory, was similarly not called to corroborate the disputed facts.

These factors, considered together with the demeanor of each witness testifying on the subject, lead to the conclusion that Gregory was never intentionally "sent to Coventry" and that the University administration did not direct anyone to ostracize her. Whatever "coldness" Gregory felt in Malamuth's non-verbal behavior toward her was the result of his understandable unintentional reaction to being accused of unlawful conduct in the Unfair Practice Charge.

The next alleged act of retaliatory harassment had to do with the CUCC's drafts of its report on the evaluation of the CS Program. The first version of the report, issued on about February 1985, made the following reference at page 11 of a report consisting of 16 pages:

> The screening of applicants and choice of those admitted are formally in the hands of the Administering Committee, but in practice are mainly the responsibility of Ms. Gregory. In view of her experience and

> evident competence, we see nothing to object to in this procedure. . . .[24]

Sometime after this version of the report was drafted, it was circulated to some members of the faculty, including Rosenthal and Malamuth, for their review and comments.

On April 15, 1985, Malamuth wrote to the chair of the CUCC, Professor Andrew Charwat, and discussed two areas where he believed the draft was in error and should be changed. The bulk of the letter deals with Malamuth's objection to the report's analysis and conclusion that the number of CS courses taken by students has been minimized due to dissatisfaction with CS courses. In one paragraph, however, he made the following objection:

> First, on page 11, the review indicates that in practice Ms. Gregory has the major responsibility for the choice of those admitted to the program. While Ms. Gregory has prepared the materials for the committee and has made recommendations, in the three years that I have been here Professor Rosenthal and myself have actually made the admissions decisions.[25]

At its meeting of April 17, 1985, Malamuth's letter was discussed by the CUCC. While under no obligation to accept the changes proposed by Malamuth, the Committee felt there might be a problem with the draft report's suggestion that the faculty leading the program was inappropriately delegating its

---

[24]There are several other references to Gregory in the draft report, not at issue herein.

[25]Malamuth did not propose alternative language.

authority in certain activities. Therefore, it issued a revised report sometime thereafter, modifying the paragraph on page 11 as follows:

> The screening of applicants and choice of those admitted are in the hands of the Administering Committee, based on the recommendations of Ms. Gregory. There is no set minimum GPA for admission . . ."

The second portion of the report to which Malamuth objected was also deleted from page 9.

The UCAFT argued that Malamuth's objections caused the CUCC to delete the draft's reference to Gregory's "experience and evident competence." Gregory testified this would have hurt her in the sense that the initial report would probably have been placed "in her file" as a form of favorable letter of recommendation.

Malamuth's uncontradicted testimony made it evident, however, that it was not at his insistence the phrase "experience and evident competence" be deleted and that his objection was to the first part of the sentence dealing with the "practice of the Committee." Charwat's testimony supported the conclusion that the changes were made at the Committee's discretion and based on considerations other than Gregory's protected activities. While Gregory's admissions recommendations were almost always followed, Rosenthal and Malamuth indeed had the final authority as to whether to accept them. Gregory did not testify that the revised report was erroneous in this respect.

Interestingly, the Committee also preserved, though in modified form, at pages 9 and 11, comments arguably critical of Malamuth's courses as being unpopular with students and of his research orientation as not being "central" from the standpoint of the communication discipline.

As to Gregory's allegation that her title was changed from visiting lecturer to adjunct lecturer, the evidence, including testimony given by Gregory herself, indicates that the change did occur, but for reasons other than retaliation or harassment of any sort.

Gregory acknowledged she was originally (1981) given the title of adjunct lecturer because, in addition to having a lecturer (instructional) title, she was given another (auxiliary) title as Student Affairs Officer for the CS Program. For reasons that are unclear, she later was designated as a visiting lecturer. At the time of the Unit 18 election, adjunct lecturers were not included in the unit and could not therefore vote. Since Gregory's title had become visiting lecturer, she was allowed to vote. Her title remained unchanged through the beginning of February 1985.

In mid-June 1985 Gregory found out that her title had been changed back to adjunct lecturer, thus out of the unit, as of late February 1985. She surmised that the reason for it was to exclude her from the unit she was representing. She testified that she never found out who changed her title, however. Upon discovering the change, she complained to Bickal.

Sometime thereafter the University agreed to move all adjunct lecturers into Unit 18, including Gregory. The decision resulted from the resolution of a dispute between UCAFT and the University as to the proper unit designation. Gregory conceded that, during that dispute the University found anomalies in its listing of adjuncts, including Gregory's. Therefore, in an attempt to classify properly, it changed the titles to what they should have been all along. Following the changes, and a resulting settlement agreement, all adjuncts were included in the unit pursuant to a PERB Unit Modification Order dated October 3, 1985 (see PERB File No. SF-R-18, SF-UM-371-H).

Gregory testified that it occurred to her that the cause of her reclassification back to adjunct lecturer was a result of the University's review of its records where it found that quite a number of people, including herself, were reclassified. There is no evidence that the reclassification was taken as a reprisal for Gregory's exercise of protected rights. There is similarly no evidence that, between February and October 1985, Gregory's technical exclusion out of the unit had any adverse impact on her role as negotiator or on her duties as an employee.

H. Released Time

Because of the way in which released time allegations were pled in the underlying charge, the theories surrounding it were

often muddled. At times it appeared that the allegations were that the University was harassing Gregory in the way it dealt with released time at and away from the table. At other times the UCAFT appeared to be alleging that the University bargained in bad faith regarding released time. Finally, it sometimes appeared that the issue was whether or not the University in fact granted reasonable amounts of released time for negotiations. All three theories will be discussed below.

1. Negotiation of Released Time

Unit 18 was originally designated by the PERB pursuant to Decision No. 270-H, dated December 28, 1982. Consequently, when the UCAFT and the University began negotiations after election results were announced, there was no memorandum of understanding in effect and no ground rules governing the provision of released time for unit members to engage in meeting and conferring pursuant to HEERA section 3569. Given this, one of the initial concerns for both parties was the negotiation of ground rules which would include released time.

With respect to the provision of released time for negotiations without loss of pay, there was virtually no disagreement from the inception. That is, at the first negotiation session on May 18, 1984, the University stated that although HEERA called for the granting of reassigned time as a minimum, it would be willing to grant released time. The next few sessions (May 1, June 1, June 15, June 28, and June 29)

were spent mainly discussing ground rules and held during times when no classes were scheduled. At the session of June 28 and 29,[26] the parties agreed to a set of ground rules which covered, inter alia, released time. Some of the pertinent portions of that agreement are as follows:

> . . . it is agreed that up to six (6) AFT team members who are employees of the University will be released without loss of pay from work assignments which are scheduled by the University in order to attend meet and confer sessions . . . For the six (6) Union representatives on paid released time their status shall be without loss of salary and benefits only for the time spent at scheduled negotiating sessions, including reasonable travel time. Costs associated with this no loss of pay and benefits shall be borne by the University . . . The assignments from which the team members are released shall be limited to those for which the team members would have been scheduled to work had he or she not been released from his or her scheduled work assignments . . .

According to Robert Bickal, whose testimony I credit in this regard, the authorization for released time was a creature of the ground rules and, by virtue of the agreement, the UCAFT bargaining team was automatically authorized to miss their assignments during dates meetings were scheduled and during their travel period to and from those meetings. Bickal thus notified the UCLA campus, for example, that Marde Gregory was

---

[26]Originally, the parties met every other Thursday and Friday. The "two-day" meetings were considered to be one session.

to be released in such a way that she could participate at the bargaining table on every other Thursday and Friday and, when sessions were scheduled more regularly, on every Thursday and Friday.

The actual dispute between UCAFT and the University throughout the negotiations was about whether the latter was obligated to bargain over the arrangements to adequately cover courses while the lecturers were away at the bargaining table. At the beginning, the Union took the position that the use of substitutes was not an effective way to cover the classes, that it was inappropriate, and not in the tradition of the University. The UCAFT insisted that the appropriate thing to do when course schedules partially conflicted with bargaining dates was to release the instructor from all responsibility for that course for the entire term. This concept was referred to as "course relief." Under this concept, if one of Gregory's courses was scheduled to meet on Tuesdays and Thursdays, she would simply be released from all responsibility for the course because bargaining sessions were held on Thursdays and Fridays.

The University's position was also persistently stated at the bargaining table. It asserted that substitutes had, in fact, been used to cover classes in the past and, in some cases, their use might be appropriate. It added that, although course relief might be appropriate under certain circumstances, to automatically relieve a faculty member of all responsibility for a course, regardless of its nature and the extent of interference between the bargaining schedule and the schedule

of instruction was inappropriate. Bickal explained that, under the Union's philosophy, it was conceivable that a lecturer might only be scheduled to teach one course and, if it partially conflicted with bargaining, the instructor would be relieved from all employment responsibilities for that term.

Additionally, Bickal repeatedly stated that the University was only obligated under HEERA to provide reasonable released time. But, he added, the decision as to who would decide how classes were going to be covered absolutely rested in the academic departments, and was not within the scope of bargaining.[27]

The positions outlined above were articulated during initial sessions and continued to be a source of controversy notwithstanding the agreement on ground rules. There existed various other philosophical and legal differences about matters related to released time. For example, the UCAFT's objection to the use of subsitutes to cover classes was accompanied by Gregory's strongly worded assertion that the UCAFT was not willing to sacrifice course integrity, student protection and

---

[27]During her testimony, Marde Gregory consistently made reference to arrangements for the coverage of classes due to released time and to actual release time as one concept. Thus, when she testified about requests for released time, she lumped together requests for specific arrangements for the coverage of classes with requests for time off for negotiations. She also referred to them generally as "release time arrangements."

the quality of education. Thus, the Union advocated language that stated that released time would be accomodated in such a way as not to interfere with the effectiveness of the educational programs and the students' progress.

