STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA NURSES ASSOCIATION,	)	
	)	
Charging Party,	)	Case No. LA-CE-413-H
	)	
v.	)	PERB Decision No. 1255-H
	)	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)	March 20, 1998
	)	
	)	
Respondent.	)	
	)	

Appearances: Eggleston, Siegel and LeWitter by M. Jane Lawhon, Attorney, for California Nurses Association; Office of the General Counsel by Susan H. von Seeburg, Attorney, for The Regents of the University of California.

Before Johnson, Dyer and Amador, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by both The Regents of the University of California (University) and the California Nurses Association (Association) to a PERB administrative law judge's (ALJ) proposed decision (attached). In his proposed decision, the ALJ held that the University violated section 3571(a) and (c) of the Higher Education Employer-Employee Relations Act (HEERA)[1] when it hired

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

> It shall be unlawful for the higher education employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

cardiovascular technicians to perform duties exclusively-performed by unit members, refused to bargain over said change, refused to provide necessary and relevant information to the Association, and discriminated against an Association activist because of his protected activities.

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript, and the University and Association's exceptions and responses to exceptions. The Board finds the ALJ's findings of fact and conclusions of law to be free from prejudicial error and adopts them as the decision of the Board itself.

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 (University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a) and (c). The University violated section 3571(c) by unilaterally transferring bargaining unit work to employees outside of the bargaining unit without providing the California Nurses Association (Association) with notice and an opportunity to bargain over this issue and when it failed to

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> 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.

provide necessary and relevant information upon the Association's request. This same conduct also interfered with the right of unit members to be represented by the Association in violation of section 3571(a). It is also found that the University retaliated against Michael Leptuch (Leptuch) for his involvement in protected activities. This action violated section 3571(a).

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

A. CEASE AND DESIST FROM:

1. Unilaterally transferring duties of bargaining unit employees outside of the bargaining unit, failing to provide relevant and necessary information, or retaliating against employees for their exercise of rights protected by the HEERA.

2. By the same conduct, denying bargaining unit employees the right to be represented by the Association.

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

1. Upon demand of the Association, meet and confer about duties of registered nurses (RN).

2. Restore the conditions of RN duties that prevailed prior to the hiring of Cardiovascular Technicians.

3. Remove and destroy the August 15, 1994 letter of reprimand to Leptuch.

4. Within thirty-five (35) days following the date 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, indicating that the University will comply with the terms of this Order. 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.

5. 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 the director's instructions. All reports to the regional director shall be concurrently served on the Association.

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

Members Johnson and 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. LA-CE-413-H, California Nurses Association v. The Regents of the University of California, in which all parties had the right to participate, it has been found that The Regents of the University of California (University) has violated Government Code section 3571(a) and (c) of the Higher Education Employer-Employee Relations Act (HEERA). The University violated section 3571(c) by unilaterally transferring bargaining unit work to employees outside of the bargaining unit without providing the California Nurses Association (Association) without notice and an opportunity to bargain over this issue and when it failed to provide necessary and relevant information upon the Association's request. This same conduct also interfered with the right of unit members to be represented by the Association in violation of section 3571(a). It is also found that the University retaliated against Michael Leptuch (Leptuch) for his involvement in protected activities. This action violated section 3571(a).

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

A. CEASE AND DESIST FROM:

1. Unilaterally transferring duties of bargaining unit employees outside of the bargaining unit, failing to provide relevant and necessary information, or retaliating against employees for their exercise of rights protected by the HEERA.

2. By the same conduct, denying bargaining unit employees the right to be represented by the Association.

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

1. Upon demand of the Association, meet and confer about duties of registered nurses (RN).

2. Restore the conditions of RN duties that prevailed prior to the hiring of Cardiovascular Technicians.

3. Remove and destroy the August 15, 1994 letter of reprimand to Leptuch.

Dated: _____ THE REGENTS OF THE UNIVERSITY OF CALIFORNIA

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA NURSES ASSOCIATION,	)	
	)	
Charging Party,	)	Unfair Practice
	)	Case No. LA-CE-413-H
v.	)	
	)	PROPOSED DECISION
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,	)	(6/3 0/97)
	)	
Respondent.	)	
	)	

Appearances: Eggleston, Siegel and LeWitter, by M. Jane Lawhon, Esq., for California Nurses Association; Office of the General Counsel by Susan von Seeburg, University Counsel, for the Regents of the University of California.

Before Gary M. Gallery, Administrative Law Judge.

PROCEDURAL HISTORY

This case examines the impact of the University's appointment of cardiovascular technicians (CVT) whose duties overlapped with incumbent registered nurses (RN),. and a letter of reprimand given to a RN who complained of tasks being performed by the technicians.

On December 9, 1994, the California Nurses Association (CNA) filed an unfair practice charge against the Regents of the University of California (University or UC). After two subsequent amendments to the unfair practice charge, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) investigated the matter and issued a complaint on June 12, 1995.[1]

[1]Prior to issuing the complaint, the general counsel issued a refusal to defer the matter to the grievance machinery of the parties' memorandum of understanding.

The complaint alleged four causes of action against the University. The first three were that: (1) in July of 1994, the University unilaterally transferred duties of scrub nurses to employees outside of the bargaining unit; (2) on September 14, 1994, the University refused CNA's request to meet and confer on the decision and effects of the change in policy on duties of scrub nurses; and (3) on or about August 5, 1994, CNA requested information relevant and necessary to discharge its duty to represent employees. The information requested was job descriptions for CVTs and RNs; any modifications of RN duties; and any communications with outside agencies concerning the use of CVTs. It was alleged that the University did not respond to CNA's request until November 28, 1994, and then it only provided the CVT job description. The conduct described above was said to be a violation of the Higher Education Employer-Employee Relations Act (HEERA or Act) section 3571(a), (b) and (c).[2]

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[2]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. In relevant part, section 3571 states that it is unlawful for the University to:

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

The fourth cause of action alleged that the University-issued a written warning against Michael Leptuch (Leptuch) because he exercised rights guaranteed by HEERA by objecting on behalf of RNs to a CVT's performance of duties previously performed only by RNs. This action was said to be a violation of section 3571(a).

The University filed its answer on July 24, 1995, denying certain allegations and any violation of HEERA and raising defenses that will be considered in other parts of this proposed decision.[3]

A settlement conference did not resolve the dispute. Formal hearing was held on July 22, 23, 24 and 25, and October 25, 1996, in Los Angeles, California. With the filing of post-hearing briefs on March 6, 1997, the matter was submitted for decision.

FINDINGS OF FACT

The University is a higher education employer within the meaning of the Act. CNA is the exclusive representative of nurses employed by the University. The University operates highly specialized laboratories for heart patients. In 1993, at the University's Los Angeles Medical Center there were three laboratories, the adult cardiac catherization laboratory (ACCL), the 4 West Procedure Laboratory (4West Lab) and a pediatric

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

[3]The University again moved for dismissal on deferral grounds. That motion was denied by the undersigned on July 2, 1996.

catherization laboratory, all dedicated to heart patients.[4] Both diagnostic and interventional procedures are performed in the labs.

For all times relevant, Lawrence Yeatman (Yeatman) has served as director of the ACCL and Frances Ridlehoover (Ridlehoover) has been associate director of the medical center. Until the summer of 1994, Laboratory Technologist Heidi Noriyuki (Noriyuki) was ACCL manager. Around June of 1994, Beth Schraad (Schraad) became the nurse manager of ACCL.[5] Leptuch is an employee of the University within the meaning of the Act and has been employed full-time as an RN in the ACCL since 1988. For all times relevant, Jose Sanchez (Sanchez) has been a radiation technologist at the ACCL.

As more particularly described below, in the spring of 1994, following an earthquake in Los Angeles, the University hired CVTs into the ACCL and the 4West Lab. Their duties included some of those previously done by RNs.

A second laboratory was planned for completion in September 1994. Because of the tremendous increase in patients and the

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[4]This case focuses on the ACCL, however, some evidence was received on the 4West Lab. The only common procedure for both labs is the right heart catherization. Pacemaker insertions, bronchoscopies, and cardioversions are performed in the 4West Lab. While radial technologists do not work in 4West, it appears RNs did serve as scrub nurses to assist the attending physician in pacemaker procedures. CVTs later began to scrub and assist in this procedure.

[5]Schraad came from St John's Hospital where she was the catherization laboratory manager.

request of the first lab staff, the contractor's finished the second lab in time for it to open in May 1994.

