

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



LAWRENCE LIVERMORE NATIONAL)
LABORATORY PROTECTIVE SERVICE)
OFFICERS ASSOCIATION,)
)
Charging Party,) Case No. SF-CE-421-H
)
v.) PERB Decision No. 1221-H
)
THE REGENTS OF THE UNIVERSITY OF)
CALIFORNIA (LAWRENCE LIVERMORE)
NATIONAL LABORATORY),)
)
Respondent.)
_____)

Appearances: Carroll, Burdick & McDonough by Gary M. Messing, Attorney, for Lawrence Livermore National Laboratory Protective Service Officers Association; Gabriela B. Odell, Attorney, for The Regents of the University of California (Lawrence Livermore National Laboratory).

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by The Regents of The University of California (Lawrence Livermore National Laboratory) (University) to a Board administrative law judge's (ALJ) proposed decision (attached). In his proposed decision, the ALJ found that the University violated the Higher Education Employer-Employee Relations Act (HEERA) section 3571(a) and (c)¹ when it refused to meet and confer with the Lawrence

¹HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3571 reads, in relevant part:

It shall be unlawful for the higher education employer to do any of the following:

Livermore National Laboratory Protective Service Officers Association (Association) over the effects of the University's decision to reduce the number of protective service officers (PSOs) in the high-security Superblock area of the Lawrence Livermore National Laboratory (Laboratory).

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript, the University's exceptions and the Association's response thereto. The Board adopts the proposed decision insofar as it holds that the University violated HEERA when it failed and refused to negotiate over the reasonably foreseeable effects of the reduction in staff, including the change in work hours of PSOs transferred to positions outside of the Superblock. The Board finds, however, that the University's simultaneous modification of the regular workday for PSOs remaining in the Superblock was a separate and distinct decision and not a reasonably foreseeable effect of the reduction in staff. Neither the Association's charge nor the resulting complaint refer to this workday

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

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

modification. For the reasons set forth below, the Board dismisses this new allegation as untimely.

INTRODUCTION

The Association filed an unfair practice charge against the University on May 23, 1995. On July 27, 1995, the Board's general counsel issued a complaint based on that charge. As amended, the charge and complaint alleged that, on January 5, 1995, the University reduced the number of staff within the Superblock by transferring a number of PSOs from the Superblock to other areas of the Laboratory. The charge and complaint further alleged that the University undertook this reduction in staff without providing the Association notice or an opportunity to bargain over either the decision or the effects thereof. During the hearing, the Association presented evidence that on January 5, 1995, the University also reduced the regular hours of work for PSOs remaining in the Superblock.

In his proposed decision, the ALJ held that the University's decision to reduce the number of PSOs in the Superblock was nonnegotiable but that the University violated the HEERA when it failed and refused to meet and confer in good faith over the negotiable effects of that decision. The ALJ ordered the University to meet and confer with the Association regarding the effects of the change in the number of PSOs in the Superblock, to reinstate the eight-and-one-half hour workday for PSOs remaining in the Superblock, and to pay PSOs remaining in the Superblock full backpay plus interest. In addition, the ALJ ordered a

partial backpay award for those PSOs whose hours of work were reduced when the University transferred them out of the Superblock. (Transmarine Navigation Corporation (1968) 170 NLRB 389 [67 LRRM 1419] (Transmarine).)²

UNIVERSITY'S EXCEPTIONS

The University essentially targets three portions of the ALJ's decision. First, the University contends that the ALJ erred in finding that it refused to bargain over the effects of the reduction in staff. Second, the University challenges the ALJ's finding that it unilaterally reduced the hours of work for any PSOs. Finally, the University objects to the ALJ's imposition of full backpay for Superblock PSOs.

ASSOCIATION'S RESPONSE

The Association responds that the proposed decision is supported by the evidentiary record, consistent with established legal authority, and serves to effectuate the purposes of HEERA. Specifically, the Association contends that the record supports the finding that the University refused to bargain over the effects of the change in the number of staff. The Association also argues that the change in hours of work for PSOs remaining in the Superblock, although an independent violation of HEERA,

²A Transmarine remedy is a limited backpay award that attempts to approximate the parties' bargaining positions had there been no violation. (Placentia Unified School District (1986) PERB Decision No. 595 at p. 11.) In short, the Transmarine backpay award begins after the issuance of a decision and continues during the pendency of effects negotiations. (Id. at p. 13.)

was motivated by the University's decision to cut costs and, therefore, part and parcel of the reduction in staff.

DISCUSSION

The University operates the Laboratory under a contract with the United States Department of Energy (DOE). The Superblock is a high security facility located within the Laboratory. Prior to January 5, 1995, the University's established practice was that PSOs assigned to the Superblock had a regular workday of eight and one-half hours. On January 5, 1995, the University transferred a number of Superblock PSOs to eight-hour positions outside of the Superblock. That same day, the University reduced the workday of the remaining Superblock PSOs to eight hours.

The ALJ properly held that the University's decision to reduce the number of PSOs in the Superblock was outside of the scope of representation.³ (HEERA section 3562(q);⁴ Regents of the University of California (1987) PERB Decision No. 640-H at _____)

³Because there appears to be no conflict between DOE's regulations and the HEERA, the ALJ's supremacy clause analysis, although accurate, is unnecessary.

⁴HEERA section 3562 provides, in relevant part:

(q) For purposes of the University of California only, "scope of representation" means, and is limited to, wages, hours of employment, and other terms and conditions of employment. 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.

p. 20 (Regents) (noting that reorganization decisions are within employer's prerogative).) Nonetheless, HEERA obligates the University to meet and confer over the reasonably foreseeable effects of that decision to the extent that they impact the terms and conditions of employment. (Id. at p. 17.)

Refusal to Meet and Confer in Good Faith

Both University and Association witnesses testified that the Association requested bargaining over the effects of the reduction in staff. Nonetheless, the University contends that the ALJ erred in finding that it refused to meet and confer in good faith over those effects. In fact, the University contends, the Association rebuffed a University offer to discuss the effects of the staffing decision. The record does not support the University's reading of the facts.

Although University witnesses testified that they were willing to discuss the effects of the reduction in staff, an Association witness testified that the University refused to meet and confer over those effects, offering instead to make a presentation regarding the history of the Superblock. In response to this inconsistent testimony, the ALJ credited the Association's witness. The ALJ's credibility determination is supported by the record and we see no reason to disturb it. (See Los Angeles Community College District (1995) PERB Decision No. 1091 at pp. 9-10 citing Regents of the University of California v. Public Employment Relations Board (1986) 41 Cal.3d 601, 617 [224 Cal.Rptr. 631].) Once the Association requested

bargaining over the effects of the reduction in staff, the University was obligated to negotiate over all of the reasonably foreseeable effects thereof. Its presentation on the history of the Superblock did not meet this obligation.

