STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNIVERSITY PROFESSIONAL & TECHNICAL EMPLOYEES, CWA LOCAL 9119, AFL-CIO, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. SF-CE-585-H PERB Decision No. 1700-H November 1, 2004

Appearance: Donahue, Gallagher & Woods, by George J. Barron, Attorney, for Regents of the University of California.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Regents of the University of California (University) to a proposed decision (attached) of an administrative law judge (ALJ). The underlying unfair practice charge alleged that the University violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by denying the University Professional & Technical Employees, CWA Local 9119, AFL-CIO (UPTE) access to its facilities on several occasions. The ALJ's proposed decision dismissed several of UPTE's allegations and sustained others. The University filed exceptions over those allegations in which a violation was found.

The Board has reviewed the entire record in this matter, including the proposed decision and the University's exceptions. With the exception of one technical exception which

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

is granted, the Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

DISCUSSION

Ban on Demonstrations in Mrak Hall

The ALJ found that the University's ban on all demonstrations in Mrak Hall, whether disruptive or not, was overbroad and not narrowly tailored. The ALJ also found that by unilaterally imposing the ban, the University violated its obligation to meet and confer over matters within the scope of representation. It is this latter finding to which the University filed exceptions.

Simply stated, the University argues that access rights are not within the scope of representation under HEERA. The Board disagrees. PERB precedent has long held that access rights are negotiable. (Jefferson School District (1980) PERB Decision No. 133; Davis Joint Unified School District (1984) PERB Decision No. 474; California State University, Sacramento (1982) PERB Decision No. 211-H (involving non-exclusive representative); Trustees of the California State University (2003) PERB Decision No. 1507-H (Trustees).) Recently, the Board affirmed exactly this holding in Trustees, in which the Board stated:

> It is equally clear that computer resources, telephones and fax machines comprise 'reasonable' means of access in a large academic institution. PERB has long held that reasonable access rights are negotiable. (State of California (Departments of Personnel Administration, Banking, Transportation, Water Resources and Board of Equalization) (1998) PERB Decision No. 1279-S; California State University, Sacramento (1982) PERB Decision No. 211-H; Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District (1984) PERB Decision No. 375.) Such means include the use of computers, telephones and fax machines. (Water Resources Control Board.)

The University attempts to distinguish Trustees and other cases on the ground that they all involve access policies related to employee discipline. Where employee discipline is not involved, argues the University, access rights are not matters within the scope of representation. The Board does not find this argument persuasive. Nothing in Trustees or the cases cited therein limit the negotiability of access rights to situations involving employee discipline.

Campus-wide Ban of Pilar Barton

The ALJ also found the University's 30-day campus-wide ban of Pilar Barton (Barton), a UPTE representative, to have been overbroad. Citing to Regents of the University of California (Berkeley) (1985) PERB Decision No. 534-H (UC (Berkeley)), the University argues that the ban on Barton was justified and not a violation of HEERA. In UC (Berkeley), an employee was barred from the campus library after repeatedly making inappropriate comments to other employees. Because the employee was active in union organizing, the union argued that the ban interfered with its protected rights. The Board concluded that the University had legitimate reasons to impose the ban and that the ban did not violate the union's rights.

The Board agrees that UC (Berkeley) is instructive. Specifically, the UC (Berkeley) decision provides an example of a narrowly drawn time, place and manner restriction. In that decision, the employee was barred only from the campus library, where the incidents had occurred. Here, even the ALJ noted that had the University's ban on Barton been similarly tailored, it might have withstood scrutiny under HEERA. Instead, the University imposed a campus-wide ban on Barton. Since the ban covered even public areas and areas where there was no dispute as to Barton's access, the Board agrees that the ban was overbroad.

Section 380-21 of University Policy & Procedure Manual

Finally, the University excepts to the ALJ's apparent finding on page 83 of the proposed decision that Section 380-21.XII of the University's Policy and Procedure Manual is facially invalid. The University argues that the reference should have been to Section 380-21.XII.D, since the issue only involved subsection D. After thoroughly reviewing the record, the Board agrees. Thus, the Board holds that the finding on page 83 of the proposed decision that the University's policy is facially invalid only refers to Section 380-21.XII.D, and not Section 380-21.XII in its entirety.

Remainder of Exceptions

As for the University's remaining exceptions, they are rejected. Here, the ALJ gave careful consideration to the University's legitimate interests in preventing disruption and maintaining its operations. Against this interest the ALJ properly balanced UPTE's presumptive access rights. The result is a well-reasoned decision that should be of guidance to the parties.

ORDER

Based on the foregoing 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), (b) and (c) by denying the right of access to the University Professional and Technical Employees, CWA Local 9119, AFL-CIO (UPTE); failing to negotiate in good faith with UPTE about access rights; and interfering with the right of employees to participate in activities of an employee organization.

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

A. CEASE AND DESIST FROM:

1. Denying UPTE the right of access to represent employees by: (a) prohibiting all demonstrations inside Mrak Hall; (b) banning UPTE Representative Pilar Barton (Barton) from the UC (Davis) (UCD) campus and Medical Center for thirty (30) days; (c) prohibiting Barton from conducting a contract ratification vote on the UCD campus; (d) denying UPTE the right to use a computer classroom to conduct an employment-related survey; (e) prohibiting unscheduled visits by UPTE representatives to the Chiles Road facility; and (f) prohibiting employee use of University telephones for union membership recruitment at the Chiles Road facility.

2. Failing to negotiate in good faith with UPTE by unilaterally: (a) implementing an absolute ban on all demonstrations inside Mrak Hall; (b) implementing an access provision prohibiting unscheduled visits by UPTE representatives to the Chiles Road facility; and (c) implementing an access provision prohibiting employee use of University telephones for union membership recruitment at the Chiles Road facility.

3. Interfering with the right of employees to participate in the activities of an employee organization by: (a) prohibiting all demonstrations inside Mrak Hall; (b) banning UPTE Representative Barton from the UCD campus and Medical Center for thirty (30) days; (c) prohibiting Barton from conducting a contract ratification vote on the UCD campus; (d) denying UPTE the right to use a computer classroom to conduct an employment-related survey; (e) prohibiting unscheduled visits by UPTE representatives to the Chiles Road facility;

and (f) prohibiting employee use of University telephones for union membership recruitment at the Chiles Road facility.

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

1. Post at all work locations at the UCD campus and Medical Center where notices to employees are customarily posted, copies of the Notice attached hereto as the Appendix. The Notice must be signed by an authorized agent of the University, indicating that the University will comply with the terms of the 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.

2. Written notification of the action taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on UPTE.

Member Whitehead joined in this Decision.

Chairman Duncan's dissent begins on page 7.

DUNCAN, Chairman: I dissent. The collective bargaining agreements between the Regents of the University of California (University) and the University Professional & Technical Employees, CWA Local 9119 (UPTE) entitle the University to enforce reasonable access rules and regulations. In addition, Section 3568 of the Higher Education Employer-Employee Relations Act (HEERA)[1] states that employee organizations have access "[s]ubject to reasonable regulations".

According to the letter from Associate Vice Chancellor Dennis Shimek to UPTE President Jelger Kalmijin, the University had local University access policies in place that compliment that portion of the agreement. When those local policies are followed, the parties are within the parameters of the agreement and the balance between access and reasonable regulation is maintained. Included in this reasonable access set of rules are time, place and manner restrictions to avoid disruption of University business.

UPTE and the University have negotiated three agreements that contain provisions governing access. These provisions are in Article 2 of the technical employees unit (TX) agreement, the health care professionals unit (HX) agreement and the research employees unit (RX) agreement, and all provide that the University has the right to enforce reasonable access rules and regulations as promulgated at each campus/laboratory/hospital. There must be mutual agreement that a union representative visit to patient care areas is warranted before access will be granted (HX agreement Article 2-B.)

It is significant that the administrative law judge (ALJ) found the written policies objected to by UPTE in this case merely codified existing practice and there was no

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

violation. The ALJ agreed with many of the positions taken by the University in response to the charges filed. However, I believe the Board majority should have found the University within its rights based on its right to set reasonable access regulations and to sanction violators.

UPTE was aware of the access policies and violated them repeatedly in numerous locations at various times in a variety of ways. The majority opinion could be misconstrued as encouraging or condoning a cavalier attitude towards the agreements on access policy between UPTE and the University.

In response to this, and following a local policy that gives the chancellor the authority to impose sanctions on employee organization representatives for violating University access regulations, UPTE Representative Pilar Barton (Barton) was banned for a limited time period. It was only in response to violations of existing policy that Barton was denied access to the Davis campus and Medical Center for 30 days. The ALJ did note that Barton was never excluded from areas where she was entitled to access, until the 30-day ban from the entire campus. He found that ban to be overly broad because it covered more than just areas where she could be legitimately excluded under the existing policy. It was just days later that Barton violated that ban and was expelled from University property.

Barton had violated the access rules after the University advised that if she repeated her violation it would be seen as a trespass. Her ban did not deprive UPTE or even Barton of other means of access to employees during that time. Further, it was a sanction because of her violation after she was on notice to stop.

Other representatives could visit the campus, just not Barton. Barton could make contact through other means such as in writing and by telephone. Not only could UPTE have sent another representative to conduct the contract ratification meeting, they should have because they were aware of Barton's violation.

Under Regents of the University of California (Berkeley) (1985) PERB Decision No. 534-H, the University argues that the ban is appropriate and I agree. While the ban there was limited to the library, that is where the violations took place. Here, violations were not just in one place. The 30-day ban was not imposed until after a warning was issued. The limited time ban was an appropriate response because of the level of violation. Based on the access policies of the University, not only are the actions it took reasonable, they are just common sense.

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-585-H, University Professional & Technical Employees, CWA Local 9119, AFL-CIO v. 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) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a), (b) and (c). The University violated HEERA when it denied the University Professional and Technical Employees, CWA Local 9119, AFL-CIO (UPTE) access rights; failed to negotiate in good faith with UPTE about access rights; and interfered with the right of employees to participate in the activities of an employee organization.

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

A. CEASE AND DESIST FROM:

1. Denying UPTE the right of access to represent employees by: (a) prohibiting all demonstrations inside Mrak Hall; (b) banning UPTE Representative Pilar Barton (Barton) from the UC (Davis) (UCD) campus and Medical Center for thirty (30) days; (c) prohibiting Barton from conducting a contract ratification vote on the UCD campus; (d) denying UPTE the right to use a computer classroom to conduct an employment-related survey; (e) prohibiting unscheduled visits by UPTE representatives to the Chiles Road facility; and (f) prohibiting employee use of University telephones for union membership recruitment at the Chiles Road facility.

2. Failing to negotiate in good faith with UPTE by unilaterally: (a) implementing an absolute ban on all demonstrations inside Mrak Hall; (b) implementing an access provision prohibiting unscheduled visits by UPTE representatives to the Chiles Road facility; and (c) implementing an access provision prohibiting employee use of University telephones for union membership recruitment at the Chiles Road facility.

3. Interfering with the right of employees to participate in the activities of an employee organization by: (a) prohibiting all demonstrations inside Mrak Hall; (b) banning UPTE Representative Barton from the UCD campus and Medical Center for thirty (30) days; (c) prohibiting Barton from conducting a contract ratification vote on the UCD campus; (d) denying UPTE the right to use a computer classroom to conduct an employment-related

survey; (e) prohibiting unscheduled visits by UPTE representatives to the Chiles Road facility; and (f) prohibiting employee use of University telephones for union membership recruitment at the Chiles Road facility.

Dated: _____

REGENTS OF THE UNIVERSITY OF CALIFORNIA

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

UNIVERSITY PROFESSIONAL AND TECHNICAL EMPLOYEES, CWA LOCAL 9119, AFL-CIO, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-585-H PROPOSED DECISION (5/9/03)

Appearances: Law Offices of James Eggleston, by James Eggleston, Attorney, for University Professional and Technical Employees, CWA Local 9119, AFL-CIO; Donahue Gallagher Woods, by George Barron and Andrew McNaught, Attorneys, for Regents of the University of California.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

The University Professional and Technical Employees, CWA Local 9119, AFL-CIO, (UPTE) initiated this action on February 27, 2001, by filing an unfair practice charge against the Regents of the University of California (University). The Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on July 20, 2001. The complaint, as subsequently amended by the undersigned, alleges that the University on several occasions denied UPTE's access rights, interfered with the right of employees to be represented by UPTE, unilaterally changed access rules and policies, and refused to provide UPTE with information concerning access policies necessary to represent employees. The complained of actions took place on the Davis campus, the Medical Center in Sacramento, and several work sites within the University of California Office of the President (UCOP) in Oakland.

Regarding actions on the Davis campus and the Medical Center, the complaint alleges the University (1) prohibited UPTE from conducting demonstrations inside a central administration building on the Davis campus; (2) barred an UPTE field representative from entering the Davis campus and the Medical Center for thirty (30) days; (3) prohibited an UPTE field representative from conducting a contract ratification meeting on the Davis campus; (4) announced a sweeping new access policy on the Davis campus; and (5) denied access in a series of actions at the Davis campus and Medical Center that unilaterally implemented the new access policy. Regarding the actions in the UCOP, the complaint alleges the University (1) unilaterally implemented a new access policy; and (2) refused to provide information related to the UCOP access policy that was relevant and necessary to represent employees.

By this conduct, the complaint alleges, the University interfered with the right of employees to be represented by UPTE, denied UPTE access rights and thereby interfered with its right to represent employees, and refused to negotiate with UPTE under the Higher Education Employer-Employee Relations Act (HEERA), section 3571(a), (b), and (c).[1]

[1] HEERA is codified at Government code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government code. In relevant part, section 3571 states that 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 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.
>
> (c) Refuse or fail to engage in meeting and conferring with an exclusive representative.

The University answered the complaint on August 10, 2001, generally denying all allegations and asserting a number of affirmative defenses. Denials and defenses are addressed below, as necessary.

A PERB agent conducted settlement conferences, but the matter was not resolved. The undersigned conducted eleven days of hearing in Oakland between May 16 and August 9, 2002. With the close of the briefing period on December 10, 2002, the case was submitted for proposed decision.[2]

FINDINGS OF FACT

The University is an employer within the meaning of section 3562(g). UPTE is an employee organization within the meaning of section 3562(f)(1) and an exclusive representative under section 3562(i) of three systemwide units: the research employees unit (RX Unit), the health care professional employees unit (HX Unit) and the technical employees unit (TX Unit). At all relevant times, UPTE was in the process of organizing two additional units: a systemwide unit of approximately 18,000 administrative and professional employees (99 Unit) and a skilled trades unit on the Davis campus (K3 Unit). Not every allegation in the complaint applies to every unit. The extent to which the University's conduct applies to these units will be addressed below.

Change in UCOP Access Policy and Request for Information

The UCOP has offices at several locations. The main locations are 300 Lakeside Drive in Oakland, 1111 Franklin Street in Oakland, Frank Ogawa Plaza in Oakland, and the

[2] The initial complaint issued by the regional attorney included allegations that the University had interfered with UPTE's access rights and retaliated against employees at its campus in San Diego. The University moved to defer the San Diego allegations to arbitration or, alternatively, place them in abeyance pending the outcome of the arbitration proceeding. UPTE opposed the motion. On November 9, 2001, the undersigned granted the motion to place the San Diego allegations in abeyance. (Cal. Code Ergs., tit. 8, section 32620.)

University of California Press in Berkeley. According to Daniel Martin, UPTE systemwide director, UPTE represents a "smattering" of employees in the TX Unit at these locations. Also, Martin testified, there are approximately 600 employees in the Oakland offices who are in the 99 Unit.