The Past Staffing Practice

For all times relevant, prior to the spring of 1994, staffing for predominately performed left heart catherization cardiac procedures in the ACCL consisted of the attending physician, a fellow,[6] a radiation technologist, and one or two RNs.[7]

The diagnostic procedures (about 80 percent of the work done in the ACCL) include the left heart catherization where a catheter is introduced into one of the patient's arteries, through the groin or in the arm, and is threaded to the heart and into one of the coronary arteries.[8] Contrast media consisting of a dye is injected into the arteries and x-ray recordings are made tracing the dye. In addition, a 35 millimeter film records the continuous x-ray film.

If a problem is indicated, the patient is scheduled for some interventional procedure such as angioplasty, which comprises 90

[6]A fellow is a medical doctor still in training in the specialty.

[7]It appears that the daily staffing of RNs was such that one commenced work at 7 a.m., a second around 10 a.m. and a third some time later. The effect of this scheduling was such that during the mid-day, there were two RNs on duty.

[8]This procedure includes the use of a sheath, which is inserted into the artery and into which the catheter is inserted. The sheath can be left in the patient for more than one procedure. It remains in the patient after the procedure is completed and is removed when the blood clotting factor is determined to be suitable.

percent of interventional procedures. If no problem is indicated the patient is returned to his room.

Initially, for the diagnostic procedure, the patient comes into the lab on a hospital bed and is moved onto the x-ray exam table. The patient is then hooked up to a blood pressure cuff, a pulse oximeter and a electrocardiogram (EKG) machine. The patient's groin is then shaved. The nurse or other staff then scrub.[9] After scrubbing, the nurse then completes the sterilization of the groin area with a disinfectant and then "draped" the patient with a sterile paper sheet with only the patient's face and the actual surgical field in the groin area exposed. The patient is given an intravenous (IV) under pressure that can be used to inject contrast through a manifold which can also be used to measure pressure.[10] The nurse also usually prepares the medications, such as heparin, an anti-coagulant used to defer the blood's tendency to clot when the catheter is inserted.

Usually, the attending physician and fellow then arrives to commence the procedure.[11] The RN assists both donning their

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[9]Scrub means use of a special sink and brushes where the employee scrubs their hands in a specified fashion for ten minutes. Thereafter the employee dons a sterile gown and sterile rubber gloves and mask.

[10]The manifold is connected to the groin area.

[11]Leptuch's testimony is not that RN's actually assisted the attending physician, but rather they stayed scrubbed until the fellow arrived. He personally has stayed on, but not through the entire procedure. In one incident, Leptuch complained in a grievance that he had arrived ten minutes early and Yeatman called him and asked if he could bring a patient in.

sterile gowns and then break scrub, that is take off their own sterile gown. Thereafter, the RN stands by to administer medications, do charting and monitor the patients vital signs on the available television screens. Meanwhile, the radiation technologist is in the control booth monitoring the procedure and might inject the contrast through the manifold.

Upon completion of the procedure, the attending physician leaves and the fellow prepares to remove the sheath. This process includes ascertaining the clotting time by use of the activating clotting time (ACT) device, and the injection of protamine (to counter-act the heparin and control the bleeding when the sheath is removed). Protamine was drawn up and administered by the nurse, or by the fellow later in the holding room where the patient is taken after leaving the ACCL.

Suturing the sheath was done by the fellow or specially trained RNs.[12] This procedure is designed to tie the sheath in so it will not come out while the patient was waiting for later interventional procedures following the diagnostic procedure.

The CVTs

Prior to 1994, two hospitals in the west Los Angeles area, St. Johns and Santa Monica, had ACCLs staffed with attending physicians and CVTs. It is undisputed that CVTs are not certified by any state agency.

[12]A policy put into effect in 1991 expressly allowed sheath removal by RNs who met certain conditions not relevant here.

Yeatman testified that prior to the January 17, 1994, earthquake, the ACCL was contemplating fewer hours of service by fellows and was considering alternative means of providing assistance to the attending physician.[13] However, the earthquake severely damaged St. Johns and Santa Monica hospitals and they were closed. Within days of the earthquake, Yeatman was meeting with doctors from those hospitals and arranging for their use of the ACCL. Those doctors related that CVTs would lose their jobs at the closed hospitals. By early February, Yeatman had interviewed Alicia Beach (Beach) and Mike Lyman (Lyman), who were CVTs at the time and had been working at St. Johns or Santa Monica hospitals. Beach started in the 4West Lab on February 7, and Lyman around March 1, 1994.

The lab was "fairly swamped," said Yeatman with the increase in patients caused by the closure of the other two hospitals.

In April of 1994, Yeatman generated a job description for CVTs. It described their duties as follows:

> 1. Circulating in cath lab in support of procedures.
>
> 2. Monitoring physiological status of the patient during procedures and operating the physiological recorder.
>
> 3. Removing sheaths in HU, 00U, and hospital units and achieving hemostasis.

[13]There had been underway a program for cross-training staff in the various specialized procedures. For example, Leptuch was assigned to work in the 4West Lab on pace maker installations. There is no evidence of the extent, if any, attending physicians or fellows were involved in this cross-training endeavor.

4. Performing other tasks at the direction of the ACCL Supervisor, such as ordering, stocking, etc.

5. Scrubbing for cases to assist the Cath Attending.

Yeatman testified he gave this to Ridlehoover to begin the process of creating a policy on use of CVT's in the lab.[14]

In June of 1994, the ACCL processed three requisition forms for hiring CVTs to begin by June 23 or as soon as possible.[15] Two more requisitions were completed in August and October for additional CVTs.

RN Duties

During the hearing, the parties used a duty statement to ascertain whether certain procedures related to the ACCL were performed exclusively by RNs.[16] The parties were at odds whether the duty statement is still operative.

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[14]Although titled "Job description", the University never provided CNA with the document until the hearing, and then only through the witness.

[15]The duties to be performed were:

> Provide technical support and patient care assistance for the Cardiac Catheterization Laboratory and Cardio Pulmonary Procedures Laboratory. Assist with preparation of patients for procedures and helping physicians stabilize patients post-procedure.

[16]This policy statement was in effect from July 1988 and specifically referred to the functions as RN duties. The policy also noted that one RN would function as an assistant to the operator and a second RN would serve as a circulating nurse. Leptuch testified that in May of 1994, RNs did not function as assistant to the operator, but rather, that was done by the fellow.

Not in dispute, however, is evidence of RN duties set forth in a performance evaluation given to Leptuch in 1993. The evaluation contained duties of the RN that closely paralleled those set forth in the disputed duty statement.

Primary duties for RNs listed in the evaluation include: prepare room and set up sterile instrument table; review patient chart for consent and lab data; explain procedures, answer questions and establish rapport with patients; administer medications and start IVs; under sterile conditions, prep and drape patients, set up all IV lines, pressure monitoring lines and manifold; assist attending physician as scrub nurse when fellow not available; as circulating nurse, monitor and record patient's vital signs, administer medications and record nursing notes; recognize and react to emergent situations and assist the physician; keep medical records current; and have working knowledge of various equipment such as cardiac output, waters oximeter and pulse oximeter, etc.

I find that certain duties were performed by RNs exclusively, and only incidentally by others. The testimony[17] and

[17]I give great weight to the testimony of Sanchez, Richard Kroesing (Kroesing) and Noriyuki in making these findings. Noriyuki has no interest in the matter as she was never a nurse and is retired. Sanchez is not in the bargaining unit, yet remains at the work setting. Kroesing has moved from the RN classification to a management position. All gave straight-forward and uncontradicted testimony, which, coupled with their absolute interest-free perspective, rendered their observations trustworthy. On the other hand, the ACCL director was contradicted in several respects by the testimony of Sanchez and Lyman, a UC witness. In addition, he displayed a partiality suggesting deep bias against nurses. He denied knowing that nurses had a patient advocacy role, although as a manager it

documentary evidence present a scenario where the RNs routinely performed these services, but on occasion laboratory technician Noriyuki and or the radiation technologist might be called upon to perform these services. Thus, but for exceptional circumstances, these duties were exclusively the duties of RNs:

a. Setting up the catherization table. This duty consists of preparing the table with sheets and equipment before the arrival of the patient.