Hours of Work

In its second group of exceptions, the University contends that the ALJ erred in finding that the University violated the HEERA when it failed to provide the Association with notice and an opportunity to meet and confer over the change in hours of work for PSOs. In short, the University alleges that the Association never specifically asked to bargain over the change in hours. Accordingly, the University contends, the evidence regarding the change in hours of work was a complete surprise and the ALJ should not have made any findings based on that evidence.

The Board does not require that a request to bargain over the effects of a change include a laundry list of all possible effects implicated by the change. (See Newman-Crows Landing Unified School District (1982) PERB Decision No. 223 at p. 9 (noting that request to bargain need not be made in any particular form).) Once the Association requested bargaining over the effects of the reduction in staff, the University was obligated to negotiate over all of the reasonably foreseeable effects of that change, including those effects not specifically mentioned in the request. The issue, therefore, is whether the change in the hours of either group of PSOs was a reasonably

foreseeable effect of the University's decision to reduce staffing in the Superblock.

As noted above, the University reduced the hours of work for two groups of PSOs. The University reduced the regular workday of some PSOs by transferring them from eight and one-half hour Superblock positions to eight hour positions outside the Superblock. At the same time, the University reduced the regular workday of the remaining Superblock PSOs by one-half hour.

The PSOs who were transferred from an eight and one-half hour Superblock assignment to an eight hour non-Superblock assignment experienced a change in their hours of work as a direct result of the Superblock staffing reduction. (See Regents at p. 20.) For these PSOs, the change in hours of work was a reasonably foreseeable, and therefore negotiable, effect of the reduction in staff. (See e.g., Lake Elsinore School District (1987) PERB Decision No. 646 at p. 16, citing Mt. Diablo Unified School District (1983) PERB Decision No. 373.)

The situation is different for those PSOs who remained in the Superblock. It is true that these PSOs experienced a change in their hours of work on the same date on which the University reduced the staff in the Superblock. Further, cost concerns motivated both this decision and the University's decision to reduce the number of Superblock PSOs. This coincidence of time and motive is insufficient, however, to create a causal link between these separate and distinct decisions. Accordingly, the University's decision to reduce the hours of the remaining

Superblock PSOs does not constitute a reasonably foreseeable effect of the decision to reduce the number of PSOs assigned to the Superblock.

As the Association contends, the University's failure to provide notice and an opportunity to meet and confer before reducing the workday for the remaining Superblock PSOs would, if proven, constitute an independent violation of the HEERA. (HEERA section 3562(q); see San Jacinto Unified School District (1994) PERB Decision No. 1078, proposed decision at pp. 17-18 (noting that change in hours of employment is within scope); Compton Unified School District (1989) PERB Decision No. 784, proposed decision at p. 18.) However, it is undisputed that the change occurred on January 5, 1995. Because the Association did not raise this allegation until the February 20, 1996 hearing, the Board must consider the timeliness of this new allegation.

HEERA section 3563.2 provides that the Board may not issue a complaint on conduct occurring more than six months prior to the filing of a charge.⁵ (California State University (1989) PERB Decision No. 718-H at pp. 8-9 (noting that six-month time limit is mandatory and jurisdictional).) This six-month time limit begins to run as soon as the charging party knew or should have

⁵HEERA section 3563.2 provides, in relevant part:

- (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

known of the alleged conduct. (Regents of the University of California (1993) PERB Decision No. 1002-H at p. 3; Tehachapi Unified School District (1993) PERB Decision No. 1024 at p. 4 (noting that charging party has burden of proving that allegation is timely).)

Absent evidence of delayed discovery, PERB could not have issued a complaint had the Association filed a charge regarding the January 5, 1995 reduction in hours on February 20, 1996. (HEERA section 3563.2.) Likewise, the Board could not have allowed the Association to amend an existing charge or complaint to include the new allegation on that date. (California State University (1990) PERB Decision No. 853-H at p. 7; Los Angeles Unified School District (199.4) PERB Decision No. 1041 (Los Angeles), dismissal letter at pp. 7-9.) The Board must treat a new allegation raised for the first time at hearing the same way. Accordingly, the new allegation concerning the change in work hours of the remaining Superblock PSOs is untimely and must be dismissed. (See Regents at p. 15.)⁶ Having dismissed this allegation, we need not address the University's challenge to the proposed remedy.

⁶The Board has long held that new legal theories relate back to the filing date of the original charge. (Los Angeles, dismissal letter at pp. 7-9; Regents at p. 15.) New factual allegations, such as the new unilateral change allegation in this case, however, do not relate back to the filing of the original charge. (Ibid.)

CONCLUSION

The Board affirms the ALJ's conclusion that the University violated the HEERA when it failed and refused to meet and confer with the Association over the reasonably foreseeable effects of its decision to reduce the number of PSOs within the Superblock. The Board concludes, however, that the University's decision to reduce the regular workday of PSOs remaining within the Superblock was a separate and distinct decision and not a reasonably foreseeable effect of the reduction in Superblock staff. Because the Association did not raise this allegation within the six month time limit set forth in HEERA section 3563.2, the Board finds that the allegation is untimely and must be dismissed.

ORDER

Upon the findings of fact, conclusions of law, and the entire record in this case, it is found that the Regents of the University of California (Lawrence Livermore National Laboratory) (University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a) and (c), by refusing to meet and confer over the effects of its decision to reduce the number of staff in the Superblock.

Pursuant to HEERA section 3563.3, it is hereby ORDERED that the University and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer with the Lawrence Livermore National Laboratory Protective Service

Officers Association (Association) about the effects of its decision to change the number of staff in the Superblock.

2. Denying bargaining unit employees the right to be represented by the Association in their employment relations with the University.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE HEERA:

1. Beginning ten (10) days following the date this Decision is no longer subject to reconsideration, pay to officers who, but for the University's decision to reduce staffing, would have worked in the Superblock and would have earned an additional one-half hour of pay per workday, the additional pay they would have earned, until: (a) the date the University bargains to agreement with the Association regarding the effects of its decision to reduce the staffing level within the Superblock; or (b) the date the University and Association meet and confer to bona fide impasse; or (c) the failure of the Association to request bargaining within ten (10) days following the date that this Decision is no longer subject to reconsideration or the failure of the Association to commence negotiations within five (5) working days of the University's notice of its desire to meet and confer; or (d) the subsequent failure of the Association to meet and confer in good faith.

2. Within thirty-five (35) days following the date that this Decision is no longer subject to reconsideration, post at all work locations where notices to employees are customarily placed, copies of the Notice attached as an Appendix hereto,

signed by an authorized agent of the University. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered, or covered by any material.

3. Notify the San Francisco Regional Director of the Public Employment Relations Board, in writing and in accordance with the director's instructions, of the steps that the University has taken to comply with this Order,

All other aspects of the charge and complaint are hereby DISMISSED.