In a February 5, 2001, letter, UCOP Labor Relations Specialist Karen Yun gave UPTE notice of "proposed changes and/or newly developed Human Resources administrative procedures and supplements to complement the Personnel Policies for Staff Members for local Office of the President uncovered and non-represented employees" relating to access. The Personnel Policies for Staff Members (PPSM) is a compilation of personnel policies. Yun pointed out that the notice would afford non-represented employees the opportunity to review and comment on the procedures and supplements. She also indicated that represented employees should refer to their respective collective bargaining agreements and/or consult with their union representatives regarding the changes. Yun said in the letter that she was available to answer questions by UPTE.

Attached to Yun's letter was Supplement F, Regulations Governing the Use of University Facilities and Access to University Employees by Employee Organizations and Their Representatives. This document is referred to in the record as Supplement F. It is a comprehensive policy covering topics such as use of meeting rooms and bulletin boards, mail delivery services, electronic communications, telephones, and access to employees in general.

Among other things, the general access portion of Supplement F prohibits employees and employee organization representatives from conducting employee organization business during employee work time; permits employee representatives to conduct union business in accordance with applicable collective bargaining agreements; permits employee organizations and their representatives to conduct union business in appropriate work areas during the

employee's non-work time; requires non-employee representatives to give at least 24 hours notice to the UCOP of their intent to enter the "premises;" permits employee organizations and their representatives access to work areas only when employees are not on work time, conduct of the employee organization business is not disruptive to other employees, and the work area is appropriate for conducting union business; excludes employee organizations and their representatives from otherwise appropriate work areas when the supervisor makes available alternative meeting facilities within reasonable proximity to the work area; permits access to secured work areas only to employees who are assigned to such areas or have specific authorization to be in the area; and states that UCOP access rules may not be interpreted to disrupt the operations of the University.

Martin testified that he was unaware of a written access policy covering unrepresented employees, and he similarly said when he received Supplement F he had no idea of how it compared to any existing policies at the UCOP. Many 99 Unit employees are free to schedule their breaks and lunch periods as they determine. Martin testified that the statewide practice of UPTE organizers is to contact such employees directly at the workplace. He said employees may agree to meet with organizers in the workplace while on their break or lunch hour without University involvement. When Martin received a copy of Supplement F, he became concerned that it was contrary to the practice. UPTE was initiating an organizing drive in 99 Unit and he wanted a copy of the UCOP policies that would apply.

On February 9, 2001, Martin asked Yun to "create a comparison" with existing policies to clearly set forth any changes for discussion purposes. On February 26, 2001, Yun responded with a "matrix" comparing many of the proposed changes with existing procedures. With respect to Supplement F, however, Yun provided no comparison information. Yun wrote that Supplement F was "New – Provides representatives of employee organizations with a

reasonable opportunity to contact individual employees, and at the same time, to assure that such contact does not interfere with or disrupt the work of the University."

Martin complained to Yun that her response was inadequate for comparison purposes. He testified that Yun's response was inadequate because it didn't provide a "side-by-side comparison" of the existing policy and the proposed policy. Yun did not provide more information.

On March 26, 2001, Manager of Employee and Labor Relations Shar Caldwell, informed Martin that, based on comments received regarding the proposed changes, UCOP had decided to revise the proposal. She wrote that the revised proposal would be provided to UPTE for comment and review as soon as possible.

In a May 31, 2001, letter, Caldwell provided Martin with a revision of the proposal for UPTE's review and comment. However, Supplement F had been deleted from the proposal. Caldwell wrote: "Please note that Supplement F regarding 'access' has been withdrawn pending further revision and that the revised proposed changes and/or newly developed UCOP Human Resources Procedures and Supplements included in this package have not been finalized, and are therefore, also subject to further revision based on additional comments." (underlining in original.) As of the close of hearing in this matter, UCOP had not proposed the changes reflected in Supplement F.

Yun testified that no written access policies covering UCOP employees existed, except those contained in the relevant collective bargaining agreements. Yun said there were no "rules on access for the Office of the President" and there was "no practice" that she was aware of.[3] Judy Boyette, associate vice president for human resources and benefits, similarly testified

[3] The parties stipulated that if called to testify, Kay Miller, acting director of human resources at UCOP, would give the same testimony as that given by Yun.

that there was no formal written access policy. Boyette speculated about the reason for the lack of written access rules covering the UCOP. She said the UCOP office previously was located in Berkeley and access rules for the Berkeley campus were followed by UCOP. After moving to Oakland, the UCOP adopted no new rules of its own.

Boyette also testified that Supplement F was consistent with existing access practices. However, after reviewing Supplement F more carefully, she testified that "some" of the provisions therein were consistent with procedures at other locations, but they were not the practice at UCOP. She did not identify specific parts of Supplement F that were applicable.

Although the testimony indicates that there were no written access policies at UCOP, there is some evidence of the existing practice at two locations. These are the Lakeside Drive and the Franklin Street offices. Boyette testified that, as a safety precaution, security measures were implemented for floors 4, 5 and 12 of the Lakeside Drive office in about November 1997. Boyette said she has no knowledge of whether the same measures apply to other floors. She said the University administers its medical disability retirement program and it is not uncommon for disgruntled individuals to threaten UCOP employees. Therefore, the security measures were implemented to permit the receptionist to admit visitors only after determining who they are and who they intend to visit. If an individual attempts to visit a University employee without an appointment, the receptionist informs the employee that a visitor is present and the employee typically meets the visitor in the reception area. This procedure applies to the general public, as well as employee organization representatives.

Boyette was not asked specifically about the reason for the sign-in procedure at the Franklin Street office. She said, however, that it applies to the general public as well as representatives of employee organizations.

Martin described his experience trying to get access to the Lakeside office: "Well, here's what happens, go up to a floor to look for an employee, first the floors are locked, you have to call in to the receptionist who will then buzz you in. Then you have to – you can't then go look for the employee, the receptionist has to call that employee and say, you know, announce that the union is here to see you, which causes obvious problems." The problem, according to Martin, is that "people tend to get nervous and not want to be publicly associated. It's much different from being able to go up to a person in their office or cubicle and say do you have the time to talk, and that employee defining what works for them." Martin said the requirement to be "buzzed in" to 300 Lakeside Drive and openly announce to the receptionist that he wants to visit with a particular employee has a chilling effect of an employee's willingness to meet with a union representative at the work site. He said employees have told him they are reluctant to be seen talking to him at the office.

Martin also described difficulties gaining access to the Franklin Street address, where a large number of 99 Unit employees work. He testified that UPTE organizers must sign in at the front desk of the Franklin Street office and announce the name of the employee they plan to visit. The organizer must then write the employee's name he or she intends to visit in a sign in log. The receptionist does not contact the employee; rather, Martin said, the representative is permitted to enter. He described the problem with this procedure as similar to the one associated with the Lakeside Drive procedure. Martin said he has no knowledge of when the security measures at the Lakeside Drive office were implemented, nor does he know when restrictions at the Franklin Street office were first imposed.

The testimony about precisely when the practices at the Lakeside Drive and Franklin Street offices commenced is limited. Boyette testified that the security measures at Lakeside

Drive began in about November 1997. And Martin said he had no idea when the practices at these offices started.

According to Martin, the University has refused to give UPTE e-mail addresses or work telephone numbers of 99 Unit employees at the UCOP. He also said the University has refused to give UPTE home addresses unless the employee has consented in writing at the time of initial employment.

Mrak Hall Demonstrations

On October 16, 2000, UPTE and other unions began a series of six weekly demonstrations at Mrak Hall, the central administration building on the Davis campus. The primary purpose of the lunch-hour demonstrations was to protest the slow pace of negotiations to University officials, including the chancellor, who work in Mrak Hall. At the time of the demonstrations, the parties were negotiating a successor agreement to the TX Unit MOU, and wage and benefit reopeners for the MOUs covering the RX and HX Units. On each occasion, the demonstrators carried picket signs and used a variety of noisemakers to attract attention. These included, among other things, pots and pans, whistles, and a bullhorn.

The first two demonstrations began outside Mrak Hall and the participants proceeded to march to other areas of the campus. During subsequent demonstrations, however, employees entered the hall to continue their protest. According to Livingston, the first time demonstrators entered Mrak Hall was a "spur-of-the-moment thing" with no discussion before hand. He said the purpose was to make sure that the message was clearly sent to decision-makers in the building that employees were not satisfied with the pace of negotiations. Livingston also testified that the demonstrators believed that entering Mrak Hall would not disrupt work because most of the employees were out to lunch at the time.

The protestors entered Mrak Hall during four demonstrations in late 2000. On each occasion, approximately ten to forty demonstrators entered the building and remained inside for up to twenty minutes. On the first occasion the demonstrators entered the lobby and protested there. Business offices such as the registrar's office, the cashier's office and the college of agriculture and environmental sciences are located adjacent to the lobby. Doors to these offices were closed during the demonstrations.

During two or three of the subsequent demonstrations, protestors went beyond the lobby and the majority entered the upper floors of the building through stairwells. Specifically, Livingston testified that the demonstrators used the stairwells to enter the main lobby on the second floor, as well as the third and fourth floors where administrators work. He said the demonstrators could not enter the fifth floor because the doors to the stairwell leading to that floor were locked. The chancellor's office is located on the fifth floor.

Livingston also testified that the demonstrators encountered non-demonstrators on the stairs and "let them pass." He said "there was always plenty of room to go out" and the demonstrators "never blocked doors." Noisemakers, including the bullhorn, were used in the stairwells and the upper floors.

Each demonstration was monitored by University representatives such as Mike Garcia, associate director of employee and labor relations, and Michael Sheesley, director of employee and labor relations. They took notes and photographs of the demonstrations. After the first demonstration inside Mrak Hall, Garcia and Sheesley informed Livingston that the demonstrators should not enter the building again because they made too much noise and disrupted work.

As noted, Garcia was one of the observers for the Davis campus. He testified that he asked Livingston not to enter Mrak Hall but Livingston ignored him. During at least one of the

demonstrations, Garcia said, about 35 employees entered the lobby, marched around the lobby and proceeded up the stairwells to the upper floors. Contrary to the testimony given by Livingston, Garcia said the demonstrators impeded employees who worked in locations adjacent to the lobby from reaching their offices. He said they had to wait for a few minutes for the demonstrators to pass by so that they could proceed to their offices. However, he said he saw no one turn around and leave the building.

Garcia followed the demonstrators up the stairs on at least one occasion and formed the opinion that "there was no way that anybody coming down would have been able to get out." However, Garcia didn't encounter anyone trying to proceed down the stairs and out of the building. Garcia also said the demonstrators reached the second floor on this particular occasion and continued to make noise.

Sheesley's testimony is substantially similar to the testimony given by Garcia. In brief, Sheesley said he was concerned that 40-60 demonstrators in Mrak Hall would make it difficult to use the stairway in an emergency, and he was concerned about general ingress to and egress from the building. Sheesley also was concerned that demonstrators in the lobby would interfere with visitor access to the elevators and disrupt the administrative offices adjacent to the lobby and on the second floor. In sum, Sheesley concluded the demonstrations in Mrak Hall were disruptive.

Meanwhile, on November 13, 2000, after the demonstrations had started, Sheesley sent an e-mail to UPTE Field Representative Pete Livingston and UPTE Chapter President Rob Brower. Anticipating further demonstrations, Sheesley indicated his concern about UPTE observing local access policies that regulate the time, place and manner of access. He wrote, "the key elements of the University's time, place and manner policies prohibit UPTE from disrupting the business of the university, preventing the ingress and egress of people in and out

of Mrak, or endangering the safety of persons or property during the course of any demonstration." Sheesley further noted that although use of amplified sound during demonstrations is permitted on campus, it requires a permit. He said in the e-mail that arrangements have been made to issue the permits for future demonstrations, but the privilege to use amplified sound may be withdrawn if it interferes with normal activities of the University. Sheesley also indicated that he was available to meet with UPTE to discuss any concerns about access. However, he testified, he had no intention of negotiating with UPTE at that point; he intended only to discuss the language in the contracts in an attempt to resolve the problem. The parties never met to discuss the topic.

In a January 12, 2001, letter to UPTE Chapter President Rob Brower regarding the Mrak Hall demonstrations, Sheesley wrote that

> . . . the University will not permit activities during demonstrations which present health or safety concerns, pose a realistic threat of damage to University property, obstruct access to or egress from a University building or offices within a building, or which disrupt the ongoing operations of the University. Demonstrations inside of Mrak Hall are not permitted under any circumstances. Mrak Hall is an administrative office building with numerous offices on every floor, including the ground floor where offices are located adjacent to the relatively small lobby. Demonstrations inside the building are inherently disruptive of University operations and interfere with the ability of the University to fulfill its responsibilities. In addition, demonstrations inside the small lobby area obstruct the building's entrances and impede the flow of traffic into and out of the building.

Sheesley noted that the collective bargaining agreements between the University and UPTE entitles the University to enforce reasonable access rules and regulations, and he attached to the letter copies of local University access policies. Sheesley indicated that he was available to "initiate a dialogue" about access and clear up any misunderstandings. He concluded, "it is my

duty to advise you that the University is committed to taking appropriate action, should violations of its time, place, and manner rules occur in the future."

Sheesley testified, however, that there could be situations where demonstrations inside Mrak Hall are not inherently disruptive. He testified,

> . . . In other words, if you had somebody who had a sign around his or her neck who stood by him or herself in the corner that said "The University is unfair," I don't know that that would be inherently disruptive. ¶ However, if you had, it seems to me, a hundred people doing that, it would -- likely, in that area, it would be disruptive. So, depending on how you use the word "demonstration," you could arrive at a conclusion, you could slice it thin enough to where a demonstration wouldn't be disruptive. What I saw involved 40-60 people.

Aside from the letter, Sheesley never advised UPTE about any particular harm or disruption the demonstrations caused. UPTE did not contact Sheesley to engage in discussions about access. There was no action taken under the local campus policy, which includes the California Penal Code as an enforcement mechanism, to address the demonstrations.

Department of Ophthalmology Demonstration

The Department of Ophthalmology is part of the Medical Center and is located on the second floor of 2600 Y Street in Sacramento. It contains academic, administrative, and research offices, as well as a patient clinic. A sign on the building states that only authorized personnel and patients are permitted to enter.

There is a main entrance and reception area next to an elevator for visitors and patients. Employees usually enter through stairwells at various locations that lead from the first floor to the department on the second floor. These stairwells may be entered from the first floor of the building, but they cannot be entered from the outside the building.

The physical layout of the department includes a large number of enclosed offices and open workstations. The offices and workstations are connected by a maze of corridors. The

policy in the department is that, except for patients, no person without a badge is permitted access to the corridors of the clinic or the remainder of the department. Visitors must be escorted. Individuals without a badge who are discovered in the department typically are asked to identify themselves. Typically, they turn out to be representatives for drug companies, outside vendors and friends or relatives of employees. Occasionally, patients are escorted through the hallways. There is no register or sign-in log for visitors.

Martha Barber is the manager of clinical operations. She testified that access to employees is available through mailboxes, bulletin boards, and e-mail. She also said employee organization representatives may meet with employees in conference rooms, the cafeteria, and at workstations during non-work time if they have an appointment.

The department includes employees in the RX Unit, the TX Unit and the 99 Unit. The demonstration described below occurred during a lunch hour. Most employees in the department are professional employees who have the discretion to take their breaks and lunch as their work allows.