It is found the catherization table set-up was primarily the duty of the RN. This is based upon the 1988 job description, as augmented by Leptuch's 1993 performance evaluation. In addition, Schraad called Leptuch's attention, in September of 1994, to the fact that this was a primary function of RNs.

On occasion, Noriyuki or Sanchez would set up the table.

After their arrival, CVTs undertook to set up the catherization table.

b. Position patient for catherization procedure. This includes transferring the patient onto the table.

This duty was done by RNs, and on occasion they were assisted by the radiation technologist. After their arrival, CVTs did this chore.

c. Prepare operative site. This task includes washing and shaving the groin area where the sheath and catheter would be inserted into the main aorta. After the shaving, a hygienic

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would be most logical that responsibility be understood. He denied any knowledge of CVTs manipulating catheters, even when Sanchez had reported such an incident to him.

material was swathed onto the area. In addition, IV lines were set up by the RN.

This function was performed by RNs. Neither Noriyuki or the x-ray technologist performed these tasks. After their arrival, CVTs would shave the groin area and drape the patient. CVTs even set up IV lines but were later instructed to cease that chore.

d. Patient supervision during the procedure which includes monitoring all vital signs: EKG, blood pressure, respiration, pulse, temperature, and IV.

The RN had monitoring and charting responsibility. There were others doing charting, however, from different perspectives such as the fellow on procedures and the x-ray technologist on the x-ray machine.

It appears that CVTs undertook some of these chores. According to Leptuch, CVTs hook up monitors, hook up blood pressure and the pulse oximeter, EKG and also change settings on the IV devises.

e. Operate equipment such as the blood gas analyzer, etc., during the procedure.

One component was the blood clotting time which is significant to determine when the sheath may be removed. Prior to May of 1994, only RNs performed this task.[18] After their arrival, CVTs performed the task. According to Beach, a CVT, this was an RN task, but she did it if the RN did not do it.

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[18]According to Leptuch, special training for RNs was required to do this task.

Several other duties, ostensibly in contention during the hearing, appear to be conceded by CNA as not exclusive to RNs. They will only briefly be referenced and the reason for the finding:

a. Comfort patient and provide psychological support.

This duty cannot be said to be the primary duty of the RN. Indeed, the whole staff in contact with the patient ought to be charged with this task. It cannot be found that the attending physician, the fellow, or the x-ray technician would not comfort the patient.

b. Administer medications as indicated by physician.

While it is clear that the attending physician, the fellow and the RNs were authorized to do this, it is not established that, but for the issue of contrast, discussed below, CVT's undertook the administration of medicine.

c. Dress surgical site after completion of catherization.

Leptuch testified that in May of 1994 this was not a regular duty of the RN but rather the fellow would generally perform this function to make sure the sheath was secured. No findings are thus made on this task.

e. Sterilization of all instruments, catheters, and all other supplies used during the procedure.

This job was basically eliminated by the employment of disposable equipment.

Other duties were not established by CNA to be the exclusive work of RNs or that CVTs assumed performing the duties. These included:

f. Maintain operating table and all other equipment in asceptic condition.

g. Calibrate all non-radiologic equipment daily.

h. Keep record of patient status, procedure, complications, and results of procedure.

i. Send blood samples to clinical labs if patient is having surgery or any other indicated tests.

j. Maintain a readily accessible supply of cardiovascular and analgesic drugs.

k. Maintain equipment needed for resuscitation, intubation, and cardiac resuscitation.

Leptuch's Activities

Leptuch has been outspoken about Yeatman. In 1990 he complained about Yeatman's coughing into a clean pan.

In March of 1994, Leptuch wrote to the chief of the cardiology unit complaining that Yeatman was rushing staff. The complaint was to be considered a grievance. A copy went to Ridlehoover.[19]

[19]In this writing, Leptuch wrote that he yelled into the phone "stop rushing the staff". He noted that he was "screaming at Doctor Yeatman" on his way home. He said he had talked to other staff who also complained about Yeatman. He went on to say:

> With his constant meddling and interference, Dr. Yeatman is driving the staff crazy. I want you to put a stop to this. Have him

Leptuch filed a grievance in April of 1994, complaining to Ridlehoover about Yeatman's rushing and verbally "baiting" lab staff. Among other complaints, Leptuch referred to risks associated with physicians starting the procedure before the equipment is ready, and risking sticking the nurse with needles or splashing blood upon them, both HIV dangers.

Sometime in May 1994, a meeting was held in the new lab that had just opened. Leptuch raised the issue of CVTs scrubbing as certified but unlicensed personnel. Yeatman testified that a CVT gave "a fairly succinct but cogent response." Yeatman also stated at that meeting that it was accepted community practice that CVTs scrub.

CVT presence in the laboratory and the duties they performed became a matter of discussion at staff meetings.[20] Leptuch was the informal spokesperson. While Yeatman and Ridlehoover thought

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> leave the staff alone and let them do their jobs! The staff will not tolerate this harassment any longer.
>
> . . . . . .
>
> This is a written notice to management that Dr. Yeatman's hurrying of and constant interfering with the staff is causing mental distress to staff members. The staff expects this to stop. If it does not, please consider this as Step I of the grievance process.

[20]Prior to Schraad's arrival, ACCL staff meetings were called as needed. Schraad, however, issued a schedule of weekly meetings of the ACCL staff.

that Leptuch spoke for himself,[21] it is clear from the testimony of Sanchez and Kroesing, another RN, that Leptuch spoke of issues of concern to RNs and the x-ray technologist. Sanchez and Kroesing as well as Joyce Enomoto, another RN, also spoke on the issues. Leptuch would describe some event where a CVT had performed a task Leptuch thought was beyond their authority and Schraad would say that it was legal. Leptuch later gave Schraad a copy of title 22 and 17 that were copied by Kroesing. Again, the RNs were told that the CVT activities were accepted community practice.

Yeatman came to a meeting and said he knew the CVTs did not have state licenses but that it was a legislative oversight and was being corrected.

Leptuch wrote to the director of nursing Heidi Crooks (Crooks) on July 22 indicating that on his last rotation to the 4West Lab he was asked by the physician to "fluoro" the position of the balloon. He wrote that this was illegal and that he refused to do it. Another nurse did the procedure. He further wrote that CVTs were observed suturing in sheaths, running ACTs, mixing heparin, "panning" the x-ray table, setting up fluoro shots and injecting x-ray contrast. He wrote that he had told his supervisor who told him it was accepted practice. It was illegal, he said, and questions could be directed to the State of California (State) Department of Radiology.

[21]Neither Yeatman or Ridlehoover regularly attended the staff meetings, nor did they testify as to Leptuch's behavior at any meeting in the summer of 1994.

Leptuch also wrote to Dr. Neil Parker (Parker), director of quality management services, on August 2. Parker responded on August 5 acknowledging Leptuch's letter of August 2, and telephone conversation of August 4 expressing the following concerns:

1. Nurses and CVT's panning the table and operating the fluoro switch.

2. CVT's injecting protamine and contrast into coronary arteries through the cardiac catheters.

3. CVT's suturing sheaths in place.

4. CVT's performing laboratory testing specifically ACTs which was previously done by trained RNs.

4. CVT's inserting and manipulating right and left cardiac catheters.[22]

Leptuch also told Yeatman that a CVT had activated the x-ray equipment and panned the table during the procedure.

After investigation, UC determined that, while it may have been community practice, it was not supported by regulations. Therefore, UC curtailed the practice by memo to the staff on August 5, 1994. Yeatman wrote:

> For the present time it is the operational policy of the ACCL that only physicians licensed as operators of xray equipment and radiation technologists may activate xray

[22]Yeatman specifically denied that CVTs manipulated cardiac catheters. In fact, Lyman testified that he did a biopsy. Yeatman denied that CVTs ever inserted catheters. Sanchez described such a situation and testified that he reported the incident to Yeatman.

> equipment for the purpose of making xray images or pan the table. Others in the lab may turn on the equipment and move the image intensifiers into place.

On August 5, 1994, Leptuch filed an "Assignment Despite Objection" form with Schraad, objecting to CVTs doing illegal procedures. In this form, Leptuch alleged that Lyman did an R.V. biopsy, advanced wires into a patient's heart and injected contrast. On the form, he indicated he had notified risk management and the State Department of Health Services.

On August 12, Ridlehoover responded to Leptuch's earlier letter to Crooks regarding RN and CVT functions. She noted a 1993 memo regarding a list of functions nurses could perform with regard to the fluoroscopy equipment. She then outlined a planned review of CVT duties and assignments to insure their compliance with Title 22 of the California Administrative Code. She wrote she was going to establish a committee of physicians and staff to also include review of his letter.