Additionally, the parties differed over where the arrangements to cover classes due to released time should be made. The UCAFT orginally asserted that they be dealt with at the systemwide bargaining table. Later, it took the position that, because it was the Academic Senate's delegated responsibility to provide for the quality of the courses, the decision as to the coverage arrangements should be left to the Academic Senate in consultation with the instructor. The UCAFT believed that, because the instructors were ultimately responsible for the quality of instruction in their courses, they were the appropriate individuals who should decide which release time coverage arrangements were consistent with the educational mission.

Although the University asserted that the coverage of courses due to a lecturer's release was strictly an academic decision residing within each department, it had no problems with allowing bargaining team members to have the opportunity to consult with the administration over the coverage arrangements made to accomodate released time. It was its position that those arrangements were appropriately to be made at the campus level.

Consequently, the following language was included in the ground rules of June 29:

> Through the course of these negotiations the University, in consultation with the AFT team member, will take responsibility for developing a work schedule which will accomodate the need for released time for scheduled meet and confer sessions and reasonable travel time for each of the six (6) AFT team members eligible for paid released time.
>
> The parties agree that it is their intent that the purposes of this provision be fulfilled in such a way so as not to interfere with the effectiveness of the instructional program or the progress of the students which it serves.

Rather than clarifying each parties' rights and obligations, the above language created more disputes, during bargaining as well as during the unfair practice hearing, over its interpretation and implementation. Gregory insisted that the reference to "the University" in the first paragraph meant that the released time coverage arrangements were to be dealt with at the bargaining table. Accordingly, she protested having to deal about her own arrangements through Neil Malamuth when he became chair of the Speech Department and the CS Program.

The Union also took issue with the University's repeated refusals at the bargaining table to designate the specific "appropriate academic officer" on each campus who was to officially advise each AFT team member of his/her released time

arrangements. The University had agreed, at the June 29 session, that "an appropriate academic officer" would provide such notice.

The concept delineated in the second paragraph of the above-quoted provision was also in constant dispute at the bargaining sessions. The UCAFT claimed that instructors were in the best position to determine the effectiveness of the instructional program, and not the academic administration. The University persisted in its view that, although instructors would have input as to course coverage in their absence, the University, through each academic department, was ultimately responsible for the way instruction was delivered.

Beginning with the bargaining session of December 13, 1984, the UCAFT stated that because certain Academic Senate regulations (that were promulgated pursuant to powers delegated from the Regents) charged officers of instruction with the responsibility for the integrity of their courses, and because lecturers were officers of instruction, released time resolutions therefore had to come through discussions with the Academic Senate. The regulation relied upon in making this assertion is section 750(A) of the Regulations of the Academic Senate, which reads as follows:

> Only regularly appointed officers of instruction holding appropriate instructional titles may have substantial responsibility for the content and conduct of courses which are approved by the Academic Senate.

Although there was no testimony that the above language was meant to give lecturers the primary and/or ultimate responsibility for the integrity of the course, the UCAFT asserted that view in its many attempts to secure "course release" for its negotiating team and, particularly, for Marde Gregory. One of the arguments was that the frequent use of substitutes in place of the instructors, was disruptive of courses and, as a result, caused students to look with disfavor upon the lecturer. Then, when the time came, their disfavor would be manifested in student course evaluations, which in turn were often factors in administrative decisions of whether to reappoint lecturers for additional terms and/or whether or not to approve merit salary increases. Student course evaluations were allegedly the only regular device for the appraisal of lecturer performance.

The University's interpretation of the Academic Senate regulation in question was that the responsibility for course quality and content rested in the academic departments. The individual ultimately responsible for course integrity was thus, the department chairperson.

As a result of the various theoretical differences between the parties as outlined above, a great deal of negotiation time was expended dealing with released-time related issues. For example, it was not uncommon for the Union's released time requests to be accompanied by written claims for funding to

cover costs of audio-visual materials, guest speakers, etc. Requests that the University reimburse academic departments housing lecturers who were released for bargaining were brought to the negotiations table. Often, when the released time coverage arrangements were not handled in a timely manner at the campus level, Gregory brought the problems to the bargaining table for resolution.

In addition, as disagreements persisted, both parties "threatened" to schedule future bargaining sessions on weekends and/or during days that courses were not scheduled for lecturers. Although Gregory's testimony indicates that the UCAFT repeatedly proposed negotiating on weekends and was turned down each time, upon closer scrutiny, none of these were actual "proposals." Neither side proposed that a specific future meeting date be on any particular weekend. Instead, a typical "proposal" was to the effect that, "if we don't resolve the released-time arrangements soon, we'll have to meet on weekends." These did not call for acceptance or rejection.

The University bargaining team, while expressing the view that it would help resolve these problem areas, never waived its assertion that coverage of classes due to released time was the domain of the University academic administration. Although it refused to grant course relief as a solution to coverage problems in all circumstances, it did grant course relief in a couple of instances, including course relief for lecturers

Marde Gregory and Roz Spafford. With respect to requests for reimbursement of departments due to released time, Bickal responded that the funding for released time was a management problem, and not bargainable.

2. Released Time for Marde Gregory

Scheduling conflicts regarding released time for the spring quarter of 1984 were virtually nonexistent, largely because negotiations started toward the end of that quarter and when the parties were just beginning to discuss proposals on ground rules. The only UCAFT team member who was unable to attend the May sessions was Gary Adest, inasmuch as his teaching load spilled over into Thursdays and Fridays. The Union agreed to hold these meetings in Adest's absence. Marde Gregory taught during the summer of 1984. The parties agreed to accomodate her schedule by arranging summer negotiation sessions around her classes.

For the fall quarter of 1984, Gregory requested (on 6/28/84) to be released from her Student Affairs Officer position for 10 hours every other week. The request was granted. She made a request to be released from the identical responsibilities for the following (winter) quarter. That request was also granted.

For the spring quarter of 1985, Gregory requested to be released from teaching one full course and from some hours as SAO. Although this request was ultimately granted, the UCAFT

claims that the way it was handled amounted to harassment and bad faith on the part of the University. The incidents surrounding this issue will be described in detail below.

According to Gregory's testimony, for the summer of 1985, the choice was either to ask for released time and bargain through her summer schedule, or, once again to take a hiatus from the negotiations so that she could teach. The Union and the University jointly decided to take the hiatus, even though Bickal felt it would inconvenience the University's team, so that Gregory's schedule could be accomodated.

During June 1985, Gregory submitted an oral request that she be released eight hours per week from her SAO position during the fall 1985 quarter.[28] Prior to the beginning of the quarter, she received a letter from the dean advising that her request was granted. In sum, Gregory was granted all of the released time she requested in each instance.

(a) The Spring Quarter 1985 Request and CS 185

As noted above, Gregory's request for the spring 1985 quarter was to be released from teaching one speech course and 10 hours every other week from her SAO position. It was submitted in writing some time during the second week of November 1984. Gregory needed the extra time off because she

---

[28]During the summer, it had been agreed that, instead of scheduling sessions every other week, they would be occurring every Thursday and Friday.

was committed to teach an additional section of Speech 1 in order to fulfill her 50% time contract for an eight-course annual courseload.

Consistent with its view that course relief might be appropriate under certain circumstances but not across-the-board, Neil Malamuth (now serving as chair of Speech) was asked (by Dean Morris) to ascertain whether course relief was necessary, or whether an alternative was feasible. In a letter to Gregory dated December 11, 1984, Morris informed her that Malamuth would be discussing spring released time arrangements with her.

Accordingly, sometime in mid-December 1984, Malamuth met with Gregory to discuss her request for the spring 1985 quarter. The testimony of Malamuth and Gregory as to what occurred at that meeting was in sharp conflict in key areas.

According to Gregory, Malamuth told her that the University was not interested in allowing full course relief and asked whether there was any other rationale by which he could release her from that course. Gregory replied in the affirmative, explaining that the previous chair, Paul Rosenthal, had given her one course off every other year in exchange for her services as administrative coordinator for Speech 1 and 2 classes.

Gregory testified that Malamuth then brought up the issue of CS 185, saying that the arrangement whereby Gregory was paid

as an SAO (staff position), yet was required to teach a class (CS 185) was an embarassment to the deans. Malamuth allegedly indicated that Gregory's previous arrangement with Rosenthal to take one course off every other year might be a solution to the problem.

According to Gregory, she had a second meeting with Malamuth in January 1985. At this meeting, Malamuth allegedly told her it was possible for Gregory to be granted her request on two "bases": (1) on the basis that it had been granted in previous years and this was a year it was scheduled to fall on; (2) if she agreed to allow him to sit in on every one of her CS 185 class sessions during the winter quarter and allow him to teach that course in the spring quarter.

Gregory supposedly protested that Malamuth was trying to remove her from a course she was uniquely qualified to teach. She said she was able to fulfill her bargaining responsibilities without giving up the course. According to her, Malamuth refused to concede and demanded that Gregory invite him in writing to attend her winter CS 185 course and to teach the course in the spring in exchange for her released time.

Gregory added that, after this meeting, she submitted her requests in writing under protest (Exhibit 47). She was thereafter released from the one course in addition to receiving time off from her SAO position.

The undisputed testimony indicates that Malamuth did not attend all of the winter CS 185 class sessions and did not take the course from Gregory for the spring quarter. He attended a few sessions, during which he complimented Gregory in the presence of her students for her handling of the course. He had made plans to have another professor teach the course for the spring in case Gregory did not do so, but it turned out to be unnecessary.