The demonstration that occurred in the department on January 9, 2001, is set against a background of grievances filed by UPTE member Jacqueline Quigg. In brief, on November 16, 2000, UPTE representative Stanley Choy filed a grievance under the RX Unit contract on behalf of Quigg. The grievance alleged that the Medical Center had failed to reasonably accommodate her disability and issued her a medical separation. On December 13, 2000, UPTE filed another grievance against the Medical Center alleging that Quigg should have been transferred to another position rather than terminated.

Sonia Salcedo, Medical Center labor relations representative, timely responded to the grievances in accordance with step one of the grievance procedure and the parties conducted two grievance meetings in late December 2000. The main representatives for the Medical

Center were Diane Weeks, manager of the academic component of the department, and Barber. Weeks was the person generally responsible for Quigg's termination. The grievance meetings were marked by acrimony. On one occasion, UPTE representative Pilar Barton testified, Weeks glared at the union representatives, stood up, said "I don't have to speak to the union," and departed.

At approximately 11:40 a.m. on January 9, 2001, UPTE representative Pilar Barton and approximately ten other demonstrators rode the elevator to the second floor.[4] The protestors were representatives of UPTE, the Coalition of University Employees and the American Federation of State, County and Municipal Employees (AFSCME). Five of the demonstrators, including Barton, were UPTE representatives. They marched in a single file through a corridor and entered the department. The participants carried signs that read "Give Jackie Her Job Back" and "An Injury to One is an Injury to All." Barton said the participants agreed that they would engage in a "silent" and dignified demonstration in an attempt to convince Weeks to meet with UPTE on behalf of Quigg and discuss reasonable accommodation before terminating her, and to demonstrate to employees that the unions would stand up for an employee.

Barton first encountered analyst Shannon Banderman and asked to see Weeks. Banderman informed Barton that Weeks was at lunch and directed her to supervisor Kim Cello. Cello was in a meeting with the director of the biostatistics department on the Davis

[4] The demonstrated followed several confrontations between Barton and Weeks. Barton had entered the department four or five times prior to January 9, 2001, to meet with employees. She said it was a "hot spot" which generated a lot of employee complaints. During four of these visits, Barton had angry exchanges with Weeks, who claimed she had no right to be present in the department. At some point prior to January 9, Barton testified, labor relations representative Ron Gordon informed her in a telephone conversation that her conduct in the workplace was in violation of the contract and there would be consequences.

campus when Barton knocked on the door to her office and inquired about Weeks. Cello responded that Weeks was at lunch and continued the meeting.

After trying for about five minutes to locate Weeks, Barton and the protestors left the department, returning to the first floor lobby to search for Weeks in the cafeteria. When Weeks could not be located, most of the demonstrators returned to the department. When they arrived, Banderman again contacted Cello, who was still in her meeting. At some point in this series of events, John Keltner, a physician and chairman of the department, was contacted. He was with a patient in the clinic and could not attend to the matter. He instructed Banderman to use a pager to contact Weeks and Barber, who were at lunch together.[5] As Banderman paged Weeks, some of the demonstrators entered Weeks' office and an unidentified person placed a sign on her desk chair. It read, "Give Jackie Her Job Back!" Unidentified participants also taped signs to the door to Weeks' office. The signs read, "No Justice No Peace!" and "A People United Will Never be Defeated!" Also, Barton gave employee Mary Edwards a January 3, 2001, letter to addressed to Weeks and signed by twenty-six employees and UPTE representatives. Barton and the others then departed.

Barton testified that the sign left on Week's office chair was not an UPTE sign, nor were the signs posted on the door to Weeks' office UPTE signs. She said the signs left in Weeks' office were AFSCME signs. She said she gave no directions to UPTE participants to leave signs in Weeks' office; in fact, she understood that the signs would be retained for the

[5] The parties presented lengthy testimony about these events, and there are conflicting versions about what precisely happened and the sequence in which the events occurred. For example, witnesses gave conflicting testimony about whether Barton asked to see Keltner the first time she was in the department or the second. And it is unclear who suggested that Keltner be contacted or when the suggestion was made. As more fully discussed below, it is unnecessary to address these inconsistencies and set the sequence of events with precision to resolve this dispute.

next demonstration. When Barton left the department, she had no idea that the signs had been left in Weeks' office.

Upon returning from lunch, Weeks discovered employees "milling around my office, looking at the signs and wondering what was going on." Barber, who had been at lunch with Weeks, testified that the employees gathered around Weeks' office normally would have been at their workstations. Weeks next saw the signs in her office and later read the letter left by Barton. The letter addressed the Quigg grievances and accused Weeks of refusing to become involved in an "interactive process with UPTE" and committing an "injustice" toward an UPTE member. It asserted that an injustice to an UPTE member is an "injustice to all." The letter went on to summarize the Quigg case and demand cooperation. It closed with the following:

> We are committed to this fight for Jackie Quigg because it is our fight as well. If but only one employee is discriminated against, harassed or bullied and nothing is done to correct it, we are all in danger of this type of treatment. We view your actions as a potentially contagious disease that must be eliminated immediately lest it become an epidemic. We will not sit idly by while one of our own is being treated unjustly.

Weeks immediately reported the matter to the labor relations office. She testified that she construed the letter as a personal threat, she believed her privacy had been invaded, and she was "appalled." After she gave the police a report she left work in tears at about 2:30 p.m.

In her testimony, Barton disagreed that the letter contained a threat. She said the content of the letter was mere "hyperbole," and she was never contacted by the police or the University about the letter. Asked why she didn't deliver the same message to Weeks by telephone or other means, Barton testified it would have been futile because Weeks would not have responded. "Diane Weeks despises me," Barton testified.

After the January 9, 2001, incident, the labor relations office placed a security guard in the department for two weeks, and Weeks posted "Authorized Personnel Only" signs on doors leading into the department to restrict access. Weeks defined authorized personnel as people with badges and people escorted by people with badges.[6]

In a January 12, 2001, letter to UPTE President Jelger Kalmijn, Associate Vice Chancellor Dennis Shimek described the incident in the Opthamology Department from the University's perspective. In brief, he wrote that the demonstration was inappropriate and disruptive. He described it as "intolerable" and "deplorable." He asserted that it violated the collective bargaining agreements and University access policies. Citing prior occasions when the University accused Barton of acting in violation of access rules, Shimek asserted that Barton has again run afoul of the rules in protesting a grievance matter outside the negotiated procedures. Pointing to a local policy that gives the chancellor the authority to impose sanctions on employee organization representatives for violating University access regulations, Shimek announced that Barton would be denied access to the Davis campus and the Medical Center for thirty days. Violation of the ban, he wrote, would be considered a trespass, and further violations of access rules by Barton will result in permanent denial of access to the Davis campus and Medical Center.

Contract Ratification Incident

On or about January 25, 2001, Barton entered the Ellison Building at the Medical Center to conduct a ratification vote for the HX contract. The Medical Center is considered part of the Davis campus. The vote was to be conducted in the cafeteria. Barton was

[6] The University presented testimony that Barton entered the department several times after January 9, 2001. Because these incidents occurred after January 12, 2001, letter, I find their probative value in addressing the issues presented by the complaint limited and therefore will not consider them further.

recognized by Robert August, a manager of registered nurses, who reported her presence to Banderman. Banderman, in turn, reported to Weeks that Barton was in the building, and Weeks called the University police.

Officer Mike Williams took a statement from Weeks, obtained a copy of Shimek's January 12, 2001, letter, and served a copy of the letter on Barton in the cafeteria. Based on the access restriction in the letter, Williams escorted Barton off the premises. Barton complied with the expulsion in a cooperative matter.

At the time of Barton's expulsion, she was the only UPTE representative present and the ratification vote was terminated. Shimek testified that Williams' action was an appropriate response under the terms of his letter.

Davis Home Health Care Incident

The Medical Center's home health care unit is located at 3630 Business Drive in Sacramento and employs social workers in the HX Unit. At the time of the hearing, there were two social workers employed in the relevant work area. Social workers have flexible hours in that they have the discretion to determine the timing of their breaks and lunch.

Kathy Marty, clinical supervisor in the facility, testified that the one-story facility is considered a restricted area with specific access procedures for non-employee visitors. She said union representatives and other visitors must enter through a main entrance, identify themselves at the reception desk, state who they intend to visit, and be "buzzed" in through a locked door. Other entrances to the facility are kept locked, but employees may enter and exit work areas in the building through these doors by using a passkey. Once admitted to the facility, visitors must be escorted by an employee, according to Marty.

The procedure to enter through the reception area applies to union representatives as well as employees from other parts of the Medical Center who visit the facility for work-

related reasons. Employees from other parts of the Medical Center are permitted access to the work areas only if they are working on a case with a social worker, and they must be escorted by an employee while moving through the facility.

A walkway leads from the reception desk to a large open work area which is divided by partitions into three smaller areas containing cubicles where social workers' desks are located. Medical records are stored in filing cabinets throughout the work area, including the area along the walkway that leads to the cubicles. Social workers frequently go the filing cabinets to retrieve patient charts during the day. According to Marty, areas where employees work and patient care information is stored are restricted areas. The break room and hallways leading to the break room are not considered restricted areas.

While there are no patients on site, confidential medical records are often in plain view on social workers' desks. At the end of the day, the records are locked up in desks. Patient names are posted on scheduling boards lining the walkway that runs from the reception area to the work areas. The names are visible to a visitor proceeding through the walkway. Social workers often discuss patient care openly in the facility. These discussions often include sensitive topics such as spousal and child abuse. Marty testified that "it happens all day long," and her concern is that non-employees who are permitted access to the work areas may hear confidential information.

On March 21, 2001, Barton entered the facility through the reception area. She announced herself as an UPTE representative visiting employees to distribute information about negotiations. She also indicated that she "would be happy to see any social workers that were available or that could see [her] . . . for the purpose of trying to get them information." Barton testified that "a tall woman" then escorted her down the walkway to the work area where a few social workers were present. She entered the work area where desks are located

and placed UPTE material on the desk of social worker Sharon Wilson. At the time, Wilson was engaged in a telephone conversation. According to Barton, Wilson gestured to her to wait until she completed her call. After the telephone call, Barton and Wilson began a conversation, Barton gave her a UPTE membership form, and Wilson began to fill it out.

At that point, Marty approached Barton and the two women began a conversation about access. Marty testified that she informed Barton that "this was a patient care, confidential area, and if she wanted to meet with the staff, I could direct her over to our break room and also our lunch room." Marty also informed Barton that if she refused to leave the police would be summoned to escort her to the break room or off the premises. Marty then escorted Barton through the walkway back to the entrance.

Barton testified that Marty, during the conversation, did not direct her to the break room. According to Barton, Marty "asked me to leave that day and she said in the future if I wanted to come back, I couldn't talk to the employees unless I had arranged to meet with them in the breakroom."

Barton testified that UPTE has no access to employees in this facility through e-mail or by telephone. She said when she tries to contact employees by calling the main telephone number, she is forced into a "general voicemail loop" which has not permitted her to get through to individual employees. In contrast, Marty testified that employees in the facility may be contacted by telephone, voice mail or e-mail. She also said information for individual employees may be left at the receptionist's desk. Employee mailboxes are located next to the break room, but Marty considers that a restricted area because employees discuss patients in that area.

Computer Classroom Incident

Joan Randall is an UPTE steward and an analyst in the department of nutrition. She is a member of the 99 Unit. In October 2000, Randall and other employees attended a seminar on workplace "bullying" sponsored by Drs. Ruth and Gary Namie. The seminar was related to the Campaign Against Workplace Bullying organized by the Namies, who offered to conduct a survey on workplace bullying at the University. The Namies have no connection to the University and wanted to conduct the study as part of their private research. Randall and other unions accepted the offer.

For approximately one month prior to May 2001, UPTE and other unions posted and distributed leaflets throughout the Medical Center announcing a town hall meeting and inviting interested employees to go to the Campaign Against Workplace Bullying website to participate in the survey. The flyers indicate that "UCD/UCDMC UNIONS ENCOURAGE STAFF" to participate in the survey. Randall testified that UPTE and other unions supported the survey for the purpose of communicating with employees about "the extent of bullying" in the workplace.

Among the distributed materials was a leaflet displaying a schedule of hours computer classrooms were open at the University for free web access for employees who wanted to participate in the survey but did not have such access or could not participate at their work stations. One such location was a classroom in the administrative support building at the Medical Center. Access to the building is controlled by an electronic key system. It is considered a secure building because it houses computer equipment, computer classrooms, a computer mainframe and the main telecom facility. The mainframe contains patient information. The building is locked after 5:00 p.m., and evening access is through the key system or a contact inside the building.

Classrooms in the building may be reserved by University employees for training and other purposes under guidelines prepared by Rick Lawler, a programmer at the Medical Center who has responsibility for reserving computer classrooms. The guidelines include detailed criteria for reserving a classroom. They note at the outset that that classrooms are used "primarily" to teach computer classes to staff, faculty and students. They are also used to conduct computer-related training programs. According to Randall, however, the room is open to all staff members, as "walk-in traffic," to use the computers for various purposes at times consistent with a published schedule. In fact, the guidelines conclude with the following:

> Classroom may be used by individuals on a case-by-case basis only when classroom is not in use. Individual must call I.S. immediately prior to use to make sure classroom is available. Access may be cancelled at any time. Only during regular work hours. Non-work-related use of classroom not allowed. Lay-off candidates okay to update or create resumes and related.

Pursuant to the reservation procedure, Randall reserved the computer classroom in the administrative support building through Lawler from 4:00 p.m. to 8:00 p.m. on May 22, 2001. She testified that the room was reserved for a "union-sponsored event" so that employees would have access to computers to participate in the survey. She also said Namie would be there to answer questions about the survey and assure the campus community that it was a survey to support his personal research, not a survey conducted by the University or UPTE.

According to Lawler, Randell told him she wanted to reserve the room for a "web-based survey." When he told her the classrooms are for use by Medical Center and hospital employees and groups, Lawler testified, Randall said the group participating in the survey consisted of "people from the Medical Center." At no time, Lawler testified, did Randall say

she wanted the room for a union function.[7] Later in his testimony, Lawler said Randall "mentioned that, while she was a union representative, it was not a union event." His testimony is clear, however, that he knew the purpose of the room reservation was employment related. He said, "it was a workplace survey and they wanted to have a space available for employees to come to complete the survey if they didn't feel comfortable doing it at their own workstation or if they had questions or problems."

When Randall and others arrived at the classroom on May 22, 2001, Lawler was of assistance initially. He identified the password and began to show participants how to log on to the network. Randall brought out various materials related to the survey and gave Lawler her UPTE business card. Lawler said there was nothing in the materials that would prohibit conducting the survey in the classroom. He also said the password he gave Randall and others would not have enabled them to access any confidential information at the Medical Center. To access such information, a participant in the survey would need passwords or codes created specifically for that purpose.

As Randall and others displayed their materials and Randall identified herself as a union representative, Lawler apparently became concerned that the room would be used for a non-University function. Lawler then reported his concern to his supervisor who, in turn, passed it up the chain of command. After about 15 minutes, Guy Koppel, associate director of hospital clinics and chief information officer for the Davis Health System, arrived. He was accompanied by others from his office. He immediately questioned use of the room for the survey. At the time, Koppel was aware that Lawler had approved use of the room, but felt the

[7] Because Randall worked at the Davis campus, a "department recharge" would be assessed against her department. However, another trainer happened to be available that night and Lawler and Randall agreed that she would monitor the room.

reservation had been granted under suspect circumstances; that is, Lawler had authorized use of the room while under the impression that it would be used for a University function.