The committee was established in August to review CVT job duties. State regulations were reviewed and Leptuch's concerns were discussed. There was never a publication of the committee's work.

The Adverse Letter

Leptuch got a warning letter from Schraad on August 15, 1994, regarding his alleged "unsatisfactory interpersonal relations and unprofessional behavior" in recent weeks. The letter stated:

On Monday, August 1st 1994 a cardiologist and a cardiovascular technician came to me stating that Mike Leptuch had confronted the cardiologist in the patient care area regarding the cardiologists actions during the procedure (see attached). Both the cardiologist and the cardiovascular technician stated that the confrontation was regarding procedures performed by Alan Vieths that you perceive to be illegal. The Cardiovascular technician was standing at the patient bedside, approximately 15 feet away, and was able to hear your conversation with the cardiologist. He was greatly concerned about the possibility that the patient was also able to hear the statements regarding the perceived illegal behavior. Both of these people stated that the confrontation was presented in a loud, unprofessional and aggressive manner. Confronting co-workers with this type of information in a patient care area with patients who are awake and aware of their surroundings is serious unprofessional behavior. The acceptable and professional behavior is to present this type of information outside the patient care area and/or in an area with no patients present in a non-threatening, beneficial manner.

On August 3, 1994, I was informed by Susan Johnson, Department of Nursing, that she had received a letter, addressed to Heidi Crooks, from you dated July 22, 1994, regarding work policies in the Adult Cardiac Cath Lab. This is the first that I had heard of this letter and its contents. I received a copy of the letter on August 8, 1994. Over two weeks were lost in addressing these concerns due to the delay in sending this letter to another department before the concerns were reviewed by management in Cardiodiagnostics. This is inappropriate and unacceptable. The appropriate lines of communication are 1st - Nurse Manager, 2nd - Manager of Cardiodiagnostics, 3rd - Associate Director of Cardiodiagnostics. All communication of questions, opinions or concerns regarding the Adult Cardiac Cath Lab and the Cardiopulmonary Procedure Room should first follow these lines. This will assist us in the ability to expeditiously address your questions and concerns. In fact, a review of

> your work policy concerns was immediately initiated after first being referred to Associate Director Ridlehoover.

The letter went on to note that during the past five staff meetings July 14, 19, 26, and August 2 and 11, 1994, Leptuch allegedly:

> . . . initially sat in a corner away from the main group and I have had to ask you to join the group. Also during the two most recent staff meetings you have consistently displayed confrontational behavior towards me and have been disruptive to the problem-solving process. During the August 2, 1994, staff meeting you were confrontational on every issue brought to the staffs attention. For example, when I was discussing communication skills you loudly stated, "I want to clarify that - are you speaking directly to me? Because if you are then I want you to know..". Also, when I was discussing room turnaround time you loudly stated "This sounds like something coming from Larry Yeatman, its not true! We work damn hard here!". On August 11, 1994, at the end of the staff meeting you stated that you wanted to discuss lunch breaks, you felt they should be one hour in duration, and that you were not getting your 15 minute breaks. My response was we then need to work on you getting your breaks. You then loudly stated "Well then, you will,be hearing from the Union about this!". When my further response was that this was fine - I would discuss the issue with the Union when they called, you stated in a loud voice "They <u>will</u> be calling!". These are all unsatisfactory interpersonal relations and unprofessional behavior. During staff meetings I expect you to join the group and interact in a positive, beneficial manner in order to address issues brought to the groups attention. If you have an item that you Would like discussed during these meetings, you should speak to me prior to the meeting so that I may add the item to the agenda.
>
> In addition to your conduct at meetings, I have also been advised by another co-worker

> of additional unprofessional comments you have made about me that are disruptive to the work group. Specifically you commented that "she is walking into a hornets nest" and "she doesn't know who she's dealing with" (see attached). This is intimidating and disruptive to the team. Comments of this nature to coworkers while in the work area should be discontinued. [Emphasis in original.]

Schraad invited Leptuch to consult with the staff and faculty service center for free counseling. She then wrote:

> Please be aware that immediate and sustained improvement is necessary. It is expected that your views and opinions be presented so that the impact is useful in building and enhancing the team instead of creating divisiveness, disruption, and negatively impacting the team.
>
> Please be warned, that further behavior of the type described above could result in further disciplinary action up to and including dismissal. You have the right to request a review of this action in accordance with the provision of the collective bargaining agreement in effect between the University of California and CNA.

Yeatman testified that this letter was in part caused by him. Dr. Sherman spoke to Yeatman, after the patient incident. Yeatman testified that Dr. Sherman was "livid," and told him that it was completely inappropriate.[23] Dr. Sherman wanted Yeatman to do something about it. Yeatman said Dr. Sherman told him he was very close to the patient, and the patient could hear.[24]

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[23]Ridlehoover testified that she spoke with Sherman and he mentioned only a fluoroscopy and not sheath incident.

^Yeatman's testimony is contradicted not only by charging party's evidence, but CVT Allen Vieths' (Vieths) written statement as well. Charging party exhibit no. 11 is a diagram drawn by Leptuch showing Sherman at the extreme end of the inside

Yeatman called Schraad and asked her to take the appropriate steps. Schraad did not testify at the hearing. She did not secure a written statement from Dr. Sherman, nor did she interview Leptuch or Sanchez about the incident.

Both Leptuch and Sanchez testified about the incident. The patient was undergoing a rotoblade procedure and Leptuch was the RN assigned. CVT Allen Vieths (Vieths) had replaced Lyman who was absent for lunch. Dr. Sherman was reviewing the videos of the patient in the control room. Leptuch was also in the control room. They were inside the control booth on the other side of the glass (leaded about 1/2 inch thick) separating the control both from the lab. The room is noisy from the power hum of the equipment.

Vieths had asked Dr. Sherman if he wanted Vieths to suture the sheaths.[25] Dr. Sherman replied in the affirmative. Leptuch told Sherman that was illegal. Dr. Sherman said he did not think it was illegal but he would ask Schraad. Vieths sutured the sheaths.

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of the control booth. Next to him is Sanchez, and then Leptuch. At the door of the control booth is Vieths. The patient was situated in the laboratory such that his feet were closer to the control room than the head, which was farthest from the control room. Leptuch and Sanchez both testified that this was the physical setup, and that Sherman was in the control room. Veith's statement, likewise, asserts that both Sherman and Leptuch were in the control room.

^Leptuch's drawing has Vieths at or near the door of the control booth. Sanchez said Vieths was nearer the patient, but he, Sherman and Leptuch were all in the control booth.

According to Leptuch, Dr. Sherman did not state that he was upset. In fact, Leptuch testified that Dr. Sherman called him personally after Leptuch had received the August 15 letter expressing disavowal of the letter.

During the procedure Sanchez was in the control room. He confirmed that Leptuch and Dr. Sherman were both in the control room. Sanchez testified that Leptuch expressed his concern and did not appear to be angry. He spoke in his normal tone which is louder than Sanchez. Leptuch did not make any unprofessional statements to Dr. Sherman, and his manner could not be characterized as aggressive. Sanchez said Leptuch uses his voice "in order to get their attention and make sure they are paying attention to his request."

Sanchez described the control room and testified that he speaks to the attending physician in the laboratory by way of a microphone with a switch that must be activated by pressing a bar. Without the intercom system, he cannot hear what was said by one standing at the head of the patient. Sanchez said he has never been concerned about the patient hearing what was said in the control room because of the "ambient noise from the equipment."

Moreover, patients are usually sedated during the procedure.

In addition, the particular procedure involved included a dual cooling system creating noise behind and under the patient's head. Even the doctor, positioned at the level of the patient's

hip, said Sanchez, had to speak loud to the patient to get him to respond.

Regarding the matter of Leptuch's behavior at meetings, Sanchez attended meetings in summer of 1994 and he testified that he did not see Leptuch engage in confrontational or disruptive behavior, or make loud outbursts. Sanchez said Leptuch was normal and articulated concerns about CVT activities. Sanchez said Leptuch is very clear about his points and did not mince words. Leptuch is "very short and concise," said Sanchez.