According to Gregory, Malamuth told her in February that he was going to propose she teach CS 185 on the same basis as before. By memo dated March 21, 1985, Malamuth confirmed that Gregory was responsible for teaching the course for the upcoming spring quarter.

Malamuth testified that, during the December 1984 meeting with Gregory, she seemed defensive and upset over the fact that Malamuth was involved in the negotiation of released time issues. Previous communications over the subject had come to Gregory through either Bob Bickal or Dean Morris.

A conflict had developed over Gregory's teaching of the additional speech course. At the time of the meeting, Gregory was scheduled to teach one speech course on Mondays and Wednesdays from 11:00 a.m. to 1:00 p.m. She was scheduled to teach the second speech course on Tuesdays and Thursdays from 3:00 p.m. to 5:00 p.m.

Yet Gregory was the person responsibile for scheduling her own classes. She had, sometime during the preceding October,

scheduled herself to be teaching that second speech course on Mondays and Wednesdays. Between October and December, she had arranged with administrative assistant Jennifer Dowling to change the course to a Tuesday-Thursday mode, putting it in direct conflict with the bargaining schedule.[29]

During the meeting in December, in addition to exploring alternatives to full course relief, Malamuth questioned the change and asked and why she could not revert back to a Monday/Wednesday schedule in order to avoid a direct conflict with bargaining. According to Malamuth, Gregory never gave a clear answer about her schedule change. Instead, she told him that a Monday/Wednesday schedule would not allow her to catch an airline flight to Oakland in time to be at negotiations for Thursdays.

By Malamuth's account, Gregory then told him that course relief was available under the rationale that Rosenthal had a practice of releasing her from one speech course every other year in exchange for her administrative tasks with the Speech Department. Gregory also told Malamuth that, if the course relief was not granted, she might not be willing to teach the

---

[29]Gregory later conceded that she may well have initiated the change to a Tuesday/Thursday mode.

CS 185 course, since it was never really written anywhere that she had to do it.[30]

Puzzled by Gregory's responses, Malamuth inquired and concluded that, indeed, there were available flights to Oakland from Los Angeles after 5:30 p.m. He then requested, by memo dated December 27, 1984, that Gregory detail her desire for course relief in writing. (Exhibit II.)

Malamuth had a second meeting with Gregory, according to him, whereby he told her he had checked the airline schedules and wondered why she could not take a later flight to Oakland to attend bargaining. Gregory responded that the Union required her to take Air Cal because of some ticket arrangement and the last Air Cal flight on Wednesdays was at 5:30 p.m.[31]

Gregory's testimony on cross examination indicated that Malamuth offered to look into the possibility of having the University make up the difference between the discount ticket rate and the rate of another airline with available flights. Gregory turned down the request, replying that such an arrangement was "improper and inappropriate."

---

[30]At the time of the meeting, the CS 185 course was not scheduled to be taught at a time that conflicted with the negotiations schedule.

[31]The Air Cal flight schedule effective at the relevant time (Exh. A) indicates that there was a flight available at 8:15 p.m. Gregory testified that she told Malamuth that it left at 6:30 p.m.

Thinking that he had better make contingency plans in case Gregory decided not to teach the CS 185 course in the spring, Malamuth asked her if she would mind his sitting in, from time to time, on some sessions during the winter quarter. Malamuth knew very little about the course and thought, if Gregory refused to teach it, either he or someone else in the program might need to teach it. According to him, Gregory said she would welcome it and was very encouraging about his sitting in on the course.

He denied insisting that he be allowed to sit in on the entire course, and teaching it in the spring, as the price for approving her release from the other Speech course. He also denied that the course relief was granted under the rationale that Gregory had historically been relieved from the course by Rosenthal, rather than under the rationale that the speech class conflicted with bargaining.

For various reasons, Malamuth's account is credited over Gregory's. First, Gregory was very unresponsive and unclear when cross-examined about what she told Malamuth regarding flight schedules. According to her, she told him that the last flight departed for Oakland at 6:30 p.m. Yet the airline schedule indicates no flight leaving at that time, but it does show flights departing at 5:30 p.m. and 8:15 p.m. After a break during cross-examination, wherein she acknowledged that she looked at a flight schedule, she appeared increasingly confused.

In addition to the above, it is clear that, in quarters previous to the spring of 1985, Gregory had taught a speech course from 3:00 to 5:00 p.m. on Wednesdays with no indication that the schedule posed a problem with flight arrangements. (See p. 2 of Exh. 41 and Exh. 47.) There is no evidence that she had previously complained about this or any related problems to anyone in the administration, including Bickal.

In describing her December conversation with Malamuth, she made no reference to the dispute over flight schedules. It was acknowledged for the first time when she was confronted with it on cross-examination. The same is true in regard to her mention of, or failure to mention, the fact that it was at her own initiative that her additional speech course was altered in such a way as to conflict with the negotiations schedule.

Gregory's testimony that Malamuth suggested that the University would pay the difference between her discount airfare and the fare she would have to pay if she took a later flight is inconsistent with her theory of harassment.

Similarly inconsistent is Gregory's account that Malamuth told her that she was required to invite him in writing to sit in on her CS 185 course and to allow him to teach the course in exchange for the grant of released time. There is no evidence that Malamuth needed to be invited by Gregory for the alleged purpose. Malamuth sat in on courses of two other lecturers, and there is a lack of evidence that he was invited to do so.

Gregory's memo of January 14, 1985 (Exhibit 47), both from the circumstances and on its face, indicates that it was not written pursuant to Malamuth's demand to teach the CS 185 course, but rather in response to his written request of December 27, 1984 wherein he simply asked her to detail the released time needs in writing.

Contrary to Gregory's assertion that her January 14 invitation to Malamuth was "under protest," Malamuth's testimony that she was upset at having to deal over released time with him, is the more credible version and is supported by the overall record. At the time of the December and January meetings, witnesses were uniform in testifying that the Union's position was that released time coverage arrangements should take place at the systemwide bargaining table. The January 14 memo by Gregory indeed states

> . . Finally, I submit this memo directly to you under protest, since it is the UC-AFT's position that the University of California Systemwide Offices are responsible for release time under HEERA.

Likewise, the memo itself belies Gregory's testimony that she was forced to invite Malamuth to sit in on her course in writing. If he had coerced such a memo, it is highly unlikely that she would have chosen to use such language as: "I am delighted with your interest in my Field Studies in Communication Studies course (CS 185)"; "I am pleased that your interest will permit you to attend the course this quarter . . .;" "I'll be more than happy to assist in making any

necessary arrangements . . ."; "I'm most appreciative of your understanding . . ." If Gregory was indeed protesting Malamuth's coerced invitation, it would logically follow that she would have indicated that the invitation was under protest as she did indicate with respect to having to deal with released time at the department level.

Gregory's testimony in other areas dealing with released time leads the undersigned to discredit her version of the events regarding CS 185 insofar as they conflict with Malamuth's. When being cross-examined regarding released time for the spring of 1984, she testified that she requested it in April 1984 in writing. Yet, the document she was referring to (Exhibit 40) clearly indicates that it was not a request for released time, but a request for reimbursement.

She testified that, by mid-December 1984, her requests for released time for the winter quarter had not been answered. She later added that, by the fall negotiation session on December 13 and 14, 1984, the Union team had not received word of their released time for the next (winter) quarter. Yet, she failed to qualify that testimony with the fact that Dean Morris had written her a letter on December 11, 1984 (exhibit HH) stating the following:

> Please be assured that during the coming Winter Quarter (1984-1985) that you may have release time for 10 hours every other week

> from your Student Affairs Officer position in order to participate in the scheduled meet and confer sessions.

Her attempt to minimize the fact that the University granted her spring 1985 request for course relief and time off from the SAO duties upon the rationale that it was granted not as "collective bargaining release" but as "administrative release," is disingenuous and not supported by the record. The credible evidence indicates Malamuth made a written recommendation on February 1, 1985 that Morris approve her course relief on the sole basis that her current class schedule conflicted with negotiations.

The fact that Malamuth could have, but chose not to, defeat Gregory's request for course relief by mentioning to Morris the flight schedule controversy and Gregory's role in scheduling the speech class runs counter to her assertion of harassment. The same is true with respect to favorable comments made by Malamuth regarding Gregory in front of her students.

Malamuth's testimony, supported by documentation, indicates that he asked Morris to approve Gregory's course relief request on February 1, 1985, that he had earlier told her he expected her to teach the CS 185 course in the spring, and that his released time recommendation was approved by Morris sometime prior to February 22, 1985 (Exhibit KK), over one month prior to the beginning of the spring quarter.

UCAFT's assertions that the University's conduct in dealing with Gregory over released time coverage should be viewed as harassment or bad faith, are not supported by the credible testimony and the documentary evidence. There were problems that arose at the table, such as legitimate complaints that coverage arrangements were slow or untimely, that the Union needed to know which University official with whom to deal regarding coverage conflicts, and other similar inconveniences. However, the evidence does not show these were either parts of a deliberate plan or that they were created by an unwillingness to deal in good faith, notwithstanding whether released time coverage was legally within the scope of representation under HEERA.

IV. DISCUSSION

Virtually every action taken by the University as described in the Unfair Practice Charge is alleged as discriminatory and/or retaliatory, as well as a breach of its bargaining obligation under the HEERA. The same conclusion is drawn by UCAFT with respect to the unalleged violation regarding the attempted removal of three FTE's from the Speech Department in December 1983.

A. The Legal Standard for 3571(a) Violations

Section 3571(a) of HEERA makes it unlawful for a higher education employer to:

> Impose or threaten to impose reprisals on employees, to discriminate or threaten to

> discriminate against employees, or otherwise to interfere with, restrain or coerce employees because of their exercise of rights guaranteed by [the Act].