At that point, a discussion took place. According to Koppel, there was confusion about granting access to the room and whether the purpose of the meeting was appropriate. Koppel said he had no knowledge of the survey at that time. He said he merely asked Randall if the room was being used for a "University-related function" and she handed him an UPTE business card and identified herself as a union representative. Koppel said he assumed Randall worked for UPTE, he became concerned that she was not part of University staff, the function was not University-related, and the appropriate process for reserving the room had not been followed. According to Koppel, a reservation process must be followed, and "it makes no difference whether it's union or otherwise."

Randall testified about the discussion as follows. She said she gave Koppel her UPTE business card and explained the survey was not a union event. But she told Koppel that she was a "union person," the survey was "union supported," and it was for staff employees. Randall testified that Koppel said "this is not available to unions." Randall described her discussion with Koppel as follows.

> He told me I had no right to be there, and I kept saying why don't I have a right to be there, and he said, because this is a restricted area. I said based on what? He says, because it's secure, it's not for you, this is a union function. I said, this is not a union function. He said it's a union function. It was back and forth, one of those kinds of conversations. . . .

Koppel testified that he eventually explained to Randall that there is a process to gain access to the room for University-related functions, "[i]t makes no difference whether it's union or otherwise," and he inquired if Randall had completed the process for authorization. For some unknown reason, Randall responded that Shimek authorized use of the room.

Koppel immediately contacted Shimek by telephone and learned that he was aware of the survey, but had not authorized use of the room. After speaking with Shimek, Koppel told Randall that there was a "process problem" regarding access to a controlled area. He pointed out that it was close to closing time (5:00 p.m.) and he would lock the room until the matter was cleared up. Koppel said he asked Randall and other participants in the survey to leave the room and wait in the lobby until he could "get it squared away." Signs were quickly posted at entries to the building to inform late arrivers that the event was cancelled.

Shimek testified that the local University access regulation that covers use of meeting rooms by employee organizations does not prohibit participation by a person not affiliated with the University. Asked if he would have an objection to Randall using the computer classroom for the survey if she followed the procedure administered by Lawler, he responded "none whatsoever."

Chiles Road Incident

The Division of Information and Educational Technology is located at 3820 Chiles Road in Sacramento. Duties performed by employees at the facility include computer programming, reprographics, art reproduction and media-related illustrations or graphics. The computer programming function involves working with databases that contain information about employees, such as payroll information and social security numbers. Because employees are free to withhold such information, Ken Ealy testified, the databases are considered confidential. The programming function also includes implementing systemwide programs from the UCOP.

Employees in the TX Unit and the 99 Unit work in the facility. As professional employees, they have discretion to determine their lunch and break periods.

Barton testified that she visited the facility on several occasions prior to June 13, 2001, to distribute UPTE materials and meet with employees. She said the procedure to enter the two-story building involves checking in with the receptionist, signing a log, identifying the employee to be contacted and receiving a visitor's badge. On her prior visits, Barton testified, employees stopped work and talked to her. Her prior visits with individuals typically lasted a few minutes; lunch hour visits lasted approximately one hour. Although Barton has on occasion contacted employees at this facility by telephone, she does not have a comprehensive list of phone numbers. She testified she does not know if employees have access to e-mail.

Barton and UPTE representative Justin Middlecoff visited the Chiles Road facility early in the afternoon on June 13, 2001. According to Barton, she and Middlecoff were approached by a University representative in the workplace, informed that their visit disrupted employees, and asked to leave. After debating the right of access with the University representative, Barton and Middlecoff left the premises. Barton and Middlecoff were in the facility for a total of about 10 minutes.

Shortly thereafter, Ealy received an "access violation report" from Human Resources/Business Manager Susan Kennedy-DuHain indicating that two UPTE representatives (referred to in the report as "Pilar" and "Justin") had violated access rules at the Chiles Road location. In brief, the report stated that Kennedy-DuHain had learned from managers that two UPTE representatives, wearing visitor badges, had entered the workplace between the hours of 2:00 p.m. and 3:00 p.m. on June 12, 2001, met with five employees in the TX Unit for approximately 15-20 minutes in each employee's work area, and gave each employee flyers titled "Where do my UPTE dues go?" and "UPTE Membership Application." The report noted that the UPTE representatives had entered only their first names in the visitor sign-in book, did not indicate who they represented, and listed their contact as Steve Osterday,

an information resources employee. The report indicated further that the UPTE representatives had not provided advance notice of the visit to any manager. The report asserted that the activity interfered with employee work because the designers perform contract work and bill by the hour. According to the report, "repro graphics is a recharge unit and each designer is part of the unit's production goal of 60%-65% chargeable activities – excluding lunch and break time." The report continued, "unscheduled and unauthorized activities are harmful to the department's production and efficiency and creates client service problems by contributing to missed deadlines and unnecessary distractions."

In addition, Ealy testified that on or about June 13, 2001, he received a number of telephone calls from managers at the Chiles Road location similarly complaining about UPTE representatives entering the workplace to contact employees in the TX Unit and the 99 Unit about matters relating to union membership. Ealy testified that he was informed that these contacts occurred in work areas and disrupted employees as they worked.

On June 15, 2001, after conferring with managers at the Chiles Road location, Ealy sent a letter to Barton regarding Kennedy-DuHain's report and the complaints. In relevant part, the letter asserts that UPTE representatives had approached both TX Unit and 99 Unit employees in the workplace. It cites the access provisions in the MOU covering the TX Unit and applicable University policies covering 99 Unit employees. It continues,

> In order to avoid disruptions with future visits at this location, the Division would like UPTE and any other union to follow a simple procedure. Contact Tina Perez, Human Resources Analyst, at 916-757-3456 and provide her with the name of an UPTE representative and the date and time when UPTE requests having the identified representative talk with employees on the site. Ms. Perez will arrange space for the UPTE representative in the break room for the requested day and time. When UPTE's requested dates and times cannot be granted, alternate dates and times will be offered.

> There is another problem on which I need your help. The "Where do my UPTE dues go?" flyer that was distributed had [UPTE chapter president] Rob Brower's work phone number on it.[8] This could be considered misuse of UC phones for union membership recruitment. The TX contract permits use of UC phones only in the context of filed grievances. Future membership recruitment material must not display any UC phone numbers as a means of contacting any UPTE representative.
>
> Please call me if you have any questions or wish to meet on this topic.

Ealy first testified that use of University telephones by UPTE representatives generally is limited to matters related to grievance processing, according to the terms of the TX Unit MOU and local policies. However, Ealy later said, "based on incidental personal use on the part of the employee," an UPTE representative may call an employee at a University phone about a matter unrelated to a grievance. With respect to use of University telephones by employees, Ealy testified that the practice is to "treat it like another personal call." If the department allows "incidental use" of telephones by employees, Ealy continued, an employee may call a union representative. If the call is a toll call, the employee is responsible for the cost, Ealy said. If an employee calls a union representation for representation, Ealy said, "ideally, the rep would say can I take your number and call you back"? Ealy said the "incidental use policy" varies from department to department.

Ealy testified that he intended the procedure described in the letter to apply to employees in the TX Unit and the 99 Unit at the Chiles Road facility. Ealy also testified that his letter had no application to access policies at the Medical Center or other locations that are subject to the allegations in the amended complaint.

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[8] While in the Chiles Road facility, Barton had written Brower's phone number on a flyer after an employee inquired about contacting him and later Ealy saw the flyer.

After Ealy sent the letter, he spoke with Barton about meeting to discuss access to the Chiles Road facility, show her the layout of the facility, the location of the break room, and related matters. He said "I didn't say anything other than, you know, this is how we can provide access to the employees and you can meet the people, the players. They can meet you. You can see where the place is. You can see where bulletin boards are. You can talk to them about scheduling, . . . It wasn't a matter of anything other than that." He testified, moreover, that it was not his purpose to negotiate with Barton about access issues. According to Ealy, Barton declined to meet and asserted that UPTE would "litigate the situation."

Ealy testified that he did not consider his letter as a formal notice of a change in access policy. He said, "[i]t was not announcing any changes in access policies. It was more my intent was to call attention to what we considered a violation of our access policy and offer some alternatives to provide access other than what had occurred that day."

Veterinary Medical Teaching Hospital Incident

The Veterinary Medical Teaching Hospital (VMTH) is located in a two-story building on the Davis campus. Entrances to the building are not normally locked. Employees in the TX Unit, predominately animal technicians, work throughout the second floor of the hospital, the relevant area in this particular dispute.

The second floor of the hospital may be entered from an unlocked stairwell at the east end of the building. The stairwell leads to a main hallway running the length of the floor from east to west. There are many work areas off the main hallway. These include, for example, an intensive care laboratory, an operating room, an isolation ward, an emergency room, a radiology room, a chemotherapy room, and a minor surgery room. Signs or color-coded markings at the entrances to these areas indicate the nature of the work performed inside and regulate access.

Barton has entered the second floor of the hospital on many occasions prior to June 26, 2001. Typically, she has entered through the stairwell on the east end of the building, dropped UPTE materials in a "mail slot area" off the hallway at the far east end of the building, and proceeded through the main corridor to the west end of the floor where more mail slots and a "sort of" break room are located. Barton ordinarily exists through a door on the west end of the floor. Barton has not generally entered areas off the hallway that would be considered patient care areas. Rather, she has contacted employees in these areas through a "buzzer on the wall" or a cell phone, and the employees have met her in the hallway to receive UPTE materials or information.

During a visit on June 26, 2001, Barton encountered a supervisor who, she testified, is named Max Gerdes in the hallway outside a surgical area off the main hallway. Barton described Gerdes alternatively as a supervisor and a leadperson. Barton said he informed her that she didn't have to stand in the hallway and could proceed through an entranceway toward the surgical area up to a point where a green stripe on the floor marked the end of the non-patient area. Barton described his comments as follows: "And he said if you'll notice this is kind of an employee changing area where they put their overcoats on and there's some mail slots. If you'd like, you can leave anything you need to in there or you can arrange to meet with workers in this area as long as you don't cross the green line. And I said, wow, that's really interesting." Barton testified that Gerdes also described the non-patient care areas to which access is permitted. In essence, these consisted of the break rooms and mail slot areas described above. When it was pointed out to Barton later in the hearing that Gerdes is a horse shoer at the VMTH, not a supervisor or a leadperson, she said that it was a supervisor named "Mark" who outlined areas where access is permitted.

Shortly after her conversation with the supervisor named Mark, Barton said she encountered Cindy Savely, small animal clinic manager, in the hallway and Savely told her she would have to leave the premises. Barton explained that she had just been informed of the areas she could enter. Barton described the rest of her conversation with Savely as follows: "And [Savely] said, well, I've been told that you can't be in here and you can't be in here. And I said, well, at least I can go down the hallway. And she said, no, you can't even go down the hallway. You can't be in here at all. And so she asked me to leave. And I said, well, why don't you talk to [Coordinator of Employee and Labor Relations] Robert Martinez. He and I are working together on, you know, approving, you know, kind of working towards a more principled relationship." Barton then departed.

Barton testified that she called Martinez a few days later and explained what had happened. She said he responded that it was a misunderstanding and he would contact Savely. Barton said Martinez has not contacted her again regarding this matter.

A few days later, Barton testified, she again encountered Savely in the hallway at the VMTH as she (Barton) made her "rounds," and Savely again told her to leave the premises. Barton said she explained to Savely that, based on her discussion with Martinez, she was permitted access to the floor "as long as I don't go in any patient care areas." According to Barton, Savely responded that, in fact, Martinez had told her (Savely) that she (Barton) "absolutely couldn't be on that floor, period." Barton testified that she left the building and called Martinez, who again explained that there must be a misunderstanding and said he would call Savely to clear up the matter.

Savely's testimony is direct conflict with that given by Barton. Savely testified that she has seen Barton in the hallway on the second floor of the VMTH many times before June 2001, and she knows Barton is an UPTE representative. However, she flatly denied ever telling

Barton to leave the VMTH. In fact, she said she has always exchanged pleasantries with Barton and has never had a conversation with her that in any way attempted to restrict access to the VMTH.

Savely testified that she learned later that Barton had a confrontation with another supervisor, Moira Fitzgerald, on the second floor of the VMTH. During a brief discussion about access a few months before the hearing, Savely testified, Fitzgerald recalled a confrontation she had with Barton in the work place. In brief, Fitzgerald informed Savely that she (Fitzgerald) encountered Barton, informed her that she was not permitted access to the VMTH, and asked her to leave. Fitzgerald did not identify the area from which she asked Barton to leave. Savely testified her discussion with Fitzgerald was short, and she informed Fitzgerald that union access is permitted in the VMTH, except for patient care areas. Barton testified that she has never met Fitzgerald or heard of her.

Martinez also testified about this subject. He said he has no knowledge of an incident where Savely informed Barton that she had to leave the VMTH. However, he testified about another incident that took place in the summer of 2001. Martinez said he was on vacation for a week beginning July 23, 2001, and upon his return he read a July 27, 2001, e-mail from Fitzgerald to VMTH associate director Paul Brentson. The e-mail stated: "Approached Pilar in back hall of VMTH second floor. Reminded her that she was in an area off limits to the public. She stated several times that she had 'just talked' to Robert Martinez and he told her that she could be in the back hall and that the VMTH was in error. I indicated to Pilar that [Associate Director] Paul Brentson had spoken to Robert in the recent past and clarified that UPTE may not be in non-public areas of the VMTH. Robert Martinez has been out of the office and unavailable to anyone since the afternoon of 7/23. 'Just talked' to must refer to

when??????.' " After discussing the incident with Fitzgerald, Martinez eventually met with Barton and other UPTE representatives to discuss access and other issues.

The credibility determinations involving the testimony of Barton and Savely and Martinez are resolved in favor of Savely and Martinez. These determinations are more fully addressed below in the conclusions of law.

There were other disputes about access to the VMTH during the summer of 2001. Barton lodged several complaints of interference with Martinez and supervisors complained that UPTE representatives had overstepped their right of access. Even Savely filed a complaint with VMTH Director Bill Herthel. In a June 5, 2001, e-mail to Herthel, Savely wrote: "I have got comments from several people about union people being in the work place. Yesterday, Cheryl said the union people were in dialysis for about half an hour talking to John while he was doing dialysis. They left a paper with him and said they'd be back tomorrow to pick it up. Also they have approached staff when the staff is working. I thought they could approach people who were on break or on a meal period. We (do you want me to do it?) should give them a list of rooms they should not go in?"

According to Savely, there are many patient care areas on the second floor of the VMTH. She defined patient care as including a "a wide variety of procedures ranging from anywhere from emergency to critical care to nursing to surgery to anesthesia to diagnostics, chemotherapy, [and] physical exams." Savely testified further that patient care activity occasionally occurs in the main hallway on the second floor. Animals are transported through the corridor to and from diagnostic tests and procedures. Often the animals are on gurneys attached to anesthesia machines. If an animal becomes unstable when being transported, it must be stabilized in the hallway. Occasionally, physical exams and tests are performed in the hallway. Other hallways may be restricted at certain times. For example, the hallway adjacent

to the post-anesthesia recovery room would be restricted if a patient is in recovery. A "quiet sign" is posted because patients react to noise.

However, Savely said she does not view the main hallway or the hallways leading to patient care areas as restricted areas. If a nonemployee, such as a union representative, is in the hallway when one of these events occurs, the representative would be asked to step aside until the matter has been addressed. Asked if she would ask Barton to leave the corridor in the event she encountered her there, Savely said "I would not." In fact, Savely testified, she has never had a problem with Barton on the second floor of the VMTH.

Barton testified that she has returned to the VMTH after June 26, 2001. She said she has been granted "complete access to those areas without any restriction," and Savely's been "extremely nice." Savely has noticed Barton in various corridors about 12 times since June 26. Barton also testified that other UPTE representatives, Livingston and Middlecoff, have been permitted access to the second floor of the VMTH.