Chairman Caffrey and Member Amador 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-421-H, Lawrence Livermore National Laboratory Protective Service Officers Association v. The Regents of the University of California (Lawrence Livermore National Laboratory), in which all parties had the right to participate, it has been found that The Regents of the University of California (Lawrence Livermore National Laboratory) (University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a) and (c). The University violated HEERA by refusing to meet and confer over the effects of its decision to reduce the number of staff in the Superblock.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer with the Lawrence Livermore National Laboratory Protective Service Officers Association (Association) about the effects of its decision to change the number of staff in the Superblock.

2. Denying bargaining unit employees the right to be represented by the Association in their employment relations with the University.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE HEERA:

1. Beginning ten (10) days following the date this Decision is no longer subject to reconsideration, pay to officers who, but for the University's decision to reduce staffing, would have worked in the Superblock and would have earned an additional one-half hour of pay per workday, the additional pay they would have earned, until: (a) the date the University bargains to agreement with the Association regarding the effects of its decision to reduce the staffing level within the Superblock; or (b) the date the University and the Association meet and confer to bona fide impasse; or (c) the failure of the Association to request bargaining within ten (10) days following the date that this Decision is no longer subject to reconsideration or the failure of the Association to commence negotiations within five

(5) working days of the University's notice of its desire to meet and confer; or (d) the subsequent failure of the Association to meet and confer in good faith.

Dated: _____ THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA

By _____
Authorized Representative

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



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

LAWRENCE LIVERMORE NATIONAL)	
LABORATORY PROTECTIVE SERVICE)	
OFFICERS ASSOCIATION,)	
)	
Charging Party,)	Unfair Practice
)	Case No. SF-CE-421-H
v.)	
)	PROPOSED DECISION
)	(10/23/96)
THE REGENTS OF THE UNIVERSITY OF)	
CALIFORNIA (LAWRENCE LIVERMORE)	
NATIONAL LABORATORY),)	
)	
Respondent.)	

Appearances: Carroll, Burdick & McDonough, by Gary M. Messing, Esq., for Lawrence Livermore National Laboratory Protective Service Officers Association; Gabriela B. Odell, Esq., for the Regents of the University of California (Lawrence Livermore National Laboratory).

Before Gary M. Gallery, Administrative Law Judge.

PROCEDURAL HISTORY

This proceeding commenced with the filing of an unfair practice charge by the Lawrence Livermore National Laboratory Protective Service Officers Association (PSOA) against the Regents of the University of California (Lawrence Livermore National Laboratory) (LLNL or University) on May 23, 1995. After investigation, and on July 27, 1995, the general counsel of the Public Employment Relations Board (Board or PERB) issued a complaint against the LLNL.

The complaint alleged unilateral changes in staffing levels, overtime opportunities and procedures for evaluation of persons returning to work after incurring an injury on the job. Specifically, the complaint alleged that prior to January 5,

1995, the staffing levels within the Superblock (a highly-secured area within the LLNL more particularly described below) included a total of 15 Protective Service Officers (PSO) on the day shift and 14 on the swing and owl shifts. The complaint alleged that on or about January 5, 1995, LLNL changed the policy by transferring four officers on the day shift and six officers on the swing and owl shifts to assignments outside the Superblock.

Four additional causes of action were set forth in the complaint relating to changes in the distribution of staff among the three shifts at the Superblock, overtime opportunities for Armed Property Control Officers, procedures for evaluation of fitness for return to work following on-the-job injury, and failure to meet and confer in good faith.

All of the changes in policy were alleged to have been undertaken without giving PSOA an opportunity to meet and confer over the decision to implement the changes and/or the effects of the changes. This conduct was alleged to constitute failure and refusal to meet and confer in good faith in violation of the Higher Education Employer-Employee Relations Act (Act or HEERA) section 3571(c), and interference with employees rights to be represented in violation of section 3571(a) -¹

¹The Act commences at section 3560 of the Government Code. All references are to the Government Code unless otherwise noted. In pertinent part, section 3571 provides that it is an unfair labor practice for the University to:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

The LLNL filed its answer on August 16, 1995, admitting and denying allegations and raising affirmative defenses that will be discussed in other parts of this decision.

Settlement efforts by PERB agents were not successful. Formal hearing was held on February 20 and 21, 1996, in Pleasanton, California. At the commencement of the formal hearing, PSOA announced that a tentative agreement on a collective bargaining agreement had been reached between PSOA and LLNL. Subsequent ratification of the agreement resulted in PSOA's withdrawal of all issues raised by the complaint save the change in staffing levels within the Superblock. With the filing of post-hearing briefs on April 18, 1996, the matter was deemed submitted for decision.

FINDINGS OF FACT

The University is an employer within the meaning of the Act. PSOA was certified by PERB in March of 1994, as the exclusive representative of security personnel at the LLNL facility near Livermore, California. There are approximately 123 PSOs, 30 sergeants and 6 lieutenants employed within the Protective

discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

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

Forces Division, one of four divisions in the Safeguards and Security Department at LLNL.

Phil Kasper (Kasper) is the Protective Forces Division leader. Steve Crowder (Crowder) has been a PSO at the LLNL for over eight years and serves as president of PSOA and is a member of its negotiations team. PSOA represents only the PSOs.

PSOs are armed officers classified by the Department of Energy (DOE) as Security Police Officer Level II. PSOs have authority, under the Atomic Energy Act and Title 10, Code of Federal Regulations, Part 1047, to carry an armed weapon and to use whatever force is necessary to prevent theft or sabotage of special nuclear material (SNM).² This includes authority to arrest persons within the confines of the laboratory. The LLNL is a Class A facility operated by the University under contract with DOE.

Under the Atomic Energy Act,³ DOE is empowered to enact regulations governing the security of SNM. DOE operates nearly one hundred facilities around the country. DOE rules and regulations, not the least of which involves security, govern the operation of the LLNL. DOE has final and ultimate authority on all levels of security.

²Either plutonium or enriched uranium.

³42 U.S.C, section 2011, et seq. The statute refers to the Atomic Energy Commission. In 1977, section 7151(a) was enacted which transferred all functions to the DOE.

Section 706.40 of Title 10 - Energy⁴ provides:

On all matters of security at all Government-owned,, privately operated DOE installations, DOE retains absolute and final authority, and neither the security rules nor their administration are matters for collective bargaining between management and labor, insofar as DOE security regulations affect the collective bargaining process, the security policies and regulations will be made known to both parties. To the fullest extent feasible DOE will consult with representatives of management and labor in formulating security rules and regulations that affect the collective bargaining process.^[5]

These regulations also address collective bargaining rights of employees. Section 706.2(e) provides that there will be "[m]inimum interference with the traditional rights and privileges of American labor." These provisions also provide for security clearance for union representatives to classified information where reasonably expected.