The rights guaranteed by HEERA include the right to form, join and participate in the activities of employee organizations.

In Novato Unified School District (1982) PERB Decision No. 210, the Board set forth the standards to be applied in cases where employers are alleged to have discriminated against employees because of an exercise of rights protected by the EERA. (See fn. 41, infra.) The standard was found to be equally applicable in deciding similar alleged violations of HEERA, subsection 3571(a) in California State University, Sacramento (1982) PERB Decision No. 211-H. Under the Novato rule, the charging party has the burden of showing that the protected conduct was a motivating factor in the employer's decision to take adverse action. Evidence of such motivation must often be circumstantial since direct proof is seldom available. (See Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620].) If the charging party can establish a nexus between the protected activity and the adverse action, the employer can still avoid a finding of wrongdoing by demonstrating that it would have taken the action regardless of the employee's participation in protected activity. Novato, supra; see also, NLRB v. Transportation Management Corp. (1983) 462 U.S. 393, 103 S.Ct. 2469 [113 LRRM 2857]; Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB No. 150 [105 LRRM 1169].

In order to establish a prima facie case, the charging party must first prove it was engaged in protected activity. Next, it must establish that the employer had actual or imputed knowledge of the protected activity. After these fundamental requirements, circumstantial evidence of unlawful motivation may be shown by, inter alia, an examination of the timing of the alleged discriminatory conduct in relation to the exercise of protected rights; inconsistent treatment of the alleged discriminatee as compared with other, similarly situated employees; a pretextual justification for the employer's action which is either inconsistent or contradicted by the employer's action or other objective evidence in the record when viewed in its totality; a departure from established procedures and standards when dealing with the alleged discriminatee; and a perfunctory investigation of the contentions of the alleged discriminatee. See Santa Paula School District (1985) PERB Decision No. 505.

1. The Removal of the Three Speech FTE's

A threshold question is presented as to whether the University's conduct in seeking to remove three FTE's (used to employ lecturers) in December 1983 can support a finding of a separate violation, apart from its use in providing background evidence of unlawful motivation for future events. Clearly, the attempted removal was known by the Union more than six months prior to the filing of the instant Charge (on

January 23, 1985) and there is no quarrel with the fact that HEERA section 3563.2(a) bars such claims as untimely as a general rule.

However, the UCAFT asserts that it put the University on notice, during its opening statements and throughout the hearing, that it would put on evidence of the attempted FTE removal. It did so without objection from the University. The University failed to raise the statute of limitations defense, and instead put on evidence of its own to oppose the allegation. By these actions, the Union concludes that the Respondent has waived its defense under section 3563.2(a) and that a separate violation on the issue can be found.

It is noted: that the complained-of conduct was not alleged in the Charge or amended to the Complaint, it occurred more than six months prior to the filing of the Charge, the parties extensively litigated the issues, and that the Respondent did not formally raise a statute-of-limitations defense prior to the conclusion of the evidentiary portion of the proceeding.[32]

The PERB has held that, like the analogous provisions of the federal labor laws, its six-month statute of limitations is not jurisdictional, and must therefore be pled as an affirmative defense or it will be waived. Walnut Valley

---

[32]The Charging Party does not contend that it had no knowledge of the conduct or that the statute of limitations should be tolled.

Unified School District (1983) PERB Decision No. 289, rev. den. 6/22/83, 2 Civ. 68298. Because the FTE allegation was not pled in the Charge, the Complaint nor in any amendments, however, the University's duty to plead the affirmative defense in an answer or by demurrer is inapplicable. The question remains as to whether the Respondent may be estopped from raising the defense now and, conversely, whether the Union is entitled to a finding of a separate violation.

In Santa Clara Unified School District (1979) PERB Decision No. 104, the Board adopted the NLRB standard of examining unalleged violations of the EERA. It will entertain such unalleged violations where the conduct is intimately related to the subject matter of the Complaint, where it is part of the same course of conduct, where the issue is fully litigated, and where the parties have had the opportunity to, examine and be cross-examined on the issue. See also Eureka City School District (1985) PERB Decision No. 481, at p. 17.

With respect to the last two elements of the Santa Clara test, it is found that the issue was fully litigated and that the parties had the opportunity to, and did, examine and cross-examine many witnesses on it. The record makes this conclusion plain. However, contrary to the Charging Party's assertion that the events in December 1983 were part of the same course of anti-union conduct as those regarding the Sears Plan and the harassment of Marde Gregory, the facts indicate no

relation or connection between the two. To borrow a phrase from a recent California Court of Appeal case, the events in 1983 were not "intertwined with" allegations in the Complaint. Agricultural Labor Relations Board v. United Farm Workers of America, 86 Daily Journal D.A.R. 3388, ____ Cal.App.3d _____ (9/30/86).

Therefore, these allegations will not be entertained as separate violations for which a remedy can be ordered. It appears that, because the UCAFT never indicated that it was seeking a remedy for the unalleged conduct, the counsel for the University assumed that the evidence was being submitted as background evidence only. Nevertheless, in keeping with PERB precedent, evidence of misconduct outside the statutory period may be received at a hearing as background in order to shed light on the true character of events within the six-month period. Sacramento City Unified School District (1982) PERB Decision No. 214, p. 4, fn. 4.[33]

The UCAFT has argued that the University's conduct in 1983 evinces union animus in that the attempted removal of the three FTE's was motivated by its opposition to unionization of the

---

[33] Even if the removal of the FTE's were entertained as a possible unfair practice, the fact that it was never implemented suggests that no violation can be sustained. Recently, in an interference case, the NLRB held that "action taken in contemplation of committing an unfair labor practice is not, without more, itself an unfair labor practice." Resistance Technology, Inc. (1986) 280 NRLB No. 117 [122 LRRM 1321,]. Here the removal decision was never implemented.

lecturers in general and by fears that, if successful in the pending election, the UCAFT may try to negotiate security of employment for its members.

Although the Charging Party has established the elements of protected activity (election campaign, etc.) and that University officials were generally aware of the activity and of the Union's stance on security of employment, the element of a causal link between the protected conduct and the attempted removal of the FTE's has not been shown. As noted in the recitation of the facts above, the overwhelming evidence indicates that the decision, whether wise or unwise, was based solely upon academic considerations. Indeed, the removal of the three FTE's was aborted, and not due to any efforts on the part of the UCAFT but through the efforts of Paul Rosenthal. UCAFT's role in attempting to stop the removal was notably absent, and there is no evidence that the attempted removal of the FTE's was ever made a part of the Union's campaign.[34]

A contrary finding would necessarily require the further unsupported assumptions that the University believed that it could defeat the election effort by eliminating the jobs of a relatively small number of lecturers, at a time when those

---

[34]Marde Gregory's unsupported hearsay testimony that she believed that the UCAFT had sent letters to the University protesting the removal, cannot support a finding that the UCAFT was so involved. 8 Cal. Admin. Code section 32176. In fact, an opposite inference might arguably be drawn because no such documents were produced and no percipient witness was called to corroborate it.

lecturers' affiliation with UCAFT was not yet known to any University officials, and that the only department in the UC system with a heavy concentration of lecturers with a great deal of longevity was the Speech Department at UCLA.

2. The Sears Plan

While there are numerous gaps in the evidence, the UCAFT has established a minimum prima facie case that the Sears Plan was undertaken in retaliation for and/or in an attempt to interfere with the lecturers' protected activity. The protected activity included pre-election campaigning conduct by Unit 18 members in general, the ensuing election, participation in the process of meeting and conferring, and related matters enumerated in more detail above.

There can be no question that the University administration was generally aware, at least during the fall 1983 campaign, that the UCAFT would make security of employment for lecturers a central issue in negotiations if it were victorious. Although there is no evidence that specific University administrators knew about the Union affiliation of particular lecturers during the campaign, by the time the negotiations began they were at least aware of Marde Gregory's role within the Union.

Although no credible direct evidence exists from which it can be concluded that the Plan was connected with the protected activity, there is some circumstantial evidence. The general timing of the Plan - first conceived in February 1984 and set

more concretely in the spring and fall of that year - shows it followed in close proximity to the announcement that the UCAFT had won the election. The administration had openly, though not fervently, opposed the representational efforts of the Union.

The testimony of Paul Rosenthal, supported by documentation from Academic Senate officials, indicates that, in carrying out certain components of the Plan, the University violated internal policies and guidelines related to the "shared governance" principle described in the statement of facts, supra. Such arguable violations included the attempted "de facto" disestablishment of the Speech Department by the Provost's office without prior consultation procedures with the Academic Senate and the attempt by the chair of the faculty of the College of L&S to replace Rosenthal as Chair of the CS Program, although the authority resided in the Executive Committee of the College of Letters and Science.

A prima facie case is also supported by evidence that the issue of security of employment, which was a central topic at the bargaining table, was on a direct collision course with components of that Plan - e.g., the move of lecturers to the Writing Program and related foreseeable adverse effects. Also arguably supporting the conclusion is the then-unexplained failure of the administration to reappoint the Speech lecturers in the spring of 1984 and the resulting delay in their receiving their paychecks.

The Charging Party has also requested that the undersigned draw an adverse inference from the University's failure to produce a validly subpoenaed tape recording of a meeting of the Executive Committee of the College of Letters and Science on October 15, 1984, during which a discussion allegedly ensued regarding the removal of Paul Rosenthal as Chair of the CS Program.

During the hearing in this case, the UCAFT subpoenaed a tape recording of such a meeting. The University's subsequent petition to revoke the subpoena was denied. In so ruling, the undersigned made an in camera inspection of the tape, pursuant to Respondent's request, to make an informed judgment regarding the University's contentions of confidentiality. The University refused to comply with a subsequent order to produce a tape or a copy thereof.