North Core Two Laboratory Incident

The North Core Two Laboratory is a clinical laboratory located in the pathology department at the Medical Center in Sacramento. The laboratory tests body fluids of Medical Center patients and outpatients. The laboratory operates 24 hours per day, 7 days a week. Employees in the HX Unit work in the laboratory.

A main corridor that runs north to south divides the floor on which the laboratory is located. Doors on either side of the corridor lead directly to several testing areas within the laboratory. The entrance to the main corridor from the elevator bank has an electronic security feature that requires use of a code to open. Patients and visitors must be "buzzed" into the hallway if they do not have access to the code. This entrance is at the south end of the corridor.

UPTE claims it has a right of access to the various work areas on the west side of the hallway only. Because these areas serve different functions in the laboratory, they are briefly summarized immediately below.

A door off the north end of the main hallway leads to the hematology and coagulation testing area. Employees in this area conduct tests on blood, spinal fluid and other body fluids. Toxic chemicals are used in the testing process. Two coulter machines are located in an area immediately next to the hematology and coagulation testing area. In brief, a coulter machine performs a blood count. Because there are blood and other specimens present in these areas, they are considered contaminated areas. A "contaminated area," as opposed to a "clean area," is a place where the various types of patient and donor fluids or specimens are found.

Adjacent to the coulter machines is an area where patient samples and reagents are stored. Reagents are chemicals used to perform tests manually and by instruments. According to Gwen Williams, supervisor of clinical laboratory technologists, reagents are "dangerous and toxic." No testing is done in this area. Offices of two supervisors, Phil Lee and Chris Jarvinen, are located in this area.

Immediately next to the supervisors' offices is the chemistry and urinalysis testing area. About half of this area contains instruments to test specimens and the other half is made up of workbenches. Most of the specimens in this area are blood, but some urine and spinal fluids are also tested there. Reagents, such as hydrochloric acid, are stored in the chemistry and urinalysis area and used in testing.

Within the chemistry and urinalysis area, there is a small room that is not a testing area. Mail slots, time cards and coat racks are located in this room. Employees hang coats and keep purses in this area. Although it is not a formal break room, Barton described it as a "sort of a break room." To enter this room, a visitor must pass through the chemistry and urinalysis area.

Adjacent to the chemistry and urinalysis testing area is another location where blood components from donors and patients are stored. Williams said these components are a potential source of hepatitis and HIV. Next to this area is Williams' office, which is at the south end of the main corridor near the key-coded entrance to the laboratory.

Not all testing areas are directly accessible from the hallway, although most are. Once inside any area, a person can enter adjacent areas through internal doors that connect the various areas. For example, a person can go from the hematology and coagulation to the chemistry and urinalysis area without returning to the main hallway.

Employees who work in these areas wear protective clothing. Depending on the type of sample being handled, employees in the hematology and coagulation and the chemistry and urinalysis test areas wear gloves, goggles, face shields, masks and lab coats. All protective clothing is removed and employees must wash their hands before going to the break room.

Strict protocols are required for medical purposes to ensure that handling and testing blood and other body fluids is done accurately. Williams said the workload is uneven at times, with "peaks and valleys." She also said emergencies caused by accidents or gunshot wounds occasionally require that blood be provided quickly. Tests in the chemistry/urinalysis and hematology/coagulation areas similarly require priority treatment on occasion.

According to Williams, non-employees are not permitted to enter the chemistry and urinalysis testing area or the hematology and coagulation area, except for volunteers, workers who repair instruments and occasional visitors who are announced and wear the appropriate protective gear. Tour groups and various other visitors have entered the laboratory on occasion under her supervision. However, Williams testified that she has postponed tours to avoid work disruptions during busy periods, and she asked other hospital employees, salesmen, and even laboratory directors to leave. Family members of employees visit the laboratory infrequently.

They are encouraged to remain in the break room when they visit; if they visit the laboratory area they must wear a protective coat for protection. The reason for these precautions, Williams testified, is that fluids on the premises are considered a possible source of infection, and errors might occur due to distractions caused by visitors. Potential errors are significant. Williams said, for example, an error could result in a patient receiving the wrong blood. In fact, the laboratory is required to record certain types of errors and report its findings to the federal Food and Drug Administration.

Laboratory employees, such as clinical laboratory technicians in the HX Unit, do not have set break times. Based on the workflow, they have the discretion to determine times for breaks or lunch. Williams has advised employees in the past that they are free to meet with their union representatives in the hallway and/or the break room while on lunch or break. The break room is located at the north end of the main hallway directly opposite the entrance to the hematology and coagulation testing area. Williams also has informed employees that they are not permitted to take a break and meet with union representatives in testing areas. In addition, there is a bulletin board in the hallway where UPTE material may be posted, and employees may be contacted by telephone, according to Williams.

Barton testified that prior to August 2001 she entered the laboratory and distributed UPTE materials on many occasions. In brief, she testified that ordinarily she would proceed down the corridor and place UPTE materials in the break room or post materials on the bulletin board. She also said she typically entered the chemistry/urinalysis and the hematology/coagulation testing areas to distribute UPTE materials through employee mail slots in the informal or "sort of" break room in the chemistry and urinalysis area. In doing so, she also passed through the various testing areas in the laboratory described above.

On many of her visits, Barton was confronted by Williams and told her presence in the testing areas was not permitted. Williams testified that she has confronted Barton several times, mostly in the chemistry and urinalysis area, which is near Williams' office. For example, on one occasion Williams confronted Barton while she was talking to an employee in the chemistry and urinalysis area as the employee processed urine.[9] Typically, during these encounters, Barton and Williams would debate access rights before Barton departed.

On August 21, 2001, the incident on which the complaint in this matter is based occurred. Barton entered the laboratory and encountered Williams in the chemistry and urinalysis testing area. Williams called the labor relations office and was informed that Barton had no right to be in the area; Williams instructed Barton to leave immediately or she would call the police. Barton and Williams again debated access rights before Barton departed.

In March 1998, the parties entered into an agreement to settle Unfair Practice Charge No. SF-CE-93-H. The agreement provides in relevant part:

> WHEREAS a disagreement has arisen between the University and UPTE regarding access to the Main Hospital North 2 Clinical Laboratory break room, and whereas the University and UPTE wish to settle their disagreements, the parties therefore agree:
>
> 1. UPTE representatives shall have access to the Laboratory break room to meet with the laboratory employees during all hours when the laboratory is operating.
>
> 2. To gain access to the break room UPTE representatives will announce their arrival on the intercom and promptly be buzzed in. UPTE representatives may use the hallway to get to the break room.

[9] On one occasion, Williams took photographs of Barton in the chemistry and urinalysis area and other areas. UPTE filed an unfair practice charge challenging Williams' conduct. The undersigned found that Williams' conduct on that particular occasion tended to interfere with rights guaranteed by HEERA. However, the right of access was not addressed in that decision. (See UPTE v. Regents of the University of California (2002) PERB Decision No. HO-U-797-H.)

> 3. It is agreed that non-employee UPTE representatives will not enter the work areas of the Laboratory or hold meetings in the hallway. (Res. 23, 8:113)
>
> 5. This agreement is a settlement of a dispute and does not represent an admission by any party for any purpose.

Barton testified that UPTE regards the settlement as null and void in the face of the subsequent MOU providing for access. The terms of the MOU are more fully set forth below.

Department of Pathology Incident

The main cytology and pathology laboratory is located in the Department of Pathology in Sacramento. The laboratory receives specimens of pleural fluids, bronchial washings, abdominal fluids, cervical scrapings, pap smears, and fine needle aspirations for testing. The fluids are first processed through a work area, referred to in the record as an accessioning area. Eventually actual tissue is harvested in the cytology laboratory and cells are placed on glass slides. The cells are then reviewed under a microscope by cytotechnologists to determine if they are cancerous or pre-cancerous lesions are present.

A cytotechnologist is a specialized medical technologist who reviews cell samples for the presence of cancer and other infectious agents. Cytotechnologists are in the HX Unit. There are no employees at this facility in the RX Unit, the TX Unit or the 99 Unit. Other employees in the department are represented by AFSCME.

Employees in the processing and accessioning areas wear protective clothing such as gloves, lab coats and face shields to protect them from fresh tissue that might contain hepatitis C, tuberculosis or HIV. The pathology laboratory is considered a restricted area because of the possibility that either specimens or individuals could become contaminated, and handling of specimens must be accomplished without risk of mixing samples.

Adjacent to the processing area is a screening area where four cytotechnologists actually view the slides under microscopes. They work in a cluster of small cubicles. They identify atypical cells, mark them, make a preliminary diagnosis and forward them to a pathologist for analysis. The amount of time a cytotechnologist has to review an individual slide is fixed. The national average or the accepted standard is approximately six to ten minutes per slide, depending on the case. According to Robin Davis, supervising cytotechnologist, access to the area is restricted to minimize distraction. She testified that there can be in excess of a hundred thousand cells on a slide. Referring to the cytotechnologists, Davis testified, "if they're distracted, they could lose their place on the slide. They might forget if they had seen something. It's just an area where concentration to that sample is paramount." Individuals in the screening area are not required to wear the protective clothing described above.

Neither employees from other departments nor members of the public have unrestricted access to the laboratory. The northeast entrance to the department is always locked. The south entrance is open from 7:00 a.m. to 5:00 p.m.; it is operated through a cardlock between 5:00 p.m. and 7:00 a.m. Doors to enter the various areas within the department from the corridors are kept closed, but they are not kept locked. When non-employees are seen in the laboratory, they are confronted, asked to identity themselves and state their purpose.

Cytotechnologists are not tied to rigid work hours. They may determine the timing of their breaks and lunch hour. Occasionally, they take their breaks or lunch at their workstations. Cytotechnologists do not generally receive visitors at their workstations. On one occasion, however, a daughter of a cytotechnologist came to work on Take Your Daughter to Work Day and remained in the area for a few hours.

On the morning of August 21, 2001, Barton visited the facility for the first time. The purpose of her visit was to distribute materials about negotiations and meet with an employee who earlier had contacted her about joining the union and about the negotiations. Barton entered the building on the ground floor, introduced herself to a receptionist as an UPTE representative, and stated that she intended to visit employees. She was directed down a stairwell to a lower floor where the laboratory is located. After descending the stairs, Barton was directed by an employee to the work area where the cytotechnologists she intended to visit are located. Barton described the area as a "lab-type" environment. Barton entered the screening area from the hallway, contacted the employees at their workstations, gave them UPTE materials, and held a conversation with them in close proximity to their workstations.

According to Barton, Davis confronted her as she began to leave and they had a brief exchange in the hallway about access rights. In essence, Barton testified, Davis told her she had no right to be in the area and said "if you need to meet with employees, you can meet in the breakroom." Barton testified, however, that she was not aware on August 21 that a break room existed at the facility. She testified further that if she had known that a breakroom existed she could have called the employees in question and met in the break room.

Testimony given by Davis is substantially similar to that given by Barton. According to Davis, she encountered Barton and another non-employee in the screening area as they placed materials on the desks of the cytotechnologists. Two cytotechnologists were at their workstations, and one was absent. The fourth work station is vacant; it is used for an on-call, per diem cytotechnologist. According to Davis, "their attention was drawn from their microscopes. They were handed material, actually handed material as they were working and they looked disturbed." Davis agreed that she and Barton briefly debated access rights under the MOU. Davis insisted the laboratory is a patient care area under the HX Unit MOU and

UPTE had no right of access. Eventually, Davis testified, she asked Barton to leave and offered to distribute the materials or provide a break room for Barton to speak to the employees. Barton then left the area.

Davis testified that Barton could have gained access to employees through other means. These include e-mail, internal departmental mailboxes, and bulletin boards. As noted, break rooms also are available for union representatives to meet with employees.

After August 21, 2001, Barton visited the facility on several occasions, but she was never permitted to proceed past the receptionist's desk to the laboratory downstairs. Barton testified, "I would call [members] and they would come up and meet me in the lobby and we would have a discussion there. On these occasions, Barton said, an unknown receptionist failed to offer her the opportunity of going to the break room. Barton has never returned to the downstairs laboratory.

ISSUES

As framed by the complaint, the issues in this matter are as follows:

1. Did the University, at the UCOP,

   a. change access rights without affording UPTE notice and an opportunity to bargain, in violation of section 3571(c)?

   b. interfere with the right of employees to be represented by UPTE through application of its access policy, in violation of section 3571(a)?

   c. refuse to provide UPTE with information necessary and relevant to represent employees, in violation of section 3571(c) and (a)?

2. Did Sheesley's January 12, 2001, letter banning demonstrations inside Mrak Hall,

   a. interfere with employee rights, in violation of section 3571(a)?

b. unilaterally change a policy regarding access, in violation of section 3571(c)?

3. Did Shimek's letter of January 16, 2001, which prohibited Barton from entering the Davis campus,

a. deny UPTE access rights, in violation of section 3571(b)?

b. interfere with employee rights, in violation of section 3571(a)?

4. Did the University, by preventing Barton from conducting a ratification meeting on the Davis campus,

a. deny UPTE access rights, in violation of section 3571(b)?

b. interfere with employee rights to be represented by UPTE, in violation of section 3571(a)?

5. Did Ealy's June 15, 2001, letter,

a. unilaterally implement new access rules, in violation of section 3571(c)?

b. interfere with employee rights to be represented by UPTE, in violation of section 3571(a)?

6. Did any of the following incidents constitute a unilateral change in access policy, in violation of section 3571(c), and/or interfere with employee rights or UPTE rights, in violation of section 3571(a) and (b) respectively?

a. Davis Home Health Care Incident

b. Computer Classroom Incident

c. Veterinary Medical Teaching Hospital Incident

d. North Core Two Laboratory Incident

e. Department of Pathology Incident

CONCLUSIONS OF LAW

PERB Precedent and MOU Access Provisions

Section 3568 sets forth access rights under HEERA as follows:

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

The Board stated the test for assessing reasonableness in an early decision involving access to the Lawrence Livermore National Laboratory as follows.

> [The] exercise of labor board expertise is especially fitting in this situation, involving as it does serious uncontested concerns of the laboratory for national security protection of its work. Instead of eliminating the access presumption, the questions to be answered are whether the regulations established by the employer are properly related to justifiable concerns about disruption of the Laboratory's mission, and whether the rules are narrowly drawn to avoid overbroad, unnecessary interference with the exercise of statutory rights.
> (Regents of the University of California, Lawrence Livermore National Laboratory (1982) PERB Decision No. 212-H, pp. 14-15 (Lawrence Livermore Laboratory).)

Applying this test to a hospital setting, the Board has reiterated that "HEERA provides employee organization representatives, employee and nonemployee alike, with a presumptive right of access to employees at reasonable times in areas where they work. However, the access afforded must be reasonable in light of particular needs of the workplace in question." (The Regents of the University of California, UCLA Medical Center (1983) PERB Decision No. 329-H, p. 5 (UCLA Medical Center).) An employer may rebut the presumptive right of access by evidence that a regulation is necessary to prevent disruption of operations. (Id.) An important factor in weighing the right of access against employer regulation of access is the

availability of alternative means of access. (UCLA Medical Center at p. 15.) In striking this balance, the Board has also considered the impact of the employer's regulation on the basic labor law principles set forth in the statutes it administers, which are designed to insure effective and nondisruptive organizational communications. (See Long Beach Unified School District (1980) PERB Decision No. 130, p. 4 (Long Beach).)