Regarding Schraad's criticism of Leptuch going outside of command, Leptuch said he had brought the matters up at staff meetings numerous times. Regarding Schraad's contention that he was confrontational, Leptuch thought any criticism of the lab was viewed by Schraad as confrontational.[26]

Leptuch testified that as an RN it was his obligation to advocate on behalf of the patient, and protest unlicensed people from working on the patient. It was part of his licensure that he is supposed to advocate.

Nurses employed at UC Los Angeles are required to maintain a current license as an RN, under the auspices of the State Department of Consumer Affairs, Board of Registered Nursing. It

[26]As pointed out by CNA in closing briefs, the University presented no direct evidence of Leptuch's behavior in meetings embraced in Schraad's memo. Although Ridlehoover and Yeatman testified, neither testified about attendance at any of these meetings. The obvious percipient potential witness, Schraad, did not testify nor was any explanation for her absence offered.

is undisputed that the license could be jeopardized if the nurse failed, among other things, to serve as the patient's advocate.

Among standards of competent performance set for in the California Administrative Code, Title 16, Chapter 14, section 1443.5(6) is the following:

> . . . Acts as the client's advocate, as circumstances require, by initiating action to improve health care or to change decisions or activities which are against the interests or wishes of the client, and by giving the client the opportunity to make informed decisions about health care before it is provided.

Although Leptuch said the August 15 letter "stilled" his outspokenness about conditions at the ACCL, he did file a grievance on August 19, just four days from the date of the warning letter. This grievance charged that unlicensed staff were giving medicine intraarterially, and "drawing up" drugs.

The next month, on September 19, Leptuch and four other RNs co-signed a letter seeking assistance from personnel in being relocated to other hospital work areas. The letter cited the conditions of work in the ACCL and complained of the change allegedly brought about by Schraad's arrival.

Leptuch filed a grievance on the August 15 letter. After an arbitration hearing, UC was ordered to remove the letter from Leptuch's personnel file.

Leptuch was laid off in December of 1994.

Management Rights Clause

Article 33 of the memorandum of understanding (MOU) provides:

A. Management of the University is vested exclusively in the University. The parties agree that all rights not specifically granted in this Agreement are reserved solely to the University. Except as otherwise provided in this Agreement, the Association agrees that the University has the right to make and implement decisions relating to areas including but not limited to those enumerated below. Although the University may upon request consult with the Association concerning the following areas, the University is not obligated to bargain with the Association as to such areas during the term of this Agreement.

Enumerated examples in the MOU are:

1. to establish the University's missions, programs, objectives, activities, and priorities;

2. to plan, direct and control the use of resources to achieve the University's missions, programs, objectives, activities, and priorities;

. . . . . .

4. to establish and administer procedures, rules and regulations and determine the methods and means by which operations are carried on;

5. to introduce new or improved methods, programs, equipment, or facilities or change or eliminate existing methods, equipment, or facilities;

6. to determine the location or relocation, reorganization, or discontinuance of operation; to determine where Nurses shall work; or subcontract all or any portion of any operation;

7. to assign and schedule work; to determine the need for overtime;

. . . . . .

11. to establish, modify, and enforce standards of performance, conduct, and safety

> for Nurses; and to determine the process by which Nurse performance is evaluated;
>
> . . . . . .
>
> 14. to determine and modify job classifications and job descriptions.

This clause has been on the table numerous times without revision. The MOU does not contain a "work preservation" clause.

The Demand to Negotiate And Request for Information

On August 5, Peggy Skotnes, CNA labor representative, wrote to Maure Gardner (Gardner), manager of labor relations for UC, regarding the alleged transfer of bargaining unit work to CVTs without notice to CNA or affording it an opportunity to negotiate the impact. CNA also expressed concern about the impact on patient care. It then demanded UC cease and desist from unilaterally transferring RN work to non-RN personnel and asked for certain information. The information requested was:

> 1. Copies of all job descriptions or other documents containing or reflecting duties to be performed by newly hired Cardiovascular Techs;
>
> 2. Copies of RN job descriptions;
>
> 3. A description of any modification in RN job duties or responsibilities that will occur or be necessary as a result of the introduction of the Cardiovascular Techs . . . ;

CNA also requested a complete description of RN obligations regarding supervision, direction, monitoring, training, quality control or other responsibility for the performance of duties to be transferred to the CVTs, and copies of communications with

specified outside agencies regarding planned use of CVTs in the lab.

Gardner responded to Skotnes' demand on September 14, 1994. UC's position was that the ACCL duties were not exclusive to RNs and that any of the staff performed the tasks. Further, the University relied upon the management rights article (33), particularly, the University's rights to "establish and manage its methods of operation and use of the work force was essential to maintaining an effective, efficient and economic system of health care delivery."

Information on job descriptions came to Gardner's office in mid-September and she looked at them in mid-October. Gardner forwarded the job descriptions to CNA in late November. Although these documents were marked "draft" they were the same ones sent in late November. Final job descriptions were sent to CNA on February 17, 1995.

The parties submitted the following stipulations:

> 1. The University never gave notice to the California Nurses Association ("CNA") nor did it meet and confer with CNA concerning the use of [CVT's] in the [ACCL] or the 4 West Cardiopulmonary Procedure Room at the UCLA-Medical Center at any material time. The parties disagree as to whether the University had an obligation to give notice to, or meet and confer with, CNA concerning the use of CVT's.
>
> 2. CNA first raised the issue of alleged changes in the duties assigned to RN's in the [ACCL] or the 4 West Procedure Room at the UCLA Medical Center in a letter from Labor Representative Peggy Skotnes to Ms. Maure Gardner, the Manager of Labor Relations, dated August 5, 1994. . . .

3. Ms. Gardner, on behalf of the Medical Center, first responded to Skotnes's August 5, 1994 letter in a letter dated September 14, 1994. . . .

4. The documents referred to in Ms. Gardner's September 14, 1994 letter as being "forwarded under separate cover" were sent to CNA in a fax transmission on November 28, 1994 and in a letter dated February 17, 1995. . . .

ISSUES

The issues in this case are whether the University violated the HEERA when it: (1) unilaterally commenced hiring CVTs to perform RN duties; (2) refused to meet and confer with CNA about the performance of certain tasks by CVTs; (3) failed or refused to provide information requested by CNA; or (4) issued Leptuch a letter of warning in retaliation for his activities?

CONCLUSIONS OF LAW

The Statute of Limitations

The University urges the complaint be dismissed on the grounds of the statute of limitations. Section 3563.2(a) provides that the PERB may 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."

In this case, the charge was filed on December 9, 1994. Hence, to be timely filed, the matters complained of must have occurred on or after June 9, 1994.

The University argues that the first two CVTs were hired in February and March, eight and nine months before CNA filed its charge. Leptuch and other nurses were in cross-training and were

aware of the employment of CVTs. In addition, urges UC, Leptuch filed a grievance in the spring of 1995, with a copy to CNA. Hence, CNA was involved in the ACCL.

The University relies on Eureka City School District (1985) PERB Decision No. 481 (Eureka), where PERB stated:

> Thus, in a case such as this, in order to establish a prima facie violation of the Act based on an unlawful transfer of unit work theory, the Association should have filed its charge at the time that nonunit employees first began performing unit work, not long after such a practice became established. [Emphasis in original.]

However, an additional element, knowledge of the change, is also required to effectuate commencement of the statute of limitations. In a case involving the University,[27] PERB stated the rule thus:

> . . . The statute of limitations begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, providing that nothing subsequent to that date evinces a wavering of that intent....

It is not disputed that the University did not give notice to CNA about the appointment of CVTs to the ACCL. The UC stipulated that no notice was given to CNA about the appointment of CVTs.

UC argues that Leptuch and others knew about the use of CVTs as they were in cross training and saw CVTs performing work.

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[27]The Regents of the University of California (1990) PERB Decision No. 826-H.

As charging party points out, PERB has held that notice to the exclusive representative will not be imputed because a substantial number of employees were affected by the change.[28] The fact that nurses worked in the ACCL and saw CVTs employed there does not impart awareness to CNA that the University has adopted a policy of employing CVTs to do RN work. PERB has held that notice must be acquired by an official of the employee organization who has the authority to act on behalf of the organization. (Victor Valley Union High School District (1986) PERB Decision No. 565.) There is no showing that the nurses were agents of CNA. (See Los Angeles Community College District (1982) PERB Decision No. 252; Regents of the University of California (1991) PERB Decision No. 907-H.)