DOE Order 5632.7A, Chapter 1, section 3, which covers allocation of personnel resources provides, in relevant part:

a. . . . The location and manning of fixed and mobile posts shall be determined using the "Design Basis Threat Policy for Department of Energy (DOE) Programs and Facilities (U);" local vulnerability analyses; characteristics of the facility or site, terrain, and environment; and appropriate Departmental directives. When planning for response times, the delay provided by physical barriers after the

⁴60 FR 67518, section 706.40.

⁵While this section refers to "privately operated DOE installation" I am convinced by the testimony of University witness Richard Vergas that it applies to LLNL.

initial detection of the intrusion shall be considered. Work schedules for protective force personnel shall be developed and monitored on a site-specific basis to provide adequate relief, training time, balanced overtime, and sufficient time off to ensure on-duty personnel work at peak physical and mental effectiveness.

The Superblock

The LLNL consists of a one-square mile area surrounded by a fence and includes a work place for about 8,500 employees. The LLNL is owned by the federal government through DOE. DOE has a operations contract with the University for the latter to operate the LLNL.

Within the confines of the LLNL is the Superblock, nearly the size of a city block with the highest level of security within the LLNL. It is a change in the staffing of PSOs within the Superblock that gave rise to this dispute.

Completely encircling the Superblock is the isolation zone, an area 35 feet wide, with parallel ten foot fences on each side of the zone. Within the isolation zone are several electronic means of detection for persons attempting to gain access to the Superblock. These include the Personnel Intrusion Detection Delay Assessment System (PIDDAS). Closed circuit television cameras provide a 360-degree visual access to the LLNL's central alarm system (CAS). Manned 24 hours a day, the CAS staff can alert PSOs to possible intrusion. In addition, the ground surface of the isolation zone is covered with material to slow down an attempted trespasser who succeeds in overcoming one of the two fences.

At the northeast corner of the Superblock is located the Northeast Tower (NE Tower), and just to the south of the tower is an emergency portal. From the NE Tower can be seen the isolation zone westward to the northwest corner, and southward to the Southeast Bunker (SE Bunker). The SE Bunker lies at the southeast corner of the Superblock.⁶ From this bunker can be seen the isolation zone to the Northeast Bunker and westward to the Southwest Tower (SW Tower). The SW Tower is located on the roof of Building 331 in the extreme southwest corner of the Superblock. About two-thirds the distance from the SE Bunker to the SW Tower is located the south portal. From the SW Tower can be seen the isolation zones eastward to the SE Bunker and northward to the northwest corner of the Superblock.

At the northwest corner is the Northwest Portal (NW Portal), where the main entrance to the Superblock is located. Here persons and vehicles are searched for entrance into the Superblock.⁷ To the east, and slightly south, almost due north of the south portal is the Northwest Bunker.⁸

⁶Manning and duties for this location are the same as for the Northeast Bunker.

⁷At the corner is the tower, another steel and glass enclosure, where the PSO was to observe the fence lines and isolation zones on the north and east side. This position is one that was removed by the action complained of by charging party.

⁸This is a steel room, about eight-by-eight feet, consisting of bullet resisting steel and glass. An armed PSO is stationed there. The officer has a handgun and an auxiliary weapon, a semi-automatic rifle.

Four buildings, of varying, size and height (the highest is three stories high), house program components, and are numbered 331 (one story), 332 (one and two stories), 334 (three stories) and 335 (one story). The buildings provide barrier to full visual access to all the grounds within the Superblock, both from the towers and the bunkers. The walls of the buildings housing the nuclear material are nine inches of reinforced concrete.

Persons attempting to enter the Superblock are first required to enter a telephone booth-like room called a "cane booth," at the NW Portal. The person enters a coded card into a reader head with their personal access number. If the number is acceptable, a second door opens and allows entrance to the search area, which is much like an airport security area. The person steps through a metal detector and items are examined under an x-ray machine.

Vehicles enter the Superblock via a "sallyport" area, again at the NW Portal, where they are searched.

The NW Portal is manned by two officers, one of whom is within the portal and operates the x-ray and sallyport inspections. The officers are separated so that both cannot be compromised at once.

PSOs' duties at the Superblock are to protect classified and SNMs from unauthorized theft, sabotage or other use. The protection is accomplished by assessment and interdiction. Assessment is response to threats of endangerment to the facility and interdiction is exclusionary or denial tactics. Of equal

importance is to prevent the nuclear materials from being moved to the outside. In effect, as Crowder testified, their purpose is to protect the people outside the Superblock.⁹

Other means, electronic and otherwise, are employed by the LLNL to provide detection. As noted, several electronic systems around the area are designed to notify PSOs of intrusion.¹⁰ Upon notice, the PSOs will assess the intrusion and undertake interdiction (i.e., fighting tactics), if appropriate.

Two different shifts operate during the daytime, one from 6:00 a.m. to 3:30 p.m., and a second from 7:00 a.m. to 3:00 p.m. The swing shift covers 3:00 p.m. until 11:30 p.m. and the owl shift is 11:00 p.m. to 7:30 a.m.. PSOs are regularly scheduled for periods of time to shifts within the Superblock and then to shifts outside the Superblock, but within the LLNL.

In May of 1994, the LLNL conducted a series of self assessment tests for reduced costs in the Superblock. It is not disputed that DOE was the initiator in this effort. The DOE and the Vulnerability Analysis Research Group (VARG)¹¹ were

⁹Indeed, Chowder said the duty of the PSO was "... more to protect the people outside of the superblock from the ramifications of it getting out . . ." Crowder also agreed that the "people outside," includes "the whole world".

¹⁰In a hearing before PERB in 1992, Kasper testified that the PSOs inside the Superblock do not have detection responsibility since the installation of the PIDDAS, an advanced detection system. Their responsibility, said Kasper, is assessment and interdiction, the latter by way of exclusionary or denial tactics.

¹¹VARG is a subgroup within the Safeguards and Security Department which addresses security design of the Superblock and SNM.

responsible for the analysis of measures to find an tolerable level of security to reach lower costs at the Superblock. This analysis involved assumption of "the worst case scenario," information about which the University claimed was classified.¹² The test results led the University to conclude that fewer PSOs could be used within the Superblock.

After PSOA's certification by PERB, the parties first met in November of 1994, and discussed ground rules. Proposals sunshined by either side did not include any staffing changes. The January 1995 Staffing Changes Announcements

On the morning of January 5, 1995, the LLNL announced to laboratory employees, but not PSOA, changes to staffing at the Superblock. These changes were components of the A-1 option, one of many designed to reduce costs of the LLNL.¹³ A general

¹²PSOA had, by subpoena duces tecum, called for several named documents that went to the established risk determination. Among these were the Vulnerability Assessment Probability of Occurrence Policy and the Design Basic Threat Policy. The University claimed the documents were classified and would not reveal their contents. PSOA requested and the administrative law judge (ALJ) granted exclusion of any testimony by University witnesses on information that was contained within the documents withheld by the University. (See Code of Civil Procedure section 2023(b)(3).) While the University claims denial of opportunity to put on a defense to the charge by the exclusionary ruling, this proposed decision does not question either the means by which the determination of an acceptable staffing level was made, or the conclusion itself. The PSOA concurred in this limitation. Hence, application of the rule of exclusion did not affect the University's defense in this case.