Against this background of PERB precedent, UPTE and the University have negotiated three collective bargaining agreements that contain provisions governing access. In large part, Article 2 of the TX, HX, and RX agreements are identical. In relevant part, they provide:

> A. GENERAL PROVISIONS
>
> 1. The parties acknowledge that it is in the union's interest that it be granted access to University facilities for the purposes of ascertaining whether the terms of this Agreement are being met; engaging in the investigation, preparation, and adjustment of grievances; conducting union meetings; explaining to bargaining unit members their rights and responsibilities under the Agreement; and informing [bargaining unit] employees of union activities. In the interest of facilitating these purposes, and in accordance with local campus/laboratory/hospital procedures, the parties agree to this article.
>
> 2. The University has the right to enforce reasonable access rules and regulations as promulgated at each campus/Laboratory/ hospital.
>
> B. ACCESS BY THE UNION/UNION REPRESENTATIVES – GENERAL PROVISIONS
>
> 1. Designated union representatives who are not University employees, or who are not employed at the facility visited, may visit the facility at reasonable times and upon notice to discuss with the University or bargaining unit members matters pertaining to this Agreement. In the case of visits for the purpose of conducting unscheduled meetings with bargaining unit members, the union representative shall give notice upon arrival in accordance with local campus/Laboratory/hospital procedures.
>
> 2. UPTE will furnish the University with a written list of all UPTE representatives, UPTE designated employee

representatives and officers who are authorized by the union to conduct union business. This list shall be maintained in a timely manner by UPTE and any changes, additions or deletions to the list must be made in writing to the University.

3. Such internal union business as membership recruitment, campaigning for union office, handbilling or other distribution of literature, and all other union activities shall take place during non-work time. Employee rest and meal periods are non-work time for the purposes of this Article.

The main difference among the agreements is found in the right of access to patient care areas under the HX agreement. It provides as follows:

B. PATIENT CARE AREAS

Union representatives shall have access to patient care areas only as necessary for travel to and from union business. UPTE representatives shall not contact employees in, or use patient care areas when conducting union business. When the designated campus/hospital/laboratory official and the union representative mutually agree that a visit to a patient care area is necessary to adjust grievances, and contract related issues, access to patient care areas will be granted. "Patient care area" includes:

1. Chart rooms and rooms that function as or are in the nature of chart rooms;

2. Nursing stations;

3. Patient and/or visitor lounges including patient conference rooms, sitting rooms, and solaria;

4. Libraries or study areas located within patient care areas;

5. Patient floor and operating room area corridors; and

6. Patient rooms, operating rooms, laboratories, clinics, and other treatment and patient care areas.

In addition, a host of local University policies play a role in defining access rights. These policies will be set forth and addressed below, as necessary.

UCOP Access Policy and the Request for Information

UPTE's first line of argument is that the UCOP has unilaterally implemented a change in access rules. UPTE contends that the rules proposed in Supplement F do not purport to amend or replace existing systemwide rules, but rather establish entirely new rules and restrictions on a systemwide basis. By broadly communicating the "proposed" changes in Supplement F on its website and in other ways, UPTE reasons, the UCOP has effectively established policy standards that are understood by local managers as appropriate parameters for campus/facility limitations on employee organization access to represented and unrepresented employees, particularly employees in the 99 Unit. According to UPTE, Supplement F provisions that require advance notice, limit access to non-work areas, limit designation of non-work time, restrict access to University e-mail, and limit union business to matters related to the grievance procedure are unlawful under HEERA and PERB case law.

UPTE alleges further that the UCOP has made other changes in access regulations by practice. Specifically, UPTE characterizes the pre-January 2001 practice at UCOP as one that afforded "employee and non-employee representatives . . . access to UCOP employees in their work areas, on non-work time, at reasonable times and upon notice." It is UPTE's position here that UCOP has changed its access policy by adopting practices which reflect one or more of the following requirements: (1) 24-hour notice before entering the UCOP premises; (2) limit on access to otherwise appropriate areas if alternatives are provided; (3) limit on access to employees during non-work time; (4) restriction on communications between employees and UPTE representatives to subject matter contained in the grievance procedure; and (5) restriction on use of University e-mail to employee organization business which is related to the grievance procedure.

The examples of unlawful enforcement of the above-mentioned restrictions set out in UPTE's brief are reflected in the practice at the Lakeside Drive and Franklin Street offices, where doors are locked and entry is permitted only if an UPTE representative makes a prearranged appointment with an employee. UPTE contends the latter rule places an impermissible burden on employees to openly meet with a union representative and limits casual, anonymous workplace contact on non-work hours, thus allowing positive identification and surveillance by management employees. As a related example of the UCOP's unlawful access policy, UPTE points to the restrictions on telephone and e-mail contact with union representatives that could produce the appointments required to gain access to the Lakeside Drive and Franklin Street locations.

In addition, UPTE asserts that the changes in access policy at UCOP are ripe for adjudication, and a PERB remedy is necessary to prevent implementation of a comprehensive scheme for impermissible interference with employee and UPTE rights. "Notwithstanding UCs announced intention to 'further revise the proposed changes and proposed newly developed procedures and supplements,' the promotion and web site posting of new UCOP-recommended access standards evinces UC's clear intent to implement these access restrictions," UPTE argues.

UPTE next argues that the UCOP unlawfully refused to provide information concerning its access policies. The UCOP's February 26, 2001, response to Martin's request for information was not responsive, particularly because it included no comparison with then-existing access policies. And later requests for information in the UCOP's possession similarly were rejected, UPTE continues. According to UPTE, the UCOP presumptively had relevant information in its possession as a result of its initial development of Supplement F, yet refused to make it available. UCOP's refusal, UPTE concludes, prevented the union from

conducting an informed analysis and from meeting and conferring about access or submitting meaningful input.

In response, the University argues that the UCOP has not implemented a new access policy, and therefore the allegations in the complaint are factually incorrect and wholly unsupported by evidence. According to the University, a "never-implemented draft local UCOP policy" cannot form the basis for a finding that HEERA has been violated. In any event, the University continues, the UCOP attempted to meet and confer with UPTE before deciding *not* to implement the policy. Pointing to evidence that it submitted Supplement F to UPTE as a proposed new policy, Yun provided Martin with a matrix containing significant changes, Caldwell informed UPTE that Supplement F would be withdrawn, and no new access policies have been proposed or implemented, the University concludes that Supplement F cannot possibly represent a change to UCOP access policies.

In addition, the University asserts that there have been no changes in practice. For several years prior to January 31, 2001, doors have been locked and access restricted for visitors to the Lakeside Drive and Franklin Street locations of the UCOP; and this restriction applied to all visitors and was based on safety reasons. The University further argues that UPTE has not protested the access restrictions in these locations and has not asked to negotiate about them in connection with Supplement F.

Regarding UPTE's request for information, the University contends that no UCOP access regulations existed prior to the Supplement F proposal, and there is no evidence to the contrary. It is the University's position that there was no information to provide, and it could not provide documents that did not exist. Therefore, by sending UPTE the matrix, UCOP fulfilled its obligation to provide information.

In conclusion, the University argues that UPTE's theory to the effect that Supplement F has systemwide application fails for lack of evidence. According to the University, the totality of the evidence in this matter does not depict an employer conspiring to limit UPTE's access rights on a statewide basis. Rather, to the extent the complaint alleges violations beyond the UCOP, the evidence reflects the University "reacting reasonably and permissibly to the egregious and dangerous behavior of a single UPTE employee."

The first theory of the complaint is one of unilateral change. Specifically, the complaint alleges that on or about January 31, 2001, UCOP changed its access policy without affording UPTE prior notice or an opportunity to meet and confer over the decision to implement the change and/or the effects of a change in policy. In determining whether a party has implemented a unilateral change in violation of its duty to bargain under HEERA, a charging party must present evidence of the following criteria: (1) the employer implemented a change in policy on a negotiable matter; (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations; and (3) the action is not merely an isolated incident, but amounts to a change that has a generalized effect or continuing impact on a matter within the scope of representation. (Walnut Valley Unified School District (1981) PERB Decision No. 160 (Walnut Valley); Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant).)

Before addressing whether these standards have been met, it is important to recognize that the University owes a duty to bargain with UPTE only with respect to UCOP employees who are in the TX Unit, a bargaining unit where UPTE is the exclusive representative. UPTE is not the exclusive representative of 99 Unit employees. While employees in the 99 Unit have the right to be represented by UPTE and UPTE has the right to represent such employees, the University has no duty to bargain with UPTE about access to such employees. (Regents of the

University of California v. Public Employment Relations Board (1985) 168 Cal.App.3d 937, 945 [214 Cal.Rptr. 698].) Therefore, the allegation that the University has violated section 3571(c) will be addressed only as it relates to alleged unilateral changes of access rights as they apply to the TX Unit.

Access is a matter within the scope of representation. (See Trustees of the California State University (2003) PERB Decision No. 1507-H (Trustees of the California State University).) And the UCOP access policy contained in Supplement F would have a generalized effect or continuing impact on UCOP employees and employee organizations alike. The central issue here is whether the University implemented a change in its access policy covering TX Unit employees at the UCOP without affording UPTE notice and an opportunity to negotiate.

Supplement F was never implemented. It is true that the UCOP initially proposed the changes contained in a draft of Supplement F and the parties had some discussions and exchanged correspondence over the proposal in early 2001. However, in a May 31, 2001, letter, Caldwell informed Martin that Supplement F was withdrawn pending further revision. There has been no further action by UCOP on Supplement F. Therefore, to the extent UPTE argues that UCOP unilaterally implemented Supplement F itself, that argument is rejected.

But UPTE's argument goes beyond the official implementation of Supplement F. UPTE also argues that the UCOP has effectively implemented, through practice, some of the changes reflected in Supplement F, if not the document itself, without negotiating. The evidence to support this argument is limited. It consists of testimony about access practices at only two UCOP locations: the Lakeside Drive office, where visitors must identify an employee to be visited and buzzed in, and at the Franklin Street office, where visitors must sign in and identify the employee to be visited.

One element in establishing a unilateral change is that that there has been a change in a negotiable matter. (See Grant; Walnut Valley.) The record here does not support a finding that these practices represent unilateral changes that would trigger a right to bargain. Boyette testified that the practices at the Lakeside Drive office have been in effect since about November 1997. And Martin testified that he has no knowledge when the practices at either the Lakeside Drive or the Franklin Street offices were implemented. Therefore, UPTE's claim of unilateral change is rejected.

Under a separate theory, UPTE argues that the UCOP access policies reflected in these practices interfere with the right of employees to be represented by UPTE.[10] In Long Beach, an access case decided under the Educational Employment Relations Act,[11] the Board considered whether an access rule that required employee organization representatives to submit an identification card and a sign-in procedure before entering school premises were reasonable regulations. The Board held that it is within the public school employer's legitimate authority to require that visitors to its school sites identify themselves to school administrators. (Long Beach at p. 15.) However, the Board continued, an aspect of the regulations that required employee organization representatives to use a specific method that is different from other visitors was discriminatory and therefore unreasonable. The Board also found that an aspect of the regulations that required employee organization representatives to provide the district with advance notice was unreasonable because it interfered with the organization's ability to use the

[10] Although it is unclear when the practices at the Lakeside Drive and Franklin Street offices began, they are not time-barred. Violations of access rights are considered continuing violations. (See Long Beach Unified School District (1987) PERB Decision No. 608, pp. 11-12.)

[11] EERA section 3543.1(b) is an access provision almost identical to section 3568. Hence, precedent established under the EERA is useful in defining access rights under the HEERA. (See e.g., UCLA Medical Center at p. 5.)

assistance of organizers whose availability is sporadic and unpredictable. (Long Beach at p. 16.)

The practices at the Lakeside Drive and Franklin Street offices are not discriminatory. The procedures apply to employee organizations and the general public alike. Nor is there evidence of an advance notice requirement that would interfere with access by UPTE representatives whose availability may be sporadic and unpredictable. Indeed, there is no evidence of an advance notice requirement in the practices at the UCOP. It similarly is not unreasonable to require union representatives to sign-in at the Franklin Street office. Nor is it unreasonable for UCOP to require a union representative to identify himself or herself before entering floors in the Lakeside Drive office. These requirements are consistent with those found by the Board in Long Beach to be reasonable access rules.

Moreover, that the aspect of the practice at both the Lakeside Drive and Franklin Street offices that requires an UPTE representative, upon arrival, to identify himself or herself verbally or by a sign-in is consistent with the MOU. I construe this requirement basically as a notice requirement that permits the UCOP to identify representatives who seek to enter the work place. That agreement provides generally that an UPTE representative may visit a facility "at reasonable times and *upon notice*" to meet with unit employees. And, regarding unscheduled meetings, the MOU provides: "the union representative shall *give notice* upon arrival in accordance with local campus/Laboratory/hospital procedures." The agreement includes a related provision that requires UPTE to identify its representatives in advance: "UPTE will furnish the University with a written list of all UPTE representatives, UPTE designated employee representatives and officers who are authorized by the union to conduct union business." Therefore, I conclude that the requirement that an UPTE representative sign-

in or verbally identify himself or herself is a reasonable regulation under Long Beach and consistent with notice requirements in the MOU.

The remaining aspect of the practices at the Lakeside Drive and Franklin Street offices is the requirement that a union representative identify the employee or employees to be visited, a requirement that is not found in the MOU. The MOU provides, however, that the University "has the right to enforce reasonable access rules and regulations as promulgated at the local campus/Laboratory/hospital," and the University has argued that its access rules are reasonable under the MOU and HEERA. The question, therefore, is whether the requirement is a reasonable one.

Although there is no PERB case law directly on point, the Board in Long Beach held that it is within an employer's authority to require that visitors to its work sites identify themselves before entering the premises, and to "state their business and their whereabouts while on campus" to protect the employer's interest in "monitoring on-site visitors." (Long Beach at pp. 15-16.) The requirement that a union representative identify an employee he or she intends to visit is a reasonable extension of this rule and the UCOP's general right to monitor visitors who enter work areas.

According to Martin, employees "tend to get nervous and not want to be publicly associated. It's much different from being able to go up to a person in their office or cubicle and say do you have the time to talk, and that employee defining what works for them." As I understand Martin's testimony, UPTE seeks the right of access to enter work areas and contact employees one by one without identifying the individual employees to be contacted prior to entering those areas. If an employee chose not to "talk" to the representative, as Martin testified, the representative presumably would leave or go to the next office or cubicle, and so on. It seems unavoidable that a union representative operating under this approach would end

up contacting employees in work areas as they worked. It is one thing to claim the right to meet with employees, who have the discretion to set their lunch and break times, at various times during the workday outside the traditional lunch and break periods. It is quite another thing for a union representative to contact employees in work areas on work time. In an office setting like the UCOP, I find that such a procedure would necessarily disrupt the work place.

Accordingly, it is concluded that a requirement that a union representative identify the employee to be visited is reasonable. This is especially true where, as here, there is no concrete evidence that the UCOP has applied the requirement in a discriminatory manner, attempted to single out employees who are identified by UPTE representatives, or placed such employees under surveillance.

In reaching this conclusion, I note that it applies only to access to employees in work areas under the reasoning in Long Beach that an employer retains the right to monitor non-employee visitors to its work areas. A rule requiring a union representative to identify an employee or employees with whom he or she seeks to contact before permitting access to a non-work area such as a break room or cafeteria is another matter and would not withstand scrutiny under HEERA. The concern about disruption in work areas does not extend to non-work areas, where employees may agree to talk to a union representative or not. (See e.g., San Ramon Valley Unified School District (1982) PERB Decision No. 230, pp. 12-13 (San Ramon).)