The fact that Leptuch filed a grievance with a copy to CNA does not give rise to notice that the ACCL had engaged in a policy determination to hire CVTs. There is no basis for concluding the CNA should have known that the employer had adopted an appointments policy to hire CVTs.

In addition, the other two significant aspects of this unfair practice complaint are the refusal to provide information and the letter of warning issued to Leptuch, both of which occurred after June 5, 1994.

Accordingly, the University's contention that the unfair practice charge is time-barred is rejected.

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[28]Victor Valley Community College District (1986) PERB Decision No. 570.

The Unilateral Change

An employer's unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate and violative of HEERA section 3571(c). (Regents of the University of California (1985) PERB Decision No. 520-H; Pajaro Valley Unified School District (1978) PERB Decision No. 51.)

To prevail on a complaint of unilateral change, the charging party must establish by a preponderance of the evidence that (1) the employer breached or altered the party's written agreement or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy (i.e., having a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196; Pajaro Valley Unified School District, supra, PERB Decision No. 51; Davis Unified School District, et al. (1980) PERB Decision No. 116.)

The Transfer

In Eureka, PERB stated:

> . . . In our view, in order to prevail on a unilateral transfer of work theory, the charging party must establish, as a threshold matter, that duties were, in fact, transferred out of the unit; that is, that unit employees ceased to perform work which

> they had previously performed or that nonunit employees began to perform duties previously performed exclusively by unit employees. However, where, as here, unit and nonunit employees have traditionally had overlapping duties, an employer does not violate its duty to negotiate in good faith merely by increasing the quantity of work which nonunit employees perform and decreasing the quantity of work which unit employees perform. [Fn. omitted.]

The University argues that since other employees outside of the bargaining unit performed RN duties before the appointment of CVTs, RNs did not have a claim of exclusivity of performance of those duties required by Eureka.

The facts here are similar to Eureka, but not altogether the same. The findings suggest that some of the duties performed by RNs may have been performed by others, but at no time were those duties ever performed by CVTs. CVTs did not exist on the employee roster at the ACCL prior to spring 1994. Whereas, in Eureka, a teacher's aide assignment was expanded, that is to say, she did more of the work she did before the complained-of action, no such expansion took place here. Neither the laboratory technician nor the x-ray technologist increased performance of the amount of RN duties. Moreover, there is no showing that either the attending physician nor the fellow took on increased RN duties. In fact, the record shows that there was a virtual fade out of fellows working in the laboratories. They were, in effect, replaced by a new class of employees not previously employed by the University. Hence, unlike the situation in Eureka, where incumbent nonunit employees were assigned an

increase in duties previously performed, here, no incumbent employees experienced such increase in duties previously performed, but rather there was introduced a new class of employees, CVT's, who were assigned RN duties.[29]

Moreover, the record does not establish that particular duties were traditionally overlapping. That is to say, only on rare occasions did the laboratory technician or the radiation technologist ever set up the catherization table. This task was primarily the duty of the RN. Schraad wrote in her chronology book that she advised Leptuch in September of 1994, that setting up tables was part of his duties.

Positioning the patient, including moving the patient onto the table was also primarily the duty of the RN, and was not traditionally overlapping with other employees.

Preparation of the operative site, washing, shaving the groin area, hygienic washing and setting up of IV lines were not traditionally overlapping duties. RNs did these as primary tasks. Another duty found not traditionally overlapping was the performance of the blood clotting time (ACT). Only RNs performed this task prior to the hiring of CVTs who then commenced conducting the test.

Thus, quite apart from the fact that CVTs were not among employees who might have previously performed some of the

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[29]UC attempted to demonstrate that non-licensed personnel in other hospital arenas perform overlapping duties with nurses. This argument is not relevant nor persuasive for purposes of the ACCL.

disputed duties, the record demonstrates that under the second aspect of the Eureka test, there were duties done by RNs not traditionally overlapping with other employees.

I conclude that this case does not fall within the ruling of Eureka, and that CNA established that the UC transferred bargaining unit work to employees outside of the bargaining unit in violation of its obligation to give CNA notice and an opportunity to meet and confer over the issue.

The University raises defenses that include business necessity and waiver as additional defenses. They will be considered separately.

Business Necessity

The University contends that employment of CVTs was justified by the devastating emergency of the earthquake. As the only functioning hospital in the West Los Angeles area, it had to hire the CVTs to assist the increase in patients serviced by the ACCL.

In a case of first impression created by the effects of tax revenue changes caused by Proposition 13,[30] PERB stated:

> Even when a District is in fact confronted by an economic reversal of unknown proportions, it may not take unilateral action on matters within the scope of representation, but must bring its concerns about these matters to the negotiating table. . . .

In Oakland Unified School District (1994) PERB Decision No. 1045, PERB adopted an administrative law judge's (ALJ) review

[30]San Francisco Community College District (1979) PERB Decision No. 105.

on the defense of necessity. The ALJ first noted that under Calexico Unified School District (1983) PERB Decision No. 357 (Calexico), the employer must show:

> . . . an actual financial emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action. [Fn. omitted.]

The ALJ then covered Compton Community College District (1989) PERB Decision No. 720, where PERB held that dire financial straits of the district did not prevent the possibility of formulation of a budget without unilateral cuts, thus, the district had not established a necessity defense.

It cannot be disputed that an earthquake capable of closing two hospitals was not anticipated and devastating. The University's responses no doubt could be called emergency responses. Yet, the employment of the CVTs did not take on the emergency response (about which there is no evidence) that was sure to have occurred in the general hospital non-specialized areas.

There is no showing that RNs were not available for hire to assist ACCL meet the increased patient influx. There is no showing the UC was faced with a financial emergency of paying RNs as opposed to CVTs.

Rather, in discussions with physicians from the closed hospitals desiring to bring their patients to ACCL UC learned that CVTs would be available to assist the laboratory work.

The emergency nature of the employment of CVTs is not supported by the record. UC first took steps to hire CVT Beach on February 7, 1994, nearly three weeks after the earthquake. Lyman was not hired until three weeks later, nearly six weeks after the earthquake. Requisitions for additional CVT staffing did not appear until June, then August and then October of 1994. This time schedule did not preclude meeting and conferring with CNA on the impact of hiring CVTs on bargaining unit work.

Even prior to the earthquake, UC knew that fellows would be withdrawing from the ACCL. They continued to work in the lab until sometime in the summer of 1994. At the time UC knew of the reduction in fellow staffing, prior to the earthquake, it could have put CNA on notice and provided an opportunity to meet and confer.

Finally, the University continued to employ CVTs after the impact of the earthquake had subsided. After the St. Johns and Santa Monica hospitals reopened, and there was no longer pressure on UC to allow outside physicians or patients use the ACCL, UC continued to employ CVTs.

For all the forgoing reasons, I conclude that UC has not met the burden required by Calexico, to show financial emergency, justifying bypassing notice to CNA or the opportunity to meet and confer over the impact of CVTs performing nursing duties.

Waiver

The University contends that assignment of these duties to a new non-nursing classification outside of the bargaining unit is within the MOU management rights clause.

UC contends that its rights to: establish its missions and priorities; to direct the use of resources to achieve those priorities; to determine the methods and means by which operations are to be carried on; to change or eliminate existing methods [of operation]; to assign and schedule work; to establish the size, composition and qualifications of the work force; to establish, modify and enforce standards of safety for nurses; to discipline nurses for failure to perform satisfactorily; and to determine and modify job classifications and job descriptions; all embrace the authority to transfer to CVTs duties done by RNs.

The University's authority, it urges, is essential and requires inherent flexibility to determine methods of operation, utilization of the work force to maintain an effective and economic system of health care delivery. The MOU is designed to be an integral part of UC Los Angeles Medical Center's mission of providing health care, teaching and research - not a stumbling block. Further, the fact that the agreement does not contain a work preservation clause further enhances its flexibility.

Here, argues the University, it adjusted its priorities by meeting the community needs as a result of the earthquake. To that end it was entitled to change existing methods of operation including a different approach to work the procedures as in the ACCL, such as redistributing and assigning work as called for.

The University exercised its right to establish the qualification of the work force in that it determined to hire CVTs who had appropriate training and experience to work at ACCL. Finally, it exercised its rights to determine the job classification of CVTs and to develop job descriptions for the classification. Accordingly, argues UC, CNA, by the management rights clause, has waived its right to complain about the University's action.