¹³The A-1 option came about, said Kasper, as a result of a DOE "cost effectiveness review." Kasper testified that the cost of maintaining the plutonium facility in Superblock was exceeding the cost of research that was being conducted. In an effort to reduce the cost, DOE directed a cost effectiveness review.

announcement that same day indicated the change was being made to reduce the cost of Superblock security. Implementation of the plan was stated to "result in substantial cost savings to the defense and nuclear technologies program."

On that same day, the parties meet for the second negotiating session. At the bargaining session, PSOA raised the A-1 option as affecting workload and safety.

Crowder's testimony is somewhat vague as to the precise demand made at the table. It appears that he requested negotiations on workload and safety and the effects of the change. Kasper confirmed that there were discussions about "safety issues and workload."

Crowder's testimony does not, however, provide a basis for finding that PSOA requested to negotiate overtime pay at the January 5 meeting.

Robert Perko (Perko), representing the University, credibly testified that PSOA never mentioned economic issues. Perko inquired as to which labor codes covered the issue and that the changes were classified and not subject to bargaining.

PSOA requested all documents relating to the change and Perko responded that they were classified. PSOA was told that setting the level of security was the University's right and not bargainable. The LLNL announced that Kasper would make a presentation at the next bargaining session.

At the next session Kasper spoke of the history of the Superblock. The University refused to bargain over the impact of the reduction or talk about the impact on workload.

The Staffing Changes

Before the change announced on January 5, 1995, there were 13 PSO positions on day shift, and 11 on each the swing and owl shifts.¹⁴ Shift differential salary bonus of 7-1/2 percent and 15 percent were given to swing and owl shift PSOs, respectively.

There were two officers in the NW Portal,¹⁵ one in the Northwest Bunker, one in the NE Tower, one in the SE Bunker and one in the SW Tower. In addition, there was one officer in increment three post, one officer in increment three search and one temporary position at increment one.¹⁶ Day shift had three roving foot patrols, and swing and owl shifts had two roving foot patrols each.

¹⁴The change actually occurred the following April. Those swing and owl shift employees whose positions were cut from the Superblock were reassigned to the day shift outside of the Superblock, losing shift differentials, and assuming other duties.

There are a number of positions outside of the Superblock that are paid from funds other than defense. All those inside the Superblock as well as three motor patrols outside the Superblock fence are paid for by defense and are part of the minimum requirement.

¹⁵The portal officer and the portal entry officer.

¹⁶Increment designations mean positions of officers located inside buildings. Increment three is the main entrance to the Radioactive Materials Area (RMA), manned by two officers, at the east end of Building 332. Increment one is in the central part of Building 332.

Under the A-1 plan, two positions, the NW Portal post officer position, and the NW Portal entry search officer, would be restricted. Both previously covered 24 hours a day, seven days a week, and as a result of the plan were thereafter staffed only on Monday through Friday, 0600 to 1900 hours. The NW Portal is otherwise closed at night and on week-ends.

Twenty-four hour coverage at the NW and SW Towers was eliminated.

According to Crowder, the change included the elimination of the NE Tower officer who formerly operated the emergency entrance portal. The emergency entrance portal is now manned by the SE Bunker officer who must exit his bunker and go by foot to the emergency entrance portal to manually operate the gate.

The second and third of three day shift foot patrol positions were eliminated. The second of two swing and owl shift foot patrol positions were eliminated.

In addition, there were four motor patrols surrounding the Superblock. According to Crowder, the change was to three motor patrols. This testimony is however, very vague, and accordingly, I decline to make a finding with respect to the motor patrols surrounding the Superblock.

The change also caused a loss of overtime by one-half hour every day, for certain Superblock officers. The regular shift was eight and one-half hours per day, one-half hour of which was a lunch period for which there is no pay. However, certain Superblock officers were not relieved for the lunch period so

they received one half-hour pay for their lunch period. Prior to the change, 14 positions inside the Superblock were designated as "no code" meaning they received pay for the lunch period.¹⁷

In addition to the changes described above, Crowder-described the other impacts as follows:

The NE Tower and SE Tower officers were removed from "hardened" quarters, safe for personal reasons, thus PSOs could not assess nor interdict from those locations. As a consequence, foot patrol officers, who formerly did not perform those duties were required to assume them.

This, combined with the elimination of foot patrol officer two on the swing and owl shifts, encumbered the foot patrol officer number one and the sergeant (not a member of the unit) with additional duties. This was described in the notice issued by the University on January 5, 1995, where it was stated that the sergeant would assume the responsibility to insure the NW Portal was properly secured and all alarms are set when the

¹⁷At the first day of hearing, in response to charging party's opening statement on the matter, the University raised objection to and moved to strike any reference to a change in overtime payments. The objection was that prior to the hearing PSOA had only raised issues of safety and workload, and had never raised the overtime issue. The University requested a recess to gain an opportunity to prepare evidence on the issue.

The ALJ noted that the hearing was scheduled for four days, and that he was prepared to go four days, and for the moment, denied the motion. The University did not raise concern again during the hearing about overtime pay for the worked lunch period, and in fact, cross examined Crowder about the issue.

portal is not manned. Also, the sergeant would assume escort responsibilities.

Crowder testified that prior to the elimination of the second foot patrol officer positions on the swing and owl shifts, foot patrol officer one would handle escorts and alarm assessments with the sergeant. Foot patrol officer two provided breaks to all the other posts within the Superblock, performed vehicle searches at the NW Portal and additional duties assigned by the sergeant. After the change, all duties of the foot patrol officer two position were assumed by the foot patrol officer one.

Before the change, foot patrol officer one escorted persons within the RMA and handled alarm assessments with the sergeant. Foot patrol officer two was to do searches at the NW Portal for vehicles who came during the swing or owl shifts, gave breaks to all the other posts within Superblock and performed miscellaneous duties assigned by the sergeant. After the change, the foot patrol officer one had to assume those duties formerly done by foot patrol officer two.

As noted, before the change, the NW Portal was manned 24 hours a day, seven days a week. It now closes at 7:00 p.m. as a result of the change. As before, maintenance and hazards control personnel need access twice a night through the NW Portal, thus, foot patrol officer one and the increment officer have to open up the NW Portal to allow access.