Prior to that refusal, Charging Party had put on testimony regarding some of the events of that meeting through Paul Rosenthal, who was present during a portion of it, and through Provost Orbach (called as an adverse witness). However, Charging Party argued that the tape was a more accurate and complete record of the meeting, at which, according to the Unfair Practice Charge, Marde Gregory's position in the Speech Department was affected when Paul Rosenthal (her close associate and former Chair) and the Department "were slanderously attacked" by Dean Sears and Professor Riley. The

statements are alleged to have been made for the purpose of harassing Gregory and her pro-UCAFT colleagues.

Subsequent to the University's refusal to comply with the Order to Produce the recording, the undersigned prevented it from presenting evidence in its defense regarding what happened at the meeting. The authority for this sanction, as stated during the hearing, is a long-standing principle in private sector labor law referred to as "the Rule in Bannon Mills." The principle was developed by the NLRB from Bannon Mills, Inc. (1964) 146 NLRB No. 81 at p. 611, and its progeny. See also NLRB v. C. H. Sprague & Son (1970) 74 LRRM 2641.

The Charging Party has additionally argued that, because it was prevented from using the tape to establish its case in chief, all appropriate adverse inferences should be drawn against the Respondent and all facts that the Union offered to prove through the tape be accepted as true. It cites UAW v. NLRB (D.C. Cir. 1972) 459 F.2d 1329, 79 LRRM 2332 and NLRB v. International Medication Systems, Ltd. (9th Cir. 1981) 640 F.2d 1110.

The adverse inference rule provides that when a party has relevant evidence within its control which he or she fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him or her. As noted in United Auto Workers, supra, whether to invoke the rule is within the discretion of the trier of fact.

Having considered the evidence, the parties' arguments, and having listened to the tape recording in question, it is determined that the adverse inference rule applies. The scope and weight of the inference, however, is not as wide-ranging as the Charging Party has requested. The inference that will be drawn is that Paul Rosenthal and, by inference, his Speech Department, were verbally criticized, or "attacked," as the Charge alleges, at the meeting. Whether the attack was slanderous is a matter being litigated in the courts between Rosenthal and the appropriate University officials and is not the issue before this agency. Having inspected the evidence in camera, I cannot, in good consience, draw a broader inference from the tape. It will help support a finding of a prima facie case, along with other evidence listed above.

a. The Preponderance of the Evidence Demonstrates that the Sears Plan Would have Been Developed and Implementation Begun Nothwithstanding Gregory's and Other Lecturers' Exercise of Protected Rights.

Charging Party, having produced some evidence to support each element necessary to establish a prima facie violation of the HEERA, the burden shifts to the employer to demonstrate that it would have taken the same action regardless of the Charging Party's protected activities. Novato Unified School District, supra. In this case, Respondent has more than carried its burden in establishing that its actions regarding the Sears Plan would have occurred notwithstanding any exercise of rights under HEERA.

Although the timing of the University's action appears suspect at first glance, viewed in its contextual setting the appearance of impropriety all but vanishes. According to unrebutted defense testimony and even that of Charging Party witnesses, including Paul Rosenthal, the CS Program, having been created at a time of change and controversy, was seemingly under continual review and reevaluation. As noted in more detail above, the efforts of some faculty to develop the Program were persistently hampered for one reason or other even prior to the time of the Unit 18 election campaign. As noted by Paul Rosenthal, the Program's existence was placed in jeopardy initially by Dean Burke in the mid-1970's, and two FTE's were withdrawn from it. Although the FTE's were later restored, upon Orbach's appointment in 1982, he again withdrew one of those. Rosenthal concluded that this marked a reversion to what he considered an "anti-Comm Studies policy by a new provost." Thus, whatever motive there was to reorganize the CS Program existed long before the election campaign in 1983 and thereafter continued to impact decisions over the existence of the Program.

To the extent that the Sears Plan would have effectuated a de facto disestablishment of what remained of the Speech Department, the timing of the Plan might nevertheless appear suspect.

For the reasons set forth further below, however, and because timing, without more, is insufficient to establish a nexus between an adverse act and protected activity, it is determined that the Sears Plan's anticipated impact on the Speech Department's lecturers was not in retaliation for the exercise of protected rights. California State University (Sacramento) (1982) PERB Decision No. 211-H.

The Sears Plan had roots in the controversy surrounding the Speech Department and CS Program in the 1970's. One of its other key catalysts was the submission of a proposal for a graduate program in CS by Professors Rosenthal, Malamuth and French in 1983. The submission coincided with the recent arrival of a new Provost (Orbach) and a new Dean (Sears), the latter of which had a great deal of expertise in the area of communication and had an interest in developing and/or restructuring the program.

The graduate program proposal and its ensuing review by the professors provided Sears with the opportunity to critique the program's development and performance during its existence. He saw need for change. The rejection of the proposal was based not upon union-related considerations, but upon academic ones, and upon a conclusion that, in its present form, the CS Program and its few faculty were incapable of supporting a graduate program.

Similarly, the initial components of the Sears Plan had roots in academic and administrative considerations. One was the need to broaden participation by more ladder-rank faculty from other departments on campus. Another was the need to change the leadership of the Program from Rosenthal, who had been its Chair for a long time and with whom the Provost and others were dissatisfied,[35] to Malamuth. Despite the Charging Party's efforts to paint Malamuth as anti-lecturer, anti-union, and as a puppet of an anti-union administration, the record does not support those claims.

While the violation of an employer's own rules in carrying out an adverse employee action may sometimes be viewed as circumstantial evidence of an unlawful motivation, the circumstances as viewed from the entire record, militate against such a finding in this instance.

Because of Rosenthal's lengthy tenure as a professor in the Speech Department and CS Program, as chair of both, and his long experience serving on committees of the Academic Senate - particularly as chair of the Committee on Rules and Jurisdiction - he has developed a unique expertise in the rules of the Academic Senate, the regential standing orders, and in

---

[35]There is no evidence that the administration's dissatisfaction with Rosenthal was connected with the UCAFT. The record shows that Rosenthal's fervent efforts to oppose changes in the program and in the Speech Department were not connected, either expressly or impliedly, with the cause of unionization of the lecturers.

administration policy. Consequently, he has proven to be more than a match for several administrators seeking to change programs that he has been involved in.

By comparison, administrators such as Provost Orbach, Vice-Provost Kissler, and several divisional deans, have only a general working knowledge of the intricate procedural and substantive rules Rosenthal has utilized in his many confrontations with the University. It is this lack of expertise on the part of Orbach, Sears, Morris, Kissler, and other administrators that led to their arguable violation of disestablishment policies of the Academic Senate in implementing the Sears Plan and in attempting to secure a new chairperson for the CS Program. Indeed, the evidence reflects that, with respect to the appointment of the chair of the CS Program, the required procedures had also been unwittingly violated in the years prior to 1984. Only when Rosenthal brought the matter to the Academic Senate's Committee on Rules and Jurisdiction, supported by pertinent citations, did the Committee agree that there was an error in, inter alia, the way a replacement for Rosenthal had been selected. It was an ignorance of the requirements under HEERA that also caused the University administration to proceed almost clumsily in developing and simultaneously implementing negotiable components of the Sears Plan.

Thus, while the University and UCAFT were actively attempting to negotiate job security for lecturers, the campus level administrators were busy proceeding with a course of action (transferring speech lecturers to the Writing Program) that almost certainly would have meant termination of those same lecturers. Although the Union apprised the administration in October 1984 of the legal bargaining prerequisites under HEERA, the administrators were given erroneous legal advice as to when the meet and confer obigation was triggered. Based on this faulty legal advice, and not on a retaliatory motive, the administration proceeded with implementation of the plan rather than suspending it and negotiating on aspects within the scope of representation. The overriding motives for continuing implementation were academic in nature.

The failure of the College of L&S to timely reappoint lecturers until mid-June 1984, and the resulting delay in issuing them paychecks, were similarly due to the awkward manner in which the administration proceeded to implement the Sears Plan while making modifications in it midstream. Morris' testimony convinced me that both adverse acts were not due to any ill-will or anti-union motives on his part, but due to a breakdown in communications that are unfortunately not uncommon in the College of L&S, and also due to these midstream changes in the Plan - e.g., the decision to abandon the transfer of the lecturers to the Writing Program and to, instead, reappoint them to the Speech Department.

The UCAFT's only attempts to directly link the Sears Plan to an unlawful motive points instead to a finding that no connection existed. Thus, the allegation that Steven Chaffee attempted to negotiate a deal on behalf of the University whereby Marde Gregory would relinquish her union-related efforts to obtain job security is rejected. Instead, this allegation indicates that Charging Party may have been stretching to find a motivation that just was not there. Its attempts to connect Neil Malamuth with the alleged illicit scheme were similarly unsupported with credible evidence. Indeed, given the rather unsophisticated and seemingly haphazard manner in which the University proceeded with the Sears Plan, it is highly unlikely that it could have devised such an elaborate and all-encompassing scheme to undermine the Union, as the Charging Party has alleged. The allegation of retaliation and interference with regard to the Sears Plan is therefore dismissed.

3. Sending Marde Gregory to Coventry

The facts concerning the University's alleged ostracism of Marde Gregory, discussed, supra, indicate that although Gregory exercised rights protected under HEERA, with employer knowledge, the only circumstantial evidence of an unlawful motive for the alleged conduct is its timing - that it followed the filing of an unfair practice charge. As noted above, however, timing, without more, is insufficient to establish

unlawful motivation and, thus, the requisite legal nexus. Therefore, a prima facie case of discrimination and/or interference in this instance has not been made. That allegation is likewise dismissed.