As Martin testified, it may be that some employees are reluctant to meet with union representatives in the work area out of fear that doing so might antagonize a supervisor. It is not readily apparent how such concerns would be alleviated if a union representative is permitted to enter a work area without first identifying the employee to be visited and openly meet with the employee under circumstances where it is likely that the supervisor would

discover the employee-union contact anyway. In any event, the rule does not ultimately deny employees with these concerns the opportunity to meet with a union a representative. Such meetings may be held in non-work areas such as cafeterias or break rooms or off the employer's premises entirely.

On February 9, 2001, Martin asked Yun to create a comparison of Supplement F and existing access policies to identify relevant changes for discussion purposes. Yun responded with the matrix, but it included no written UCOP policies. UPTE claims the matrix was not responsive to its request, particularly because it contained no comparison with existing policies. UPTE presumes that UCOP had relevant information in its possession through the development of Supplement F, yet it refused to make it available.

PERB has long held that an employer must provide to an exclusive representative, upon request, information that is necessary and relevant to the union's representational obligations. (See Stockton Unified School District (1980) PERB Decision No. 143.) Information that pertains to a matter within the scope of representation is presumptively relevant. (State of California (Departments of Personnel Administration and Transportation) (1997) PERB Decision No. 1227-S, p. 5 (State of California).) In this case the requested information related to existing access policies at UCOP, a matter within the scope of representation and relevant to UPTE's representational obligations. However, several University witnesses credibly testified that no written access policies existed, except for the relevant collective bargaining agreements. One possible explanation for the lack of UCOP policies, according to Boyette, is that for many years the UCOP was located in Berkeley and the access policies of that campus were followed by the UCOP. After the UCOP moved to Oakland, no such policies were implemented. Therefore, consistent with Yun's response, it is concluded that there were no

UCOP policies to provide. The University could not provide information that does not exist. (State of California at p. 13.)

Ban on Demonstrations Inside Mrak Hall

UPTE advances several arguments in support of its claim that the University's ban on demonstrations inside Mrak Hall is unlawful. First, UPTE contends that the demonstrations in general were peaceful, lawful and did not substantially disrupt any aspect of the University's business. Nor has the University convincingly established that the conduct of any individual demonstrator was disruptive. Rather, UPTE claims, the University has attempted to justify the ban on the theory that the activities associated with the demonstrations are "inherently disruptive" of University operations. According to UPTE, "this new absolute ban on UPTE and employee speech and expressive conduct achieved its unlawful purpose – all expressive and demonstrative conduct activity at Mrak Hall stopped."

In a related argument, UPTE asserts that "the absolute ban on any expressive demonstrative activity of any kind inside Mrak Hall is unlawful in that it seeks overbroad, prior restraint of all employee speech and expression related to labor disputes with UC management, including speech which does not substantially disrupt or materially interfere with UC activities and operations." Further, UPTE contends, the ban is discriminatory in that it imposes more onerous restrictive limitations on free speech by UPTE than on other organizations.

Lastly, UPTE argues that the University has unilaterally changed access policy. In support of this claim, UPTE asserts that access is a negotiable topic, demonstrations inside Mrak Hall were permitted prior to Sheesley's January 12, 2001, letter, the letter imposed an absolute ban on all such demonstrations, and UPTE was not afforded the opportunity to meet

and confer over the change. This conduct evidences a clear violation of the duty to bargain with UPTE over access rights, UPTE concludes.

In response, the University argues that there is no evidence that it has unilaterally changed its access policy regarding Mrak Hall. The University contends there is no evidence that demonstrations occurred in Mrak Hall prior to those conducted by UPTE and other unions during late 2000, nor are such demonstrations permissible under longstanding local access regulations. In fact, the University continues, its policies provide that demonstrations, including those where amplified sound is used, are permissible only outside Mrak Hall. Moreover, the University asserts that UPTE rebuffed attempts to meet about the demonstrations.

In addition, relevant case law and University access regulations permit banning demonstrations inside Mrak Hall on the grounds of operational necessity. As factual support for this argument, the University points to evidence of what it claims were large, disruptive and unsafe demonstrations. The University argues that the evidence clearly establishes the prohibition in Sheesley's January 12, 2001, letter is permissible under California law as interpreted by PERB and state courts. The prohibition therefore comports with HEERA. It is also reasonable under existing UCD access regulations, and UPTE has provided no evidence of a need to bring numerous protestors into Mrak Hall for loud, disruptive demonstrations. According to the University, UPTE wants the unlimited right to enter Mrak Hall at any time with unlimited numbers of protestors making ear-drum shattering sounds, but such tactics jeopardize the health and safety of everyone in the building, including the protesters.

Interpreting access rights under a parallel provision in the EERA, PERB has stated its approach to employer restrictions as follows.

> On the basis of our understanding of the statutory purposes of EERA, in conjunction with our review of analogous principles of labor and constitutional law, we conclude that school employer regulation under section 3543.1(b) should be narrowly drawn to cover the time, place and manner of the activity, without impinging on the content unless it presents a substantial threat to peaceful school operations. The employer's interest in regulating speech conduct on campus is fully protected, under section 3543.1(b), by narrow guidelines and by the deterrent threat posed by the possibility of subsequent punishment for unprotected behavior. [Citation; fn. omitted.]
> (Richmond Unified School District (1979) PERB Decision No. 99, pp. 19-20 (Richmond).)

Indeed, Sheesley's January 12, 2001, letter indicated that the University was committed to taking "appropriate action" for "violations of its time, place and manner rules" as reflected in its regulations.

Given the nature of the demonstrations inside Mrak Hall, the University may have had legitimate concerns about safety, obstruction of ingress to and egress from the building, damage, or general disruption of operations. In fact, Sheesley described such concerns in this letter. It would have been appropriate, therefore, for Sheesley to address these concerns by narrowly drawn rules that cover, for example, timing of demonstrations, number of demonstrators, location of the demonstration, and appropriate enforcement mechanisms. But Sheesley's letter does not contain narrowly drawn rules designed to address the perceived problems. Rather, it sets out an absolute ban on *all* demonstrations inside Mrak Hall. "Demonstrations inside Mrak Hall are not permitted under any circumstances," he wrote. This is an overly broad restriction, even under Sheesley's own testimony.

Sheesley conceded in his testimony that a peaceful demonstration could be conducted inside Mrak Hall that would not be inherently disruptive, depending on the nature of the demonstration and the number of demonstrators. At one extreme, he described an example of silent, non-disruptive demonstrations which would be permissible: "somebody who had a sign

around his or her neck who stood by himself or herself in a corner that said 'The University is Unfair.'" At the opposite extreme, he described a disruptive demonstration that would not be permissible: "a hundred people doing that [would be] disruptive." "So, depending on how you use the word 'demonstration,' you could arrive at a conclusion, you could slice it thin enough to where a demonstration wouldn't be disruptive," Sheesley testified.

Under the standard established by Sheesley's letter, certain types of protected conduct would be prohibited. Even a nondisruptive demonstration such as a small group of employees wearing union buttons in the lobby or other quasi-public area would run afoul of Sheesley's absolute ban. (See e.g. Turlock Joint Elementary School District (2002) PERB Decision No. 1490 p. 10 [wearing union buttons is protected, absent special circumstances].)

As the Board stated in Richmond, a regulation that suffers from "overbreadth and indefinite application" interferes with protected conduct. Subject to reasonable regulation, "employees and employee organizations have a right to communicate at the worksite, free from employer restriction, about specific terms and conditions of employment as well as matters of more general political, social or economic concern to employees." (Richmond at p. 24.) Sheesley's ban made no attempt to address situations in which a demonstration might be permissible. Rather, it unreasonably prohibited all demonstrations. Therefore, it is concluded that the ban interfered with the right of employees to participate in activities of an employee organization and be represented by UPTE, in violation of section 3571(a). By the same conduct, the University has denied UPTE reasonable access rights, in violation of section 3571(b).

In addition, the ban on demonstrations inside Mrak Hall was imposed unilaterally. It is well settled that the general subject of access rights guaranteed by section 3568 is a matter within the scope of representation. (See e.g., Trustees of the California State University at

pp. 3-4; State of California (Departments of Personnel Administration, Banking, Transportation, Water Resources and Board of Equalization) (1998) PERB Decision No. 1279-S.) A change in an access regulation of the type at issue here involves statutory rights of employees and employee organizations alike. And Sheesley made no attempt to provide UPTE with notice and an opportunity to negotiate. He conceded in testimony that his November 13, 2000, e-mail message to Livingston and Brower was an attempt to engage in a general discussion about the demonstrations and the access rules in the MOUs, but he had no intention to negotiate. Accordingly, I find that the University has unilaterally implemented a new access rule covering demonstrations in Mrak Hall, in violation of section 3571(c).

Ban on Barton Access to Davis Campus and the Ratification Meeting

UPTE argues that the University, through Shimek's letter of January 12, 2001, has unlawfully implemented a policy imposing sanctions against an UPTE representative for activities wrongly perceived to be in violation of access rules. Specifically, UPTE contends Barton was banned from access to the entire Davis campus and Medical Center for 30 days as a result of her protected conduct in connection with the demonstration in the Ophthalmology Department on January 9, 2001. UPTE claims the evidence shows that the demonstration was peaceful, the University's reaction was "extreme" and "exaggerated," and the University's response was an "extraordinary punitive sanction" against UPTE and Barton.

The University followed with another unlawful act, UPTE continues, when on January 25, 2001, it enforced the illegal sanction by accusing Barton of trespass, placing her in the custody of the University police and physically removing her from the campus as she conducted a contract ratification meeting. UPTE argues further that Barton's forcible removal from the Davis campus violated her constitutional rights of free speech and association, as well

as the California Penal Code, which guarantees union representatives access to work sites located on private property for organizing and contract enforcement purposes.

The University responds that it engaged in no unlawful act by banning Barton from the Davis campus for 30 days. The University claims local access rules comport with the requirements of HEERA and the MOUs to the extent that they permit imposition of sanctions on nonemployee union representatives for a violation of University policies or local access regulations. According to the University, Barton led a demonstration in the Ophthalmology Department that included precisely the type of behavior that is unprotected by HEERA; that is, activity during work time in a manner that disrupts the workplace and interferes with patient care. In the University's view, Barton's conduct in the department was not a silent demonstration, but rather a "gross violation" of local access rules in the corridors and inner offices of the department. The University argues, moreover, that Shimek's restriction was narrow and in accord with local access rules. It was limited to 30 days, it applied only to Barton, and it is supported by the operational need to "protect its employees and patients from outrageous, dangerous, and disruptive conduct like that Barton engaged in at the Department of Ophthalmology." Lastly, the University contends that Barton was not arrested for trespass. She was merely escorted off campus by police for violating a lawful ban.

To resolve the issue presented by the complaint, I find it unnecessary to determine if Barton's conduct violated the University's access rules. Even assuming Barton violated these rules, Shimek's campuswide ban was unlawful as an overbroad restriction on access.

The MOUs provide in relevant part that "the University has the right to enforce *reasonable* access rules and regulations as promulgated at each campus/Laboratory/hospital." PPSM Section 380-21, XV, provides that the "chancellor may impose sanctions for violation of University policies or UCD regulations." As noted, PERB has held that local access

regulations must be narrowly drawn to cover time, place and manner of the activity, without impinging on content unless it presents a substantial threat to operations. (Richmond at pp. 19-20.) Shimek's letter banning Barton from the entire campus was overbroad and therefore does not withstand scrutiny under HEERA, the MOUs or the local regulations, even if Barton led the demonstration and disrupted operations as Shimek claimed in his letter.

The University argues that the restriction was narrow and in accord with local access rules. It was limited to 30 days, it applied only to Barton, and it is supported by the operational need to "protect employees and patients from outrageous, dangerous, and disruptive conduct like that Barton engaged in at the Department of Ophthalmology." I disagree.

Because Shimek's letter is based primarily on Barton's role in the demonstration in the Ophthalmology Department and her alleged access violations in other work areas, patient care areas and laboratories, a narrowly drawn restriction covering the time, place and manner of Barton's access to such areas might withstand scrutiny under HEERA. But Shimek's letter does not comply with this standard. He did not ban Barton from work areas where legitimate concerns about operational necessity or disruption existed. Instead, he issued a directive banning Barton from the entire Davis campus and Medical Center. On its face, the ban applied even to public areas where no operational concerns existed, as well as to areas (work areas as well as non-work areas) where no access problems existed. Thus, Shimek's letter imposed a ban on areas beyond those where there reasonably was any concern about disruption or operational necessity.

Perhaps the best example that Shimek's letter was overbroad is found in the application of the ban. The restriction barred Barton from access to a public area (the cafeteria) to participate in protected activity in conducting a ratification vote. There is no evidence that Barton caused disruption as a result of her access to public areas such as cafeterias,

break/lunch rooms, meeting rooms or other common areas, or that banning her from such areas served any operational necessity. Shimek's letter of January 12, 2001, states no concern about access violations in public areas at the Davis campus or the Medical Center, yet he testified that there were no exceptions to his directive.

Intervention of the Davis police at the University's request denied Barton access to a public area where a ratification vote was being conducted and interfered with the UPTE's ratification process. At the time the police interrupted the ratification vote and escorted Barton from the campus, she was the only UPTE representative present and the vote had to be stopped. By banning Barton from the entire Davis campus and Medical Center, Shimek did not comply with the time, place, and manner standards required by HEERA.

It is concluded that Shimek's ban of Barton from access to the Davis campus and Medical Center and the enforcement of the ban during a ratification vote in a non-work area interfered with UPTE's right or access for the purpose of representing employees, in violation of section 3571(b), as well as the right of employees to be represented by UPTE, in violation of section 3571(a).

Ealy's June 15, 2001, Letter in Regarding Access to the Chiles Road Incident

The complaint alleges that Ealy's letter concerning access at the Chiles Road facility is unlawful under two independent theories. First, the complaint alleges that the letter contains several unilateral changes in access policies, in violation of the duty to bargain with UPTE as exclusive representative of the TX Unit. Second, the complaint alleges that the letter interfered with the right of employees in the TX Unit and the 99 Unit to participate in the activities of an employee organization.

UPTE argues that Ealy's June 15, 2001, letter is a formal notice of intent to enforce presumptively unreasonable and unlawful restrictions on access to TX Unit and 99 Unit

employees. The letter, UPTE claims, demanded compliance with several unlawful access rules and had a generalized effect on employees who have the discretion to determine the timing of their lunch and break periods. In support of its argument, UPTE points to two passages in Ealy's letter that it claims are unlawful. The first states that UPTE is required to

> [C]ontact [the] Human Resources analyst . . . and provide her with the name of an UPTE representative and the date and time when UPTE requests having the identified representative talk with employees on site. [The analyst] will arrange space for the UPTE representative in the break room for the requested day and time. When UPTE's requested dates and times cannot be granted, alternate dates and times will be offered.

UPTE argues that the requirements in this paragraph unreasonably condition access to employees on (1) pre-scheduled visits (2) in only non-work areas (3) by specified UPTE representatives (4) on dates and times determined by the University and (5) only for employees who "overcome the coercive, unreasonable and intimidating burden of open and notorious self-selection for UPTE contact in a non-work area."

UPTE next argues that the following passage in Ealy's letter is a discriminatory prohibition against employee use of University telephones to contact employee representatives.

> There is another problem on which I need your help. The "Where do my UPTE dues go?" flyer that was distributed had [UPTE president] Rob Brower's work phone number on it. This could be considered misuse of UC phones for union membership recruitment. The TX contract permits use of UC phones only in the context of filed grievances. Future membership recruitment material must not display any UC phone numbers as a means of contacting any UPTE representative.