When those personnel have to do a walk-through of the storage area, increment search and foot patrol officer one have

to open up the NW Portal, search them, allow them in and secure the NW Portal, then they must open up increment three, their normal duty before January 5.

Both maintenance and hazard control personnel regularly come at once. Where before each of the two foot patrol officers would escort each of the two personnel into the Superblock, now foot patrol officer one must escort one and then return to escort the other.

Crowder said the "fighting" duties have increased because of the reduction in manpower. There has been no changes in the policies on use of deadly force or expectations of officers in the instance of engagement. This means, said Crowder, the PSOs have to "fight twice as hard," against any intruder.

No PSOs were laid off as a result of the reduction in personnel covering the Superblock. Those officers whose positions were eliminated inside the Superblock under the A-1 option were transferred to duties outside the Superblock and paid from a different category of funding. Hence, reduction in expenses within the Superblock was realized.

No one has ever tried to scale the fence surrounding the Superblock. No one has tried to shoot a weapon into the Superblock.

ISSUES

The issue in this case is whether the University violated the HEERA when it unilaterally reduced the staffing of PSOs within the Superblock and or when it eliminated overtime payment for certain PSOs for work during lunchtime?

CONCLUSIONS OF LAW

Section 3570 of HEERA imposes upon the University the duty to meet and confer with exclusive representatives on all matters within the scope of representation.

The scope of representation for the University, means "and is limited to, wages, hours of employment, and other terms and conditions of employment."¹⁸ 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.

Section 3562(q)(4) further provides that:

. . . All matters not within the scope of representation are reserved to the employer and may not be subject to meeting and conferring, provided that nothing herein may be construed to limit the right of the employer to consult with any employees or employee organization on any matter outside the scope of representation.

PERB precedent is clear that the employer's failure to meet and negotiate in good faith with the exclusive representative about a matter within the scope of representation is unlawful.

¹⁸Section 3562 (q) .

Moreover, a unilateral change in terms and conditions of employment within the scope of representation, is, in the absence of 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.) These principles apply to the University as well. (Regents of the University Of California (1987) PERB Decision No. 640-H (Regents).)

The duty arises once a firm decision has been made. (Mt. Diablo Unified School District (1983) PERB Decision No. 373; Regents.) Under the Educational Employment Relations Act (EERA),¹⁹ where the scope language is different, PERB has developed the following test where a non-enumerated subject will be found to be within the scope of representation if: (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment; (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission. (Anaheim Union High School District (1981) PERB Decision No. 177, cited with approval

¹⁹EERA is codified at section 3540 et seq.

by the California Supreme Court in San Mateo City School District et al v. PERB (1983) 33 Cal.3d 850, 864 [191 Cal.Rptr. 800].)

Whether a violation of HEERA has occurred depends on whether the decision to change the staffing levels of PSOs within the Superblock, or the effects of that change, are within the scope of representation.

The Decision To Change Staffing Level

The University is excused from bargaining about the decision to change PSO staffing levels in the Superblock if either of the following circumstances are met: (1) staffing levels fall within the "merits, necessity, or organization of any service, activity or program" and are excluded from negotiability under section 3562(q); or (2) manning levels do not constitute wages, hours, or other terms and conditions of employment.

The PSOA argues that under First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705] (First National) an employer's decision to reduce the size of a particular operation is bargainable if motivated by labor costs. The University contends the case stands for the opposite point.

First National addressed the employer's obligation to negotiate its decision to terminate a janitorial services contract with a rest home. The rest home was one of several that the employer, by contract, provided services. What the Supreme Court said was:

We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons

outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is not part of section 8(d)'s "terms and conditions," . . . over which Congress has mandated bargaining. [Fn. omitted, emphasis in original.²⁰]

In Arcata Elementary School District (1996) PERB Decision No. 1163, the Board cited, among others, First National for the proposition that the National Labor Relations Board has excluded managerial decisions "which lie at the core of entrepreneurial control from the scope of representation unless the decision is based upon labor costs."

The Board went to expound the test as applied to a school board's decision to reduce the hours of vacant positions as follows:

. . . Such a decision which reflects a change in the nature, direction or level of service falls within management's prerogative and is outside the scope of representation. Conversely, a decision to change the hours of a vacant position which is based on labor cost considerations and does not reflect a change in the nature, direction or level of service, is directly related to issues of employee wages and hours and is within the scope of representation. [Fn. omitted.]

In this case the decision to change the staffing level was clearly predicated on labor costs. DOE mandated the VARG analysis to reduce costs and the LLNL clearly implemented the change to reduce the cost of security within the Superblock.

²⁰The court went on to observe that the decision to halt work at the specific location "represented a significant change in petitioner's operations, a change not unlike opening a new line of business or going out of business entirely."

Yet, the decision to reduce the staffing level within the Superblock also constitutes a determination of level of service to be provided. This type of decision was recognized by PERB in Arcata to remain within the prerogatives of management. Moreover, in Mt. Diablo Unified School District (1983) PERB Decision No..373, the Board held that staffing levels were within managerial prerogative, and thus not negotiable.

There is additional support for a conclusion that the decision to change the staffing level of security inside the Superblock is within managerial prerogatives. The University argues that the decision to reduce staffing at the Superblock is preempted by federal law, and relieves the University from meeting and conferring about the decision to change staffing levels.

Citing the section of the Code of Federal Regulation set forth above, the University relies on California Federal S&L Assn v. Guerra (1987) 479 U.S. 272 [93 L.Ed.2d 613] which holds that the United State Constitution's supremacy clause gives federal law supersession over state law (1) when Congress, within constitutional limits, preempts state law by so stating in express terms; (2) by implication, where the scheme of federal regulation is so sufficiently comprehensive to make reasonable the inference that Congress "left no room for" supplementary state regulation; or (3) where there is an actual conflict between state and federal law.

In Boyle v. United Technologies Corp. (1988) 487 U.S. 500 [101 L.Ed.2d 442], the preemption doctrine was extended by the Supreme Court to those situations where:

. . . [A] "significant conflict" exists between an identifiable "federal policy or interest and the [operation] of state law" [citation] or the application of state law would "frustrate specific objectives" of federal legislation, . . .

DOE's authority, under the Atomic Energy Act to control possession, use and production of atomic energy, includes regulation enactment regarding atomic energy.

The cited regulation gives DOE absolute and final decision making over security and expressly exempts from collective bargaining between management and labor the "security rules" and "their administration."

Here, urges the University, the regulations place "all matters of security" under federal control and "all matters of security" must include decisions of how, where and when security forces are to be stationed.

It further argues that a requirement under HEERA to bargain staffing decisions would inevitably conflict with federal authority. In this case, it would mean that any decision concerning number or placement of officers would have to be bargained because there would arguably always be an impact on "safety and workload." A failure to bargain could result in an order to restore the status quo ante with respect to staffing.