4. Deletion of Favorable References to Gregory in CUCC Draft Report.

Like the allegation discussed above, although the threshold elements - protected activity and knowledge - have been met, there is a lack of evidence that Neil Malamuth's successful attempt to have a reference to Marde Gregory's role in the admission process changed, was in retaliation for, or an attempt to interfere with, her protected activities. Instead, the evidence shows that, although Gregory indeed exercised a great deal of influence over the admissions process, Malamuth's suggested change of the draft was consistent with true practice. Thus, although Gregory's admissions recommendations were rarely, if ever, rejected, the authority for making the decisions had indeed rested in Rosenthal and Malamuth. There is no evidence to the contrary.

There is evidence that on several instances Malamuth made favorable remarks about Gregory's performance in context where they would be more likely to influence her career in a positive way. Included is a memo dated April 12, 1985 to Dean Morris in which Malamuth praised the performance of two lecturers, including Gregory, as "outstanding" and recommended that she

deserved a salary increase. In a subsequent memo to Gregory dated June 12, 1985, wherein Malamuth notified her of her reappointment, he also congratulated her for receiving a merit salary increase. Other instances, such as Malamuth's open praise of Gregory's performance in the presence of her students, have already been detailed above. In sum, it is concluded that Malamuth's attempts to modify the final CUCC report were devoid of any unlawful intent toward Gregory.

5. Gregory's Title Change

The only evidence that Gregory's title change, from that of visiting lecturer to adjunct lecturer, was in any way related to her exercise of rights was the fact that the change occurred after such exercise. As noted, supra, mere coincidence of time is insufficient to raise the inference of unlawful motivation. Indeed, the timing of the move may well indicate a lack of an unlawful motive, inasmuch as the title change took place about a year after the UCAFT election, and Gregory found out about it over one year after she began negotiating for the Union. In any event, her title of adjunct lecturer was shown to be consistent with University policy, initiated after the University's discovery of an inadvertent mistake in formerly titling her as a visiting lecturer, and the result did not cause any interference with her rights as a Union representative or member. Having failed to establish an unlawful motivation or interference, the allegation by the UCAFT in this regard is dismissed.

6. Released Time

Charging Party has failed to show that the University's conduct in dealing with it regarding released time was intended to or did interfere with its rights, or was retaliatory in any way. All released time requests were granted as part of the ground rules agreement - that is, the Union's negotiating team was released for attendance at all bargaining sessions and released for reasonable travel time. Similarly, it has not been demonstrated that the arrangements to cover classes missed because of released time were deliberately delayed or denied for the purpose of retaliation because of protected activities. Although some specific requests for coverage of classes were denied (e.g. - audio visual materials not ordered, money for guest speakers not provided), there is no showing of an unlawful intent in doing so, nor of any interference with the exercise of protected rights.

With respect to Gregory's request to be relieved of teaching CS 185 in the spring quarter of 1985, there is no credible evidence of improprieties by Malamuth. Gregory's course relief request was granted, along with an additional request to be released for ten hours from her staff position. The course relief was granted solely on the basis that her negotiations schedule then conflicted with her class schedule. Although Malamuth could have sabotaged Gregory's efforts to obtain course relief on the basis of perceived irregularities

6. Released Time

Charging Party has failed to show that the University's conduct in dealing with it regarding released time was intended to or did interfere with its rights, or was retaliatory in any way. All released time requests were granted as part of the ground rules agreement - that is, the Union's negotiating team was released for attendance at all bargaining sessions and released for reasonable travel time. Similarly, it has not been demonstrated that the arrangements to cover classes missed because of released time were deliberately delayed or denied for the purpose of retaliation because of protected activities. Although some specific requests for coverage of classes were denied (e.g. - audio visual materials not ordered, money for guest speakers not provided), there is no showing of an unlawful intent in doing so, nor of any interference with the exercise of protected rights.

With respect to Gregory's request to be relieved of teaching CS 185 in the spring quarter of 1985, there is no credible evidence of improprieties by Malamuth. Gregory's course relief request was granted, along with an additional request to be released for ten hours from her staff position. The course relief was granted solely on the basis that her negotiations schedule then conflicted with her class schedule. Although Malamuth could have sabotaged Gregory's efforts to obtain course relief on the basis of perceived irregularities

in her scheduling of her own classes that produced the conflict and due to Gregory's inconsistent stories about her airline schedule, etc., he chose not to do so. Instead, he recommended approval of her request and made no mention of the problems to Dean Morris. Malamuth's sitting in on Gregory's class two to three times was not shown to be disruptive or retaliatory. He did not take the class "away" from Gregory, though he could legitimately have done so as a contingency.

The additional facts indicating that the University accomodated Gregory's teaching schedule during summers, that she and Spafford were granted full course relief, and that all coverage arrangements preceded the beginning of each academic quarter, militate against a finding that the University's conduct regarding released time was harassment, retaliation, or interference. The allegations in the Unfair Practice Charge to this effect are therefore dismissed.

7. Late Reappointment and Paychecks of Lecturers

The timing of the speech lecturers' reappointment for academic year 1985-86 was the result of poor communications within the College of Letters and Science combined with the haphazard manner in which the Sears Plan was being implemented. Neither was shown to be harassment or retaliation because of the lecturers' protected activities. Upon being apprised that the reappointments were late in being submitted to the appropriate personnel departments, the administrators

acted to correct the problem in a straightforward manner, and the lecturers were able to meet their academic assignments as before.

When all the facts are considered, what might at first glance appear to be disparate treatment as to Marde Gregory's receipt of her paycheck (later than most other lecturers), is in reality the result of legitimate reasons. Gregory's payroll documents had to be processed, unlike most other lecturers', through two (staff and academic) offices inasmuch as she held an instructional position as well as a staff position (SAO). Her documents therefore had to be approved by the appropriate persons in each section, causing additional delay. The same procedures caused a two-week delay of another adjunct lecturer's (Tom Miller) paycheck.

Gregory testified that she did suspect that the extra delay in receiving her paycheck was the result of her paperwork having to go through more procedural channels due to her adjunct lecturer position. There also was unrefuted testimony that late paychecks are, unfortunately, not an uncommon occurrence within the College.

The allegation that Gregory's reappointment and late receipt of her August 1985 paycheck were somehow connected with her protected activities is therefore dismissed.

In sum, viewed individually or together, all the alleged acts, which have been characterized as harassment or

retaliation, would have occurred notwithstanding the exercise of protected rights by the Charging Party and/or its members.

B. The Legal Standard Re: Released Time

Section 3569 of the HEERA states, in pertinent part:

> A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time or reassigned time without loss of compensation when engaged in meeting and conferring . . .

This is very similar to Government Code section 3543.1(c) which provides for released time for employee representatives negotiating with public school employers. Although the PERB has not ruled on the specific issue of what amount of released time is "reasonable" under HEERA, it has provided some guidance in interpreting the released time provision under section 3543.1(c).

In Magnolia School District (1977) EERB Decision No. 19[36], the Board held that "reasonable released time" means at least that the employer has exhibited an open attitude in its consideration of the amount of released time to be allowed so that the amount is appropriate to the circumstances of the negotiations. In that case, a violation of section 3543.1(c) was found because the employer inflexibly refused to consider

---

[36]The PERB was previously known as the EERB (Educational Employment Relations Board).

or provide any released time during the instructional day, even for a single negotiating session. The Board reasoned that the Legislature contemplated, at least in some circumstances, that some released time during the instructional day would be appropriate.

In Sierra Joint Community College District (1981) PERB Decision No. 179, the employer refused to negotiate over a proposal by the union for a released time formula which would provide a one-fifth reduction from the normal fifteen-hour teaching load of community college instructors who were serving as negotiators. The employer's rationale was that released time could be granted only from scheduled assignments, and that the proposal was really a request for compensatory time off rather than released time. It asserted that released time could be provided only during periods of actual meeting and negotiating.

The Board initially held that released time is a subject within the scope of representation. It then reversed the ALJ's determination that released time must coincide with time actually spent negotiating, reasoning that such a narrow construction of the statute was unwarranted. The Board further noted that, "While the District was under no obligation to accede to the workload reduction, the proposal was lawful and the District was obligated to respond."

1. Negotiation of Released Time

Keeping in mind the above considerations, it must be found that the University did not violate HEERA section 3569 in negotiating over released time. First, there is no showing that the employer refused to negotiate over the issue. Although it refused to accede to UCAFT's proposal for "across-the-board" course relief, it never refused to consider and discuss the proposal in good faith. Indeed, it acknowledged that course relief might be appropriate under some circumstances, and, in such cases, it would consider granting course relief. The record reveals that it did grant it in specific cases.

Thus, although UCAFT's course relief proposals are mandatory subjects of bargaining in view of Sierra Jt. CCD, supra, a finding that no violation occurred in the case at hand is not inconsistent with that decision because negotiations over them did take place.[37]

Secondly, unlike the situation in Magnolia, supra, the University offered to release six negotiators from all class sessions that conflicted with negotiations without loss of pay. A great number of negotiations sessions in fact occurred during what would be considered a normal work day. Also unlike

---

[37]The mere fact that the UCAFT's arguments in support of course relief dealt with subjects within management's prerogative did not remove course relief proposals from the scope of representation.

the situation in Magnolia, the parties agreed to a released time provision relatively early in the negotiations process.

What the University stated it would not negotiate over were arrangements for coverage of classes missed as a result of the granting of released time. Whether the University's actions, as opposed to its statements, even amounted to a refusal to meet and confer in good faith over this subject is debatable, given the fact that it discussed the coverage proposals repeatedly at the table, and agreed to a provision whereby each instructor/negotiator was given consultative rights over coverage decisions made within their respective departments.