Waiver of statutory rights must be "clear and unmistakable" and will not be lightly inferred. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74; Placentia Unified School District (1986) PERB Decision No. 595.) A waiver of bargaining rights is determined by examining the express contractual terms as well as evidence of negotiating history to ascertain whether there has been a conscious abandonment of the right to bargain over a particular subject. (Palo Verde Unified School District (1983) PERB Decision No. 321.)

A generally-worded management rights clause will not be construed as a waiver of statutory bargaining rights. (San Jacinto Unified School District (1994) PERB Decision No. 1078.)

Taking each of the contentions raised by UC within the management rights clause in review does not present a case for clear and unmistakable waiver of the right to bargaining unit work.

The UC's right to establish its missions and priorities or to direct the use of resources to achieve those priorities does

not address the question of transferring bargaining unit work from one unit to another, where the same patient service is being rendered, but different personnel are being employed to render that service. If it chose to close the ACCL or to redirect the function of the ACCL, such decision might be embraced within these provisos. The University had established the mission of operating the ACCL and directed the use of RNs to perform portions of the patient service. Nothing in its powers on mission or priorities allows the UC to change that mission or resources without giving CNA its statutory right to meet and confer over changes directly impacting bargaining unit work.

Likewise, the University's right to determine the methods and means by which operations are to be carried on or to change or eliminate existing methods (of operation) does not enable UC to maintain operations but change personnel to perform those operations. Nor does the authority to change or eliminate methods of operation address transferring bargaining unit work. Clearly, UC has the authority to change the method of heart diagnosis or to eliminate present methods of such procedure, but that does not embrace the matter of changing personnel, once established, to perform the same procedures where an exclusive representative is in place representing the personnel.

The right to "assign and schedule work" or "to establish the size, composition and qualifications of the work force" does not embrace bargaining unit work transfers in derogation of an exclusive representative's rights to represent its members

concerning work duties. The right to assign or schedule work, or the right to establish the size, composition and/or qualifications of the work force is not impeded by requiring UC to give notice to and afford CNA an opportunity to meet and confer about the transfer of bargaining unit work from the unit represented by CNA to a classification of employees outside of the bargaining unit.

The rights pertaining to standards of safety for nurses or to discipline nurses for failure to perform satisfactorily is totally unrelated to transfer of bargaining unit work.

The right to "determine and modify job classifications and job descriptions" does not relate to transfer of bargaining unit work. UC may have the power to delete duties of nurses within their job descriptions under this provision, but such power does not extend to recreating another classification of employees outside of the bargaining unit to perform those same duties.

The management rights provisions do not, in their totality, or components, manifest a "clear and unmistakable waiver" of CNA's rights to bargain a proposed transfer of bargaining unit work. Hence, the UC arguments in this regard are rejected.

The assignment of RN duties to non-unit employees in this instance was done without notice to CNA, nor did CNA have an opportunity to meet and confer about the decision or its effects. This was a violation of the University's duty to meet and confer in good faith required by section 3571(c) . This same conduct also interfered with the RN's rights to have CNA represent them

in their employment relations with their employer, a violation of section 3571(a). There was no evidence that any statutory right of CNA was denied by the University's unilateral transfer of bargaining unit work, the allegation of a violation of section 3571 (b) must be dismissed.[31]

The Information Request

The University claims that it provided all information requested when it became available. When CNA requested CVT and RN job descriptions; modifications of RN duties and communications with outside agencies concerning use of CVTs,[32] no such documents existed.

UC also refers to a "breakdown" in communications between UC and CNA, although there is no evidence in the record to support such an argument.

The evidence shows that at the time of the request, the UC was developing job descriptions for the CVTs. This commenced with the draft from Yeatman to Ridlehoover in April 1994. This effort did not produce further documentation on job descriptions until mid-September when Gardner received drafts of job

[31]HEERA contains no provision comparable to Educational Employment Relations Act section 3543.5(a) which grants employee organizations the right to represent their members. (See generally, Regents of the University of California v. Public Employment Relations Board (1985) 168 Cal.App.3d 937 [214 Cal.Rptr. 698].)

[32]No evidence was even alluded to of UC written contact with outside agencies regarding CVTs. This portion of the information request should, therefore, be dismissed.

descriptions for CVTs. She reviewed the documents nearly a month later. CNA received these drafts in late November.

The only other documentation on CVTs appears to be the requisition forms to hire CVTs. One was created in March, three in June, one in August and one in October. These forms listed expected CVT duties which would be relevant to CNA's inquiry regarding CVT job descriptions. Ridlehoover was a signatory to most of these forms.

The exclusive representative is entitled to all information that is necessary and relevant to collective bargaining. (Stockton Unified School District (1980) PERB Decision No. 143.) The refusal to furnish requested information meeting these standards is, in itself, an unfair practice, and may also support an independent finding of surface bargaining. These requirements apply to employees governed by HEERA. (Trustees of the California State University (1987) PERB Decision No. 613-H.)

The documentation shows that in March, June and August, UC was processing employee requisition forms that outlined tasks expected of CVTs. In addition, in September, Gardner had in hand draft job descriptions for CVTs. Yet in response to CNA's specific request for CVT job descriptions in August, UC did not provide job descriptions for CVTs until late November, and never provided the requisition forms.

The latter were relevant to establish what was expected of CVTs. The job descriptions were clearly necessary to enable CNA

to ascertain what overlapping duties might occur with the appointment of CVTs.

It appears the UC simply ignored CNA's statutory right to information. Although CNA requested information that UC had in September of 1994, it did not provide the job descriptions until November 1994. It never did supply the employee requisition forms until the formal hearing in this matter. The UC's failure to provide the CVT job descriptions or the employee requisition forms in a timely matter was a violation of CNA's right to meet and confer provided by section 3571 (c). This same conduct interfered with bargaining unit members rights to be represented by CNA in violation of section 3571(a).

The Letter of Warning

In order to prevail on a retaliatory adverse action charge, the charging party must establish that the employee was engaged in protected activity, the activities were known to the employer, and that the employer took adverse action because of such activity. (Novato Unified School District (1982) PERB Decision No. 210 (Novato).) Unlawful motivation is essential to charging party's case. In the absence of direct evidence, an inference of unlawful motivation may be drawn from the record as a whole, as supported by circumstantial evidence. (Carlsbad Unified School District (1979) PERB Decision No. 89.) From Novato and a number of cases following it, any of a host of circumstances may justify an inference of unlawful motivation on the part of the employer. Such circumstances include: the timing of the adverse action in

relation to the exercise of the protected activity (North Sacramento School District (1982) PERB Decision No. 264); the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); departure from established procedures or standards (Santa Clara Unified School District (1979) PERB Decision No. 104); inconsistent or contradictory justification for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); or employer animosity towards union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572).

Once an inference is made, the burden of proof shifts to the employer to establish that it would have taken the action complained of, regardless of the employees' protected activities. (Novato; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626].) Once employee misconduct is demonstrated, the employer's action,

> . . . should not be deemed an unfair labor practice unless the board determines that the employee would have been retained "but for" his union membership or his performance to other protected activities. [Ibid.]

The University argues that it was unaware that Leptuch was involved in any protected activity. Because it was not until August or September when Leptuch notified CNA about the warning letter, management had no knowledge that Leptuch had included CNA in any of his activities related to CVTs. Management did not see Leptuch attempting to enforce some aspect of the MOU and his

concerns did not relate to wages, hours or terms and conditions of employment. Nor was management aware that Leptuch was speaking for other employees. Schraad was new to the ACCL and what developed was a personality conflict between her and Leptuch. Ridlehoover and Yeatman saw Leptuch's complaints as his own. Finally, argues the University, from Leptuch's history of complaints about Yeatman and Schraad's supervision, and use of CVTs, management had to assume he was complaining about himself and not in a protected context.

CNA contends Leptuch was engaged in protected activity by embracing the provisions of the MOU. The MOU requires Leptuch to be in good standing as a RN. To maintain that status, he must perform the obligations of a nurse which include patient advocacy. All of Leptuch's complaints were related to proper treatment, or the avoidance of improper procedures over patients. Thus, by advocating patient safety, Leptuch was expressing his contractual right to maintain his license as a condition of continued employment.

CNA also contends that a special relationship is created by the contractual creation of a "Practice Committee" in the agreement by which RNs are charged with considering and constructively recommending to management "ways and means to improve nursing practice and patient care." (Article 7 of the MOU.) No evidence was introduced however, that ties Leptuch as a member of the committee, hence I do not rely on this argument.