This would necessarily interfere with DOE's authority to determine the level of security it wants. It is not possible to

place these issues on the bargaining table or under PERB's jurisdiction, without interfering with federal authority and federal interests, argues the University.²¹

In San Jose Peace Officers Assn. v. City of San Jose (1978) 78 Cal.App.3d 935 [144 Cal.Rptr. 638],²² the court of appeal reviewed the negotiability of a city's policy on use of force by policemen. The court concluded California law on the question of whether the decision is bargainable rests on whether the issue "primarily involves the workload and safety of the men ('wages, hours and working conditions') or the policy of fire prevention of the City ('merits, necessity or organization of any governmental service')." (Emphasis in original.)

The court of appeal stated:

. . . Unlike the normal job in the private sector, or indeed, the job of a fire fighter, police work presents danger from third parties, rather than from dangerous working conditions. Thus the employer cannot eliminate safety problems merely by purchasing better equipment or by increasing the work force, as in Fire Fighters. The danger posed to a police officer by a suspected criminal must be balanced against difficult considerations of when an escaping criminal should pay the price of death for

²¹In Regents of the University of California v. Public Employment Relations Board (1988) 485 U.S. 589 [99 L.Ed.2d 664], the United States Supreme Court held that the federal postal regulations precluded PERB's efforts to hold the University in violation of HEERA for its refusal to process a union's mail. The union's mail was found not to fall within exemptions from mail carrying under the regulations relied upon by PERB.

²²The University cites Los Angeles Community College District (1988) PERB Decision No. HO-U-374 [12 PERC 19174], for the proposition that PERB has adopted the premise of San Jose. That was an ALJ decision, however, which has no precedential value.

ignoring a peace officer's command to stop. Viewed in this context, the safety of the policeman, as important as it is, is so inextricably interwoven with important policy considerations relating to basic concepts of the entire system of criminal justice that we cannot say that the use of force policy concerns "primarily" a matter of wages, hours or working conditions.

Here, the staffing level is tantamount to the level of security that the DOE will accept for protection of SNM. This level of protection is not only from invasion, for insiders, but more importantly to prevent removal of SNM, for protection of the world outside the Superblock. This is a management decision that should not be subjected to the give and take of collective bargaining.

The determination of how many PSOs are to be on shift at any given time, or location, is a matter of determination of the necessity and/or organization of the service of protecting the Superblock.

I conclude that the decision to reduce the staffing level in the Superblock is non-negotiable on the premise that the determination by DOE of the acceptable security level is preempted by federal law. Further justification for this conclusion is that the HEERA prohibits negotiations on the necessity, or organization of any service established by the University.

The Effects of the Decision as Bargainable

PSOA tentatively recognizes that the decision to reduce staffing may not be negotiable, but argues that the impact of

that decision is negotiable. This contention is in accord with National Labor Relations Board (NLRB) policy and PERB decisions in other areas where the decision to layoff, for example, is a management prerogative, but the effects of the layoff are within the scope of bargaining. (See First National; Newark Unified School District (1982) PERB Decision No. 225.)

The exclusionary language of HEERA also suggest legislative intent that organization decisions are out of scope, yet the effects of the decision are bargainable. Specifically, section 3562(q)(1) exempts from the scope of representation, "the merits, necessity, or organization of any service, activity, or program established by [the regents]" but carves out of that exemption the "terms and conditions of employment of employees who may be affected thereby." (Underscoring added.)

PSOA argues that three effects of the decision to reduce staffing are within the scope of negotiations. They are safety, workload and wages.

PSOA relies on Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507] for the proposition that safety and workload are within the scope of negotiations. There, the Supreme Court was faced with language somewhat similar, but as noted, in a very barren factual setting.

Under the city charter, the employer was obligated to bargain "wages, hours and working conditions," but did not have to bargain matters involving the "merits, necessity or organization of any governmental service."

The court was being asked to consider the negotiability of union proposals that were otherwise subject to arbitration, one of which was a staffing proposal.

The city contended that the staffing proposal would invade the merits, necessity or organization of the fire department.

The Supreme Court followed NLRB precedent in holding that workload and employee safety are subjects of bargaining. However, as the University points out, the court actually ruled that it was up to the arbitrator to decide the extent to which the union's man-power proposal primarily involved the "workload and safety of the men ('wages, hours and working conditions') or the policy of fire prevention of the City ('merits, necessity or organization of any governmental service')." Because the union had abandoned a proposal for a new fire house and more equipment, and instead accepted a recommendation that the staffing schedule in effect be unchanged during the term of the agreement, the court refused to rule that a proposal of the latter type would invade managements rights as to "merits, necessity, or organization".

In this case, it is not possible to ascertain the extent to which negotiating about either safety or workload issues would compromise the managerial prerogative of staffing levels. PSOA was never given an opportunity to advance a proposal by which that question could be answered. Rather, the University, without notice to PSOA, announced the change and refused to meet and

confer about safety or workload, clearly effects of the staffing level change.

The University argues that PSOA failed to request to meet and confer with sufficient specificity to establish a prima facie case of the University's refusal.

In Newman-Crows Landing Unified School District (1982) PERB Decision No. 223, PERB held:

. . . While it is not essential that a request to negotiate be specific or made in a particular form, [citations] it is important for the charging party to have signified its desire to negotiate to the employer by some means

The Board further stated:

In other words, a valid request will be found, regardless of its form or the words used, if it adequately signifies a desire to negotiate on a subject within the scope of bargaining. . . .

Here, PSOA requested discussion on workload and safety consequences of the decision to reduce the staffing level at the Superblock. The University refused to discuss those issues on the grounds that the staffing level was not bargainable. The last premise is correct, but the University should have ascertained the issues PSOA was concerned about. Following its unilateral decision to change the staffing level which impacted workload and safety issues, the University refused to discuss those issues. It should have made a good faith effort to seek clarification of what it perceived to be questionable subjects for meet and confer. (See Healdsburg Union High School District

(1984) PERB Decision No. 375; Regents of the University of California (1985) PERB Decision No. 520-H.)

Here, the University took a firm position that staffing levels was a management prerogative that precluded discussion of safety and workload issues. As the above analysis shows, both issues are in fact subject to the scope of meet and confer. Hence, the University's refusal was a violation of the HEERA.

Overtime

As PSOA argues, wages includes overtime compensation. (Oakland Unified School District (1983) PERB Decision No. 367.) In this case, the University unilaterally terminated the practice of paying one-half hour overtime to certain PSOs within the Superblock.

The University advances several arguments against liability on the overtime issue. It contends that PSOA never raised any economic issues before the first day of hearing, and should be estopped from raising the issue at hearing.

The University contends that the overtime issue is properly relegated to a separate unilateral action upon which the PSOA should have filed a separate charge, and having failed to do so, renders the charge untimely.