To the extent that UCAFT's demands to negotiate actual class coverage arrangements constitute proposals separately from course relief, they do not appear to be within the scope of representation under the HEERA. The pertinent portion of that statute, at section 3562(q) states:

> . . . . . .
>
> The scope of representation shall not include:
>
> . . . . . .
>
> (3) . . . the content and supervision of courses, curricula, and research programs, as those terms are intended by the standing order of the regents or the directors.
>
> . . . . . .
>
> All matters not within the scope of representation are reserved to the employer and may not be subject to meeting and conferring, . . .

The HEERA was not intended to intrude into the shared governance principle nor the historical joint consultative process between administration and faculty on decisions that effect the educational mission of the University. HEERA Section 3561. The UCAFT seems to argue, however, that the regents have, by standing orders and later through Academic Senate regulations, delegated the responsibility for the integrity of a course to the individual instructors. The University argues that there is no support for that conclusion, that the responsibility lies with the academic departments, and that if any individual is ultimately responsible, it is the department chairperson or his/her equivalent.

In support of its contention, the UCAFT has offered the testimony of Marde Gregory. It can be summarized as follows: the Academic Senate, pursuant to standing orders of the regents, and through regulation 750(A) makes officers of instruction responsible for the content and conduct of courses;lecturers are officers of instruction; since the Academic Senate has thus chosen to delegate its authority on the conduct of courses to them, lecturers, and not the University administration, are the persons who must determine how a course should be covered while they are on released time (e.g., by substitutes, guest lecturers, etc.).

Also in support of its contention that coverage of classes during released time is mandatorily negotiable, Gregory

testified that student evaluations of courses are often used by department chairpersons (or their equivalent) to evaluate a lecturer's performance. Therefore, if a class is covered by substitutes on a regular basis, some students express their dissatisfaction with any ensuing adverse effect on the courses by noting it on their evaluations. The evaluations, asserts Gregory, are then used in determining whether a lecturer will be recommended for such things as reappointment and/or for merit salary increases. Because lecturers are thus burdened with the responsibility of maintaining course integrity, and because their employment may be adversely affected by negative student evaluations as a result of poor class coverage decisions, it was reasoned that lecturers must, by established policy, be allowed to determine course coverage. For these asserted reasons, the UCAFT repeatedly protested at the negotiations table that the use of substitutes was an inappropriate way to cover class sessions missed because of released time.

Regential Standing Order 105.2 states, in pertinent part:

> (b) The Academic Senate shall authorize and supervise all courses and curricula offered under the sole or joint jurisdiction of the departments, colleges, schools, graduate divisions, or other University academic agencies . . .

The regulations of the Academic Senate, at section 750(A), provide as follows:

> Only regularly appointed officers of instruction holding appropriate

> instructional titles may have substantial responsibility for the content and conduct of courses which are approved by the Academic Senate.

Other than Gregory's interpretation of the regulation above, there was no evidence offered to indicate its actual intent or meaning. Her interpretation was not based upon personal knowledge of the legislative history or deliberations that led to its adoption.

It appears, not only from the face of the regulation, but by its contextual setting and by other academic regulations, that Gregory's conclusions are based on erroneous assumptions. First, regulation 750(A) is one of several that delineate restrictions on who is authorized to have responsibility for courses. It does not state that only those people teaching the course may have responsibility, nor that the instructors have ultimate responsibility. The regulation does not define "officers of instruction," and there is no indication of what is meant by "regularly appointed." There is no evidence in the record to support Gregory's conclusion that lecturers, as opposed to department chairpersons or divisional deans, are "officers of instruction," or that only lecturers fit within the description.

While it may be reasonable to conclude that lecturers are officers of instruction, it is unreasonable to assume that the ultimate responsibility for course integrity lies solely with

each instructor, while excluding the academic administrators, such as the department chairpersons. This determination is consistent with the University's Academic Personnel Manual (APM), containing policies promulgated pursuant to regential standing orders.

Specifically, APM section 752 states the policy and procedures for, inter alia, employee leaves of absence of seven days or less. At section 752-6, the language reads as follows:

> Responsibility
>
> If an appointee is granted this type of leave, the appointee's department chairperson shall be responsible for adequate replacement of the faculty member during the period of the leave, except that the appointee receiving the leave shall be responsible for the submission of any course reports, etc., required during the period of the absence.[38]

As can be reasoned from the above, the department chairperson has specifically been given the responsibility for coverage of the duties of an absent faculty member, except for such things as course reports. The situation is not appreciably different from that in which a faculty member is absent due to approved released time. Therefore, testimony of several University witnesses that it is the academic department's responsibility,

---

[38]The section has apparently been in existence at least since July 1, 1974 from the face of the document. (See Exh. MMM.)

through its chairperson (or equivalent), to arrange coverage of missed classes, is more persuasive.[39]

The UCAFT's concerns regarding evaluations, while well-taken and reasonable, do not necessarily lead to a conclusion that class coverage decisions are negotiable. If the concern is with the impact of released time on lecturers' evaluations, the HEERA does not restrict the negotiability of evaluations proposals for non-Senate faculty, unlike the restriction (at section 3562(q)(4)) relating to Senate faculty. Thus, although the UCAFT could have submitted proposals to eliminate or minimize the effect of released time usage upon their evaluations, merit increases, etc., there is no evidence that it sought to do so.

There are other reasons from which it must be concluded that decisions regarding how missed class sessions are covered are properly within the control of management and its designees, and not a matter within the scope of representation. The academic integrity or conduct of courses are not "wages, hours of employment, and other terms and

---

[39]APM section 245, Appendix A, also charges chairpersons with the responsibility "to make teaching assignments" in accordance with Senate regulation 750, to make other assignments of duty to members of the department staff, and to establish and supervise procedures on the use of guest lecturers. (Exh. LLL.)

conditions of employment" as prescribed by HEERA. As the Respondent points out in its brief,

> The adequacy of the students' educational experience is, instead, a concept at the heart of education, and at the heart, therefore, of the subjects reserved to the entrepreneurial control of management.

Respondent's argument closely parallels the PERB's rationale for excluding from the scope of mandatory negotiations subjects that would significantly abridge an employer's managerial prerogative, under the SEERA. State of California (Department of Transportation) (1983) PERB Decision No. 361-S.[40] It is consistent with HEERA section 3562(q)(3), cited above, which excludes the "content and supervision of courses" from scope. It is also consistent with statutory language indicating that the Legislature meant to preserve the joint decision-making process between the Academic Senate and the administration over matters "essential to the performance of the educational missions" of the universities. Government Code section 3561. To require collective bargaining over decisions about how a course is to be covered would not preserve that process, and would significantly intrude upon the University's managerial prerogatives.

---

[40]SEERA (State Employer-Employee Relations Act) is codified at Government Code sections 3512, et seq. Its section 3516, while in some respects is different from HEERA section 3562(q), is virtually identical where subjects within scope are delineated. In light of virtually identical language in the pertinent portions of the statutes, the State of California case, supra, is applicable and persuasive.

The University's choice to nevertheless negotiate, to a limited extent, by agreeing in the ground rules to allow lecturers consultative rights in determining class coverage arrangements, while consistent with University policies that encourage chairpersons to consult with colleagues on a number of matters, is over and beyond what the HEERA requires under section 3562(q). It is therefore determined that the UCAFT's proposals regarding how class sessions were to be covered while the bargaining team was released, are not within the scope of representation, and the University had no duty to meet and confer over them. The allegation in the Unfair Practice Charge on this issue is hereby dismissed.

2. Granting of "Reasonable Amounts" of Released Time

The record indicates that the University released the entire UCAFT negotiating team for all time spent at negotiations and for time they were on travel status. Although there is some evidence that one or more members of the team was unable to attend in isolated instances, this was not due to the fact that they were not released, but, as in Gary Adest's case, because he decided that he needed to be in class because of considerations such as the need to give examinations, etc. Gregory's released time requests were granted, and, although testifying that she personally did not believe they were sufficient, she did not complain to any University officials about it, nor request more time. Therefore, the UCAFT has not

demonstrated that the amount of released time given was inadequate or unreasonable, or that the amount of released time granted impeded the negotiation process. This aspect of the released time allegations in the Unfair Practice Charge is also dismissed.

C. Allegations of Refusal to Meet and Confer

Section 3570 of the HEERA imposes a duty upon higher education employers to meet and confer with employees' exclusive representatives on all matters within the scope of representation. This duty is analogous to the duty to bargain imposed upon public school employers under the Educational Employment Relations Act and upon private sector employers by the National Labor Relations Act.[41]

It is axiomatic that an employer's failure to meet and negotiate in good faith with an exclusive representative about a matter within the scope of representation is unlawful. Additionally, a unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate. Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94.

---

[41]The Educational Employment Relations Act is codified at California Government Code section 3540, et seq. The National Labor Relations Act is codified at 29 U.S.C. Section 151, et seq.

An employer's duty is violated, for example, when it unilaterally changes an established policy without affording the exclusive representative a reasonable opportunity to bargain. Grant Joint Union High School District (1982) PERB Decision No. 196; Pajaro Valley, supra.

Normally, it is within management's prerogative to determine its organization, the services it renders, and the method of delivery of such services. HEERA sections 3562(q)(1) and (3). However, when the subject does not merely involve a restructuring of its organization, but is inherently related to other terms and conditions of employment, such as workload, hours, wages, transfers, etc., it is within the scope of representation and cannot be altered without notice to the exclusive representative and an opportunity to bargain. See State of California (Dept. of Transportation), supra; Mt. Diablo Unified School District (1983) PERB Decision No. 373. At the very least,, a reorganization may be subject to negotiations if it affects other terms and conditions of employment. Ibid.