I conclude that Leptuch was engaged in protected activity when he spoke out about CVTs performing unauthorized tasks and expressed concern about RNs doing unauthorized work. Leptuch wrote to director of nursing Crooks on July 22, complaining about the request that he "fluoro" the balloon, a procedure he contended was illegal. He complained that CVTs were suturing in sheaths, running ACT's, mixing heparin, "panning" the x-ray table, setting up flouro shots and injecting x-ray contrast.

Leptuch complained again, on August 2, to Parker, the director of quality management services, about RNs being asked to pan the table and to operate the flouro switch. He complained to Parker that CVTs were injecting protamine and contrast, suturing sheaths in place and performing ACT's a test formerly done by RNs.

The contract required the RN to maintain licensure. Clearly, when an RN does an unauthorized procedure, their license could be jeopardized.[33] Further, it was the duty of the RN to be a patient advocate. Failure to speak to patient safety could endanger the RNs continued licensure. Leptuch spoke out and wrote letters regarding CVTs performing unauthorized procedures.

Moreover, Leptuch spoke on issues of concern to his colleagues and co-employees. Kroesing, another RN, and Sanchez, the radiation technologist, both spoke out on these issues.

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[33]Yeatman subsequently issued a memo that clarified only the attending physician or the x-ray technologist could perform the panning chore. Thus, the UC agreed with Leptuch's contention.

Finally, Leptuch spoke directly on CVTs doing bargaining unit work when he wrote to Parker complaining that CVTs were performing ACTs, a procedure formerly done by RNs.

For all the foregoing reasons, I find Leptuch was engaged in protected activity.[34] Clearly, Schraad, the author of the letter of reprimand was aware of his undertakings as she was at meetings where he spoke on these issues, and she got Leptuch's letter to Crooks wherein he raised these same issues. Indeed, she took umbrage at his writing outside of the chain of command.

CNA finds an inference of unlawful motivation based upon the timing of the warning letter. Within days of receiving CNA's expressed concern of the use of CVTs on August 11, 1994, Leptuch was given the letter of warning. A second basis is what CNA calls a "shoddy" investigation of the August 1 incident involving Leptuch and Dr. Sherman. Witness Sanchez was never questioned about the event, nor did the UC get a written statement from Dr. Sherman, although one was secured from the CVT who was present.

CNA also finds an inference based upon the contents of the letter of warning in that the second expressed reason for the letter was that Leptuch had sent his letter protesting the use of CVTs to someone outside of the chain of command, and that the one

[34]The University argues strongly against Leptuch's credibility. It is clear he took strong umbrage at Yeatman's behavior, to the point of "screaming" at Yeatman on his way home from work, no evidence in the record repudiates his complaints. His profound frustration at Yeatman does not undermine the testimony of Leptuch as corroborated by the documentation and testimony of Sanchez and Kroesing.

"confrontation" described in the letter was when Leptuch said he was going to the union about the dispute.

I find an inference of unlawful motivation in UC's issuance of the letter of reprimand on the proximity of time of the letter to his protected activity, the cursory investigation done by Schraad, and the total lack of independent evidence for support of her basis of discipline.

The letter of reprimand was issued on August 15, 1994, just days after CNA's letters regarding CVTs, an issue Leptuch had been complaining of since Schraad became manager. The letter followed a series of meetings where Leptuch was complaining about the CVTs doing unauthorized procedures, and doing the work of RNs. Although timing alone will not support an inference of unlawful motivation (Charter Oak Unified School District (1994) PERB Decision No. 404), it may, along with other factors, be considered (North Sacramento School District, supra, PERB Decision No. 264). Here, the cursory investigation by Schraad of the August 1 incident is further grounds for finding an unlawful inference. Although Sanchez was a percipient witness to the incident, Schraad did not question him about the events before issuing the letter. Nor was Leptuch asked about the circumstances. Finally, Dr. Sherman, who Yeatman said was "livid" over the incident, did not submit anything in writing such as the CVT involved did. Even the CVT's version of events places Dr. Sherman and Leptuch well inside the control both and with Sanchez's explanation, well beyond patient hearing.

As to the other grounds for the letter, the UC did not establish independent evidence that Schraad's contentions were well taken. Both Sanchez and Kroesing were examined at hearing and direct testimony of Schraad's contentions of Leptuch's alleged behavior was not elicited.

I conclude that the letter was issued in retaliation for Leptuch's protected activity. The burden now shifts to the UC to establish that it would have issued the letter of reprimand notwithstanding Leptuch's complaints.

The University put on no independent evidence of what transpired at the August 1, 1994, incident or how Leptuch behaved at staff meetings. Schraad did not testify. Leptuch, Kroesing and Sanchez did testify and were subject to cross-examination, but no testimony was elicited that would back Schraad's contentions raised in her August 15 letter. Her letter is hearsay. (See Woodland Joint Unified School District (1987) PERB Decision No. 628.)

Schraad's August 15 letter took umbrage that Leptuch went outside the chain of command, and she complained that it was not until August 3 that she heard of his July 22 letter to Crooks and that over two weeks were lost in addressing concerns he had raised.

Leptuch's direct testimony was that he raised these concerns to Schraad in staff meetings and she said they were acceptable community practice. Kroesing and Sanchez confirmed that Leptuch brought these issues to the staff meetings. There was no

competent evidence to support Schraad's contention to the contrary. Hence, Leptuch's testimony as supported by Kroesing and Sanchez goes unchallenged.

Finally, Leptuch's behavior at the staff meetings was not supported by any competent evidence. Sanchez' testimony about not observing Leptuch in unprofessional behavior is unchallenged. The University failed to establish that it would have given Leptuch a letter of warning even absent his involvement in protected activity. This conduct is a violation of Leptuch's rights under section 3571(a).

REMEDY

It has been found that the University unilaterally transferred bargaining unit work from RNs to CVTs, without providing CNA with notice or an opportunity to meet and confer on the issue. This conduct is a violation of section 3571(c). This same conduct denies unit members their right to be represented by CNA in violation of section 3571(b) and (a). It is also found that the University unlawfully failed to provide relevant and necessary information to CNA in a timely fashion. It has further been found that the University unlawfully retaliated against Leptuch because he engaged in protected activity. This is a violation of section 3543(a). It is appropriate to order the University to cease and desist in its unlawful conduct, and to meet and confer with CNA, upon request, on the use of CVTs in the ACCL. It is further appropriate to order the University to restore RN duties to those conditions that prevailed before the

unlawful change. (See Compton Unified School District (1989) PERB Decision No. 784.) It is further appropriate to order the UC to remove and destroy the August 15, 1994, letter of reprimand from Schraad to Leptuch. (See Mt. San Antonio Community College District (1982) PERB Decision No. 224.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the Regents of the University of California (University) violated Government Code section 3571 (c) of the Higher Education Employer-Employee Relations Act (Act). The University violated the Act by unilaterally transferring bargaining unit work to employees outside of the bargaining unit. This action was done without notice to or affording the California Nurses Association (CNA) an opportunity to meet and confer on the issue. This same conduct interfered with unit employees to be represented by CNA in violation of 3571(a). It has further been found that the University violated section 3571(c) when it failed to provide relevant and necessary information to CNA concerning cardiovascular technician (CVT) duties. It is also found that the University retaliated against Michael Leptuch (Leptuch) for his involvement in protected activities. This action was in violation of section 3571)a).

Pursuant to section 3563.3 of the Government Code, it hereby is ORDERED that the University, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally transferring duties of bargaining unit employees to employees outside of the bargaining unit, failing to provide relevant and necessary information or retaliating against employees for their exercise of rights protected by the Act.

2. By the same conduct, denying bargaining unit employees their right to be represented by CNA.

3. Retaliating against unit employees for protected activities.

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

1. Upon demand of CNA, meet and confer about duties of registered nurses (RN).

2. Restore the conditions of RN duties that prevailed prior to the hiring of CVTs.

3. Remove and destroy the August 15, 1994, letter of reprimand issued to Leptuch.

4. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to members of University employees are customarily posted, copies of the notice attached hereto as an Appendix. The notice must be signed by unauthorized agent of the University, indicating that the University will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

5. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board in accordance with the director's 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 Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5 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 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 Regs., tit. 8, secs. 32300, 32305 and 32140.)

Gary Gallery

Administrative Law Judge