Both arguments are rejected. PSOA's reaction to the University's change, under the facts of this case, is irrelevant as the University's action precluded an assessment of PSOA's conduct. It is the gravamen of harm here that the University

took action without notice to PSOA, not PSOA's failure to request bargaining the overtime issue.

In addition, how the decision to terminate the overtime entitlement was or is separate from the decision to reduce staffing levels is known only to the University. It presented no evidence of such separation at the hearing. The testimony of Crowder is undisputed that at the same time the staffing levels changes were implemented, the overtime payment stopped. It cannot be discerned that the decision to terminate the overtime payment was not part of the decision to reduce staffing levels. Crowder's testimony that the LLNL was able to provide coverage by the officers made available as a result of the transfer to locations outside the Superblock was not disputed by any University evidence.

The decision to reduce manning levels was predicated upon a determination to reduce cost of security. The cost of payment of overtime for the lunch period was saved by its elimination. There is no evidence to support the University's contention that the change was not a "byproduct or direct consequence of the reduction in the Superblock staffing, but the result of a conscious decision by management that it would not longer pay for the overtime."

At hearing, and inferentially in its post-hearing briefs, the University contends that it was not given an opportunity to defend against the overtime issue. Yet the University never

raised the issue during the hearing, other than following PSOA's opening statement.

At the time the ALJ denied the motion to strike, the hearing was in the first of what was expected to be a four day hearing, during which the University could have further explored the inability to present a defense to the overtime issue. It did not. The hearing concluded at the end of the second day. The University did not raise the inability to defend posture before the end of the hearing.²³

It is concluded that the University violated section 3571(c) of the HEERA when it refused to meet and confer over workload and safety impacts of the change in staffing levels, and when it unilaterally, and without notice to PSOA, eliminated the practice of overtime payment to officers who were required to work during their lunch break. This conduct also interfered with the officers rights to be represented by their exclusive representative in violation of section 3571(a).

REMEDY

Section 3543.3 empowers PERB to

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

²³The ALJ stated that he would do whatever he could to provide sufficient opportunity to the University to defend its case. As noted, the University did not allude to the problem again in the balance of the hearing.

It has been found that the University breached its obligation to meet and confer in good faith with PSOA by refusing to meet and confer with PSOA about the effects of a change in staffing levels on workload and safety, in violation of section 3571(c). The University also breached its meet and confer obligation by unilaterally terminating the practice of overtime payment for lunch time worked by officers in the Superblock. By the same conduct, the University interfered with the right of employees to be represented by their chosen representative in their employment relations with the University, in violation of section 3571(a). It is appropriate to order the University to cease and desist from such activity in the future.

PSOA requests that the University be ordered to restore the staffing levels that prevailed before January 5, 1995. It has been found, however, that the University was under no obligation to meet and confer with PSOA about the decision to reduce the staffing level within the Superblock. Thus, no restoration of the status quo ante is merited.

The University was, however, obliged to negotiate the effects of the decision to reduce the staffing level.

PSOA requests back pay for the officers who remain within the Superblock and are no longer receiving the one-half hour overtime. It also requests back pay for those officers who were removed from the Superblock as a result of the decision to reduce the staffing level, and as a consequence of their removal from

the Superblock, no longer have the opportunity to earn the one-half hour overtime.

As to the first group, those officers remaining in the Superblock, it is appropriate to order the University to make whole those officers within the Superblock, affected by the change. (See Laguna Salada Union School District (1995) PERB Decision No. 1103, and cases cited therein.) They shall be made whole for overtime lost since the change was put into place. Such back pay shall be augmented by interest at ten (10) percent, per annum, to the time of payment.

As to the second group of officers, those who lost the opportunity for the overtime payment because of the transfer out of the Superblock as a result of the reduction in staffing levels, a standard back pay order is inappropriate because it has been found that the University did have the sole authority to make the decision to reduce the staffing level within the Superblock. To award a standard back pay to this group of officers would usurp the University's authority to reduce the staffing level. As has been found, however, the University did have an obligation to bargain the effects of the decision to reduce the staffing level. One such effect of the decision to reduce the staffing level was to cause officers whose Superblock positions were eliminated to lose overtime opportunity. In this instance, in order to restore the parties to a somewhat closer bargaining equality, a special back pay order is appropriate. (See Placentia Unified School District (1986) PERB Decision

No. 595; Transmarine Navigation Corporation (1968) 170 NLRB 389
[67 LRRM 1419] .)

It is also appropriate that the University be required to post a notice incorporating the terms of the order. The Notice should be subscribed by an authorized agent of the University, indicating that it will comply with the terms thereof. The Notice shall not be reduced in size. Posting such a notice will provide employees with notice that the University has acted in an unlawful manner and is being required to cease and desist from this activity and will comply with the order. It effectuates the purposes of HEERA that employees be informed of the resolution of the controversy and will announce the readiness of the University to comply with the ordered remedy. (Davis Unified School District, et al. (1980) PERB Decision No. 116; Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to the Higher Education Employer-Employee Relations Act (Act), Government Code section 3563.3, it is hereby ordered that the Regents of the University of California (Lawrence Livermore National Laboratory) (University) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer with the Lawrence Livermore National Laboratory Protective Service Officers Association (PSOA) about the effects of a change in

staffing levels on workload and safety, and by unilaterally eliminating overtime payment for lunch periods for officers inside the Superblock.

2. Denying bargaining unit employees the right to be represented by PSOA in their employment relations with the University.

B.. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Pay to officers within the unit working within Superblock one-half hour overtime consistent with the past practice, and in addition, pay to such officers back pay in the amount of one-half hour overtime per work day from the time the practice was curtailed. Retroactive sums paid to such employees shall be subject to interest at the rate of 10 percent per annum.

2. Beginning 10 days after this Proposed Decision becomes final, pay to officers who would have worked in the Superblock and would have earned one-half hour overtime, but for the elimination of the in-Superblock positions, the rate of pay for the overtime they would have earned until: (1) the date the University bargains to agreement with PSOA regarding the impact of its decision to reduce the staffing level within the Superblock; or (2) the date the University and PSOA meet and confer to a bona fide impasse; or (3) the failure of PSOA to request bargaining within 10 days after this Decision is final or to commence negotiations within 5 working days of the University's notice of its desire to meet and confer; or (4) the subsequent failure of PSOA to meet and confer in good faith.

3. Within ten (10) working days of service of this proposed decision, post at all work locations at LLNL where notices to employees customarily are placed, copies of the Notice attached as an appendix hereto. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that said Notices are not reduced in size, altered, defaced or covered by any other material.

4. Notify the San Francisco regional director of the Public Employment Relations Board, in writing, of the steps the University of California has taken to comply herewith in accordance with her instructions.

Pursuant to California Code of Regulations, title 8, 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 Cal. Code of Regs., tit. 8, sec. 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 set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served

concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.

Gary Gallery
Administrative Law