For example, staffing policies that are aimed, at least in part, at regulating "employees' workloads" - the amount of labor for which employees will be contractually obligated - are subject to negotiation prior to a change. Davis Joint Unified School District (1984) PERB Decision No. 393. Policies relating to the assignment of extra duties and adjunct duties

that include committee work during the workday, are subject to negotiations. Anaheim City School District (1983) PERB Decision No. 364. Jefferson School District (1980) PERB Decision No. 133. The subjects of employee evaluations procedures - with the proviso that evaluation of Academic Senate faculty has been specifically excluded from the scope of representation under HEERA section 3562(q)(4) - and transfer policies, are negotiable. Jefferson School District, supra; State of California (Department of Transportation) (1983) PERB Decision No. 333-S. Additionally, the subject of re-employment rights is related to virtually every subject within the scope of bargaining and is negotiable. Healdsburg Union High School District (1984) PERB Decision No. 375.

Inherent in the Sears Plan was a component that called for the transfer of speech lecturers to the Writing Program. To this extent, the decision of whether to include transfer as a part of the Plan was a negotiable subject, and the University was required to meet and confer with the UCAFT about that decision. By telling the Union that it had no duty to meet and confer until the actual transfers took place, and by refusing its requests to negotiate before proceeding with the plan, the University breached its duty to meet and confer, and thus violated HEERA sections 3571(c) and, derivatively, 3571(b) and 3571(a).

The University's duty did not end there, however. There were other components of the Plan that, although on their face were management prerogatives, had an impact upon the lecturers' hours, wages, and terms and conditions of employment. For example, the Plan contemplated a "de facto" disestablishment of the Speech Department. The inevitable effects would be such things as termination, non-reappointment, or transfer of lecturers to other departments. Since there was no indication of when the disestablishment would be completed, it was possible that mid-year terminations would occur.

Also contemplated in the Plan was a gradual reduction of the "heavy reliance" on lecturers in the new CS Program. As noted in the factual statement above, this had the foreseeable impact of termination or non-reappointment of CS lecturers as well.

The transfer (speech lecturers) component of the Plan, in itself negotiable, had the additional foreseeable impact that lecturers would face automatic termination because of the Writing Program's policy of hiring lecturers only on the basis of 100% appointments and its adherence to a four-year rule. Even if the Writing Program had applied the eight-year rule to transferees, the 100% appointment policy would have produced the same result.

Another foreseeable impact of the reorganization plan was the effect on lecturers' workload. As noted above, because of the nature of assignments in the Writing Program, the lecturers

in speech would have been required to either conform to a new program's requirements, or a modification would have had to be negotiated. Because of this historical difference in assignments, the transfer also impacted on the areas of extra duties (e.g., participation in committees) and evaluations (new set of criteria).

The University asserts that it did not breach its duty to negotiate because, inter alia, some of the negotiable impacts of the Plan were never implemented (e.g., transfer of lecturers), the duty to bargain did not arise until those negotiable effects were implemented, and that the Union never formally made a demand to bargain.

Each of Respondent's assertions must be rejected. An employer has a duty to provide notice and an opportunity to negotiate the effects of a managerial decision that impacts on subjects within the scope of representation, when it reaches a firm decision to implement the decision.[42] Mt. Diablo Unified School District (1983) PERB Decision No. 373 (dealing with effects of layoffs). A union need not prove that an actual unilateral change in employees' working conditions resulted from the decision as a precondition to finding a duty on the part of the employer to negotiate its impact. On the contrary, the exclusive representative need only produce

---

[42]This would not apply to a subject, such as transfers, where, as noted above, there is a duty to negotiate over the decision itself.

sufficient evidence to establish that the decision would have reasonably foreseeable adverse impact on employees' working conditions.

In Newark Unified School District (1982) PERB Decision No. 225, the Board upheld an administrative law judge's finding that, although the impact of a proposed layoff was speculative at the time the union made a request for negotiations, the employer was obligated to bargain over those admittedly speculative effects. In response to the argument that the union did not prove that the layoff had an actual effect on matters within scope and hence did not violate the Act, the Board quoted, with approval, the following language of the administrative law judge:

> [I]t would not be consistent with PERB's decisions in this area to leave the judgment of whether or not a subject is "substantially" affected (and subject to negotiations) to the exclusive and unilateral province of an employer. Leaving such a decision in the employer's hands would thwart the collective negotiations objectives set forth in EERA, the salutory purposes of which were fully discussed in San Mateo County Community College District, supra, at 14-17.

The Board reasoned that bargaining before the actual impact occurs can potentially be of the greatest value.

The record reveals that the University breached its duty at each step of the process. First, no notice was ever officially given to the UCAFT of the Sears Plan. The Union first learned of it indirectly on about September 10, 1984 through the

dissemination to the faculty of the Sears letter wherein the skeletal outlines of the plan were written. Not only was this letter distributed after a firm decision had been made to proceed with implementation, but implementation had already begun. The UCAFT was thus denied timely notice and a reasonable opportunity to bargain prior to implementation.

Secondly, in Newman-Crow's Landing Unified School District (1982) PERB Decision No. 223, the PERB reiterated its long-standing rule that it is not essential that a request to negotiate be specific or made in a particular form. As noted in the above findings of fact, it is determined that the UCAFT's repeated demands at the negotiations table satisfied its requirement. Indeed, the facts indicate that these demands far exceeded the degree of specificity that the Board found legally sufficient in Goleta Union School District (1984) PERB Decision No. 391. When the UCAFT finally received constructive notice of the Sears Plan, it made repeated requests to bargain beginning in October 1984.

Third, after the UCAFT expressed its desire to bring the Sears Plan to the negotiations table, the "responses" it received from the University amounted to an outright refusal to bargain. Initially it was met by statements that only the effects of the Sears Plan on working conditions were negotiable and that there was no need to negotiate because those effects had not occurred yet. Then, it was met by a constant refrain from negotiator Bickal that he was "looking into" the

situation. The record does not indicate an expression of willingness on the University's part to bargain at the table about any aspect of the Sears Plan, whether it be transfers of faculty or indirect impacts of the plan. That the University could proceed to implement every part of the plan and deny the Union the opportunity to negotiate job guarantees for over a year on the basis that foreseeable impacts had not occurred yet is contrary to law. By its conduct, the University thus violated HEERA section 3571(c) and, derivatively (a) and (b).[43]

IV. REMEDY

The PERB is empowered to issue a decision and order directing a party offending the HEERA to take such affirmatvie action as will effectuate the policies of the Act. Accordingly, in addition to ordering Respondent to cease and desist from refusing to meet and confer in good faith over the foreseeable and negotiable impacts of the Sears Plan, as outlined above, it is appropriate to order that it suspend implementation of that Plan until such time as the meet and

---

[43]The UCAFT's apparent assertion, during the hearing that such things as the rotation of the department chairperson were within scope is rejected, inasmuch as, consistent with the analysis above, it is a management prerogative. Similarly, there was no evidence that the rotation of the chairmanship was linked to any exercise of protected rights.

confer process is completed, either by agreement of the parties or after completion of its obligations under the impasse procedures outlined at HEERA section 3590, et seq.

Inasmuch as the delay in the speech lecturer's receipt of their paychecks in June of 1985 was, at least in part, a result of the University's failure to meet its obligations under HEERA section 3570, Respondent shall be ordered to make such employees whole for any losses incurred as a result of that delay, including the payment of interest at 10 percent per annum.

It is also appropriate that the Respondent be required to post a notice incorporating the terms of this 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, defaced, altered or covered by any material. Posting such notice will provide employees with notice that the University has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the policies of the Act that employees be informed of the resolution of the controversy and will announce the Respondent's readiness to comply with the ordered remedy. See Placerville Union School District (1978) PERB Decision No. 69, and Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587.

The remaining allegations, not specifically determined above to be violative of the Act, are hereby DISMISSED.

PROPOSED ORDER

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

A. CEASE AND DESIST FROM:

(1) Failing to meet and confer in good faith with the University Council, American Federation of Teachers, AFL-CIO over those aspects of the Sears Reorganization Plan that have foreseeable impact on the terms and conditions of employment of Unit 18 members.

(2) Failing to give notice and a reasonable opportunity to bargain to the University Council, American Federation of Teachers, before including in the Sears Reorganization Plan any component that related to the wages, hours, or terms and conditions of employment of Unit 18 members.

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

(1) Suspend further implementation of the Sears Reorganization Plan until the meet and confer process mentioned above is completed, either by agreement of the parties or after completion of Respondent's obligations under the impasse procedures outlined at HEERA section 3590 et seq.

(2) Make whole the lecturers in the Speech Department of the UCLA campus for all losses incurred as a result of the delay in receiving their pay during the summer of 1985, including interest at 10 percent per annum.

(3) Sign and post copies of the attached Notice marked "Appendix" in conspicuous places where notices to employees are customarily placed at its headquarters office and at each of its campus sites for thirty (30) consecutive workdays during the regular academic workyear. Copies of this Notice, after being duly signed by the authorized agent of the University, shall be posted within ten (10) workdays from the date this Decision becomes final. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

(4) Upon issuance of a final decision, make written notification of the actions taken to comply with this order to the San Francisco Regional Director of the Public Employment Relations Board in accordance with his/her instructions.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify, by page citation or exhibit number, the portions of the record,

if any, relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, " . . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day for filing . . ." 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: December 19, 1986

Manuel M. Melgoza

MANUEL M. MELGOZA
Administrative Law Judge