According to UPTE, this aspect of Ealy's letter unlawfully deprives employees of the right to seek a wide range of employment-related information directly from the union.

In response, the University argues that Ealy's letter cannot be construed as a "formal notice" to enforce unlawful restrictions on access, and Ealy testified that he did not intend the

letter as a formal notice of a change in access policy. Rather, it was an informal response and "invitation for discussion" regarding the incident at the Chiles Road facility where, according to information received by Ealy, Barton refused to abide by lawful access restrictions. Moreover, the University contends, the fact that Ealy's letter did not apply to other locations is further evidence that it was not a formal notice of a change in access rules.

As noted earlier, University owes a duty to bargain with UPTE only with respect to employees who are in the TX Unit, a bargaining unit where UPTE is the exclusive representative. UPTE is not the exclusive representative of 99 Unit employees. While UPTE may represent employees in the 99 Unit, the University has no duty to bargain with UPTE about access to such employees. (Regents of the University of California v. Public Employment Relations Board, supra, 168 Cal.App.3d 937, 945 [214 Cal.Rptr. 698].) Therefore, the allegation that the University has violated section 3571(c) will be addressed only as it relates to alleged unilateral changes of access rights in the TX Unit.

For the following reasons, I find that certain aspects of Ealy's letter constitute unilateral changes in access rules applicable in the TX Unit. Other aspects of the letter are consistent with the MOU and thus are not unilateral changes in that unit. Those parts of Ealy's letter that are consistent with the MOU will be addressed first.

As UPTE points out, Ealy's letter contains several access rules. It effectively requires an UPTE representative to contact the human resources analyst prior to a visit. The representative must provide the name of the representative, as well as the date and time of the visit. The letter assumes that the visit will be conducted in a break room, and if the requested dates and times cannot be granted, alternate dates and times will be offered. According to the letter, these requirements apply to all visits.

To the extent that Ealy's letter requires an UPTE representative to contact a human resources analyst, provide the name of the representative, and set up a time and date for a visit, it is consistent with the terms of the MOU. The MOU provides that "*designated union representatives* who are not University employees, or are not employed at the facility, may visit the facility at *reasonable times* and *upon notice* to discuss with the university or bargaining unit members matters pertaining to this Agreement." Thus, under the MOU, UPTE representatives are identified by virtue of their designation as such and notice of pre-scheduled visits must be given. The requirement in Ealy's letter that an UPTE representative provide the time and date of appointment is consistent with the MOU requirement that pre-scheduled visits be conducted at reasonable times. On these points, I find that Ealy's letter announced no unilateral changes in the MOU.

It is also alleged that these requirements interfere with the right of employees to be represented by UPTE. Because these aspects of Ealy's letter have been agreed to by UPTE in the MOU, it cannot be concluded that they interfere with the right of TX Unit employees to be represented by UPTE. Nor do such requirements interfere with the right of 99 Unit employees to be represented by UPTE. Absent evidence that an advance notice requirement for pre-scheduled meetings is discriminatory or otherwise obstructs access rights, such rules are reasonable. (See Long Beach at p. 16; San Ramon at p.12.) And a rule requiring identification of union representatives who intend to visit a work site is reasonable. (See Long Beach at p. 15.)

UPTE also claims that Ealy's letter unilaterally established an unreasonable rule that access is permitted only for employees who "overcome the coercive, unreasonable and intimidating burden of open and notorious self-selection for UPTE contact in a non-work area." I understand this argument as challenging a rule that would require an employee to

openly identify himself as seeking union representation or contact. However, Ealy's letter imposes no such obligation. It merely states that the analyst will arrange space for the UPTE meeting "with employees on site," and does not mention employee identification. Therefore, Ealy's letter does not represent a unilateral change in this regard, nor does it interfere with the right of TX Unit and 99 Unit employees to be represented by UPTE.

In addition, UPTE argues that Ealy's letter effectively gives the human resources analyst unilateral authority to set dates and times of meetings: "When UPTE's requested dates and times cannot be granted, alternative dates and times will be offered." The MOU provides that UPTE representatives may visit facilities at "reasonable times." Like section 3568, the MOU establishes a standard of reasonableness that the University must observe in its access policy. I do not construe Ealy's letter as inconsistent with this standard. It is true that Ealy's letter suggests that the human resources analyst may have some control over the time and dates of meetings. In another part of the letter, however, Ealy described his intent as follows: "the intent . . . [is] . . . to provide representatives . . . reasonable opportunity to contact individual employees, but at the same time to assure that such contact does not interfere with or disrupt the work of the university or violate safety requirements." Read in its entirety, Ealy's letter is thus consistent with the reasonableness standard set forth in the MOU and section 3568. Therefore, on its face the letter constitutes no unilateral change in access policy, nor does it interfere with the rights of TX Unit and 99 Unit employees to be represented by UPTE.

The next inquiry concerns UPTE's argument that Ealy's letter establishes a rule that would permit access only to employees in non-work areas. Ealy's letter appears to leave no room for an employee to meet with an UPTE representative on non-work time in the employee's work area. It states that, upon receiving advance notice, the human resources

analyst "will arrange" space in a break room for a meeting. The University contends that operational necessity justifies the rule.

The work performed at the Chiles Road Facility includes, among other things, computer programming. Materials associated with the University's operation in this area include confidential employee information related to personnel matters, social security numbers, and implementation of statewide University programs. Hence, the statutory right of access must be balanced against the University's right to maintain the security and confidentiality of its computer programming operation. In weighing such concerns, PERB has observed that the availability of an alternative means of access is an important factor to consider. (See e.g., UCLA Medical Center at p. 15.)

After weighing the right of access to work areas at the Chiles Road location against the right of the University to maintain the security and confidentiality of its operation, I conclude that the balance tips in favor of the University. By arranging for UPTE to meet with employees in a suitable break room that is near the work place, the statutory right of access to employees in both units is preserved for UPTE, while the University's concerns about access to its computer programming facility and confidential information is satisfied. This is especially true where, as here, employees generally have the flexibility to structure their break and lunch periods in such a way as to facilitate meetings with UPTE in the designated break areas.

Accordingly, I conclude that this aspect of Ealy's letter is consistent with the University's right under the MOU and section 3568 to enforce reasonable access rules at the local level. As such, it constitutes no unilateral change in access policy covering TX Unit employees, nor does it interfere with the right of TX Unit or 99 Unit employees to be represented by UPTE.

There are, however, other aspects of Ealy's letter that are unreasonable and go beyond the negotiated access provision. The letter does not distinguish between scheduled and unscheduled meetings. It plainly establishes "a simple procedure" to cover all meetings. A fair reading of Ealy's letter is that it establishes a single procedure to gain access, ignoring that aspect of employee organization access through unscheduled visits. The MOU indicates that the parties have distinguished between scheduled and unscheduled meetings for access purposes. In an apparent reference to pre-scheduled visits, the agreement provides that an UPTE representative "may visit the facility at reasonable times and upon notice." The MOU treats unscheduled meetings differently. For "unscheduled meetings," the MOU provides, an UPTE representative must give notice only "upon arrival" in accordance with local policies. Ealy's letter, by comparison, requires UPTE to give advance notice to a human resources analyst, provide the name of the UPTE representative, and a suggested date and time for *all* visits. Ealy's letter on its face would effectively eliminate the possibility of unscheduled meetings with notice "upon arrival" in favor of requiring advance arrangements for all visits.

It is self evident that union representatives are not always able to schedule meetings in advance. The need for UPTE representatives to meet with an employee or employees on short notice, accommodate busy schedules, prepare for representational matters, or otherwise engage in discussions about employment-related matters is apparent from the parties MOU covering all bargaining units. As the Board has observed, moreover, an access rule that interferes with an employee organization's ability to effectively use its representatives whose availability is "sporadic and unpredictable" is unreasonable. (Long Beach at p. 16.) The MOU recognizes this point and provides for "visits for the purpose of conducting unscheduled meetings with bargaining unit members." In such circumstances, the MOUs require only that the union representative "shall give notice upon arrival."

By effectively eliminating this option, Ealy's letter established a requirement that is not included in the MOU, in violation of section 3571(c). The letter also established an unreasonable access rule that obstructs UPTE's right of access, in violation of section 3571(c), interferes with the right of TX Unit and 99 Unit employees to participate in the activities of an employee organization, in violation of section 3571(a).

UPTE next argues that Ealy's letter unilaterally implemented a discriminatory prohibition against employee use of University communications systems for the purpose of contacting employee representatives. The prohibition in this instance involved the second passage in Ealy's letter, set forth above, as it relates to employee use of University telephones for union membership recruitment.

The TX Unit MOU covers use of University telephones by employee representatives. It provides:

> Employee representatives may use University telephones for the purpose of conducting union business that is specifically authorized by Article 9, Grievance Procedure. Employees are responsible for paying any costs associated with such telephone usage in accordance with the departmental procedures in effect at the time. The frequency and duration of permitted phone calls shall not be such as to interfere with or disrupt the employee's completion of work assignments, nor impair the efficiency of University operations. The University may audit employee representatives use of the telephone system to the same extent as it may audit other employee use of such equipment.

I do not read the MOU as expansively as does Ealy in his letter. The plain meaning of the language in the MOU indicates that the parties have agreed to permit employee representatives to use University telephones as authorized by the grievance procedure. The MOU does not address use of University telephones by employees. Nevertheless, Ealy's June 15, 2001, letter states that the UPTE flyer with Brower's work telephone number on it "could be considered misuse of UC phones for union membership recruitment." He stated in

the letter that "the TX contract permits use of UC phones only in the context of filed grievances" and "future membership material must not display any UC phone numbers as a means of contacting any UPTE representative." The letter is broadly written and does not distinguish between use of telephones by employee representatives and employees. As such it imposes a restriction on use of University telephones that is not found in the MOU.

In addition, the prohibition against employee telephone use in Ealy's letter is contrary to a past practice that permits at least incidental use of University telephones by employees, as well as employee representatives. Ealy testified that under established practice employees and employee representatives alike use University telephones for incidental purposes that may involve contact between employees and UPTE on matters that do not necessarily involve grievances. In accordance with the incidental use practice, he said, an employee representative may call an employee about a matter unrelated to a grievance. And an employee may call an employee representative under the same practice, provided the employee is responsible for payment of any costs of toll calls. Despite the incidental use practice, Ealy's letter contains an absolute prohibition against use of University telephones by employees for membership recruitment.

The next inquiry is whether the restriction on employee use of phones interferes with UPTE's right of access to a means of communication under section 3568 or the right of employees in the TX Unit and the 99 Unit to be represented by UPTE. The MOU aside, the local policy relied on by Ealy in issuing his letter is found in PPSM section 380-21.XII.D. It provides:

> Employee organizations and their representatives are prohibited from using University . . . telephones . . . unless specifically permitted by a collective bargaining agreement

For the following reasons, I find this provision to be an unreasonable regulation of the right of access to a means of communication.

PPSM section 380-21.XII.D is unreasonable on its face to the extent it provides that employees or employee organizations are prohibited from using University telephones "unless specifically permitted by a collective bargaining agreement." Subject to reasonable regulation, section 3568 grants employee organizations the right to use University telephones as a means of communicating with employees. As a statutory right, access provisions stand alone and need not be incorporated into a collective bargaining agreement to become effective, although such rights are within the scope of negotiations and may be incorporated into an agreement, if the parties elect to do so. (See Trustees of the California State University at pp. 4-5.) Therefore, I conclude that a regulation that prohibits all use of University phones as a means of communication under section 3568 unless incorporated into a collective bargaining agreement is unreasonable.

Based on the foregoing, I conclude that Ealy's letter restricting telephone use modified the MOU and deviated from a past practice, in violation of section 3571(c) and the University's duty to bargain with UPTE as the exclusive representative of the TX Unit. I also conclude that the restriction interfered with UPTE's right to use University telephones as a means of communication, in violation of section 3571(b), and interfered with employee rights to participate in the activities of an employee organization, in violation of section 3571(a).

The University has advanced the argument that Ealy's letter cannot be construed as a formal notice of a unilateral change in access policy. It was not intended as such, it applied only to the Chiles Road facility, and it was not even sent to other facilities, the University argues. The University also argues that Ealy offered Barton the opportunity to meet about the matter, but she declined. These arguments are unconvincing.

Whether Ealy intended to issue a formal notice of change is irrelevant in resolving the allegations of unilateral change. (San Mateo County Community College District (1979) PERB Decision No. 94, p. 12.) The letter effectively implemented changes in access rules which have an ongoing, generalized effect on access rights of UPTE representatives and employees in the TX Unit at the Chiles Road facility. Although the letter may have applied only to the Chiles Road facility, its application to a single location is not controlling. PERB has long held that unilateral changes in negotiable matters that impact only a few employees are nevertheless unlawful if they are of a continuous nature and may impact larger number of employees in the future. (Jamestown Elementary School District (1990) PERB Decision No. 795, p. 6.) The Board has also held that a unilateral change at a facility, a hospital, was unlawful even though it did not apply to other hospitals within the same bargaining unit. (State of California (Department of Mental Health) (1990) PERB Decision No. 840-S.)

The University's argument that UPTE failed to take advantage of Ealy's offer to bargain about application of his letter to the TX Unit is similarly unpersuasive. Ealy testified that he contacted Barton to discuss access at the Chiles Road facility, answer any questions, and view the Chiles Road layout and location of the break room. She declined in favor of litigating the matter. However, Ealy forthrightly agreed in his testimony that he had no intention of actually negotiating with Barton. Thus, Barton was under no obligation to participate in what she apparently considered would be a futile exercise. (See e.g. Oakland Unified School District (1982) PERB Decision No. 236, p. 17.) And, in any event, the MOU contained a zipper clause that provided UPTE with the option not to negotiate, even if a genuine offer to bargain had been made. (See e.g. (Los Angeles Community College District (1982) PERB Decision No. 252, p. 11.)

Allegations of Continuing Access Violations

Pointing to a series of five separate incidents, UPTE argues that the University has engaged in a continuing practice of denying access rights at various locations. These violations, UPTE claims, were sanctioned by the January 2001 publication of UCOP-recommended restrictions. UPTE contends that "each of these examples reflect similar, fundamental defects. In each of these cases, the lack of an existing or identifiable access policy was met with a restrictive restatement of limitations on UPTE access inspired by the appearance of UPTE representatives." The complaint alleges that the University, by implementing the restrictive access policies reflected in the examples set forth below, has failed to meet and confer with UPTE, denied UPTE's right of access, and interfered with the right of employees to be represented by UPTE.

It bears repeating that employee organizations have a presumptive right of access to employees at reasonable times in areas where they work. (UCLA Medical Center at pp. 5-6.) The Board has declined to create any automatic exceptions to this right. (See Lawrence Livermore National Laboratory at p. 14.) [no exception to the statutory right of access for national security facilities].) An employer may rebut the presumption, however, by showing that its regulations are properly related to justifiable concerns about its operations and the rules are narrowly drawn to avoid overbroad, unnecessary interference with statutory rights. (Id. at p. 15.) When balancing the presumptive right of access against an employer's legitimate concerns, the availability of an alternative means of access is a significant factor. (Id. at p. 15.) These principles are applicable to the five incidents cited by UPTE as evidence of unlawful access practices.

Davis Home Health Care: UPTE's first contention in this series of events stems from Barton's attempt to contact social workers at the Davis Home Health Care facility on

March 31, 2001. The specific allegation in the complaint is as follows: "On March 31, 2001, UPTE representative Pilar Barton was visiting social workers at Davis Home Health Care. Although these workers had questions for Barton and were on non-work time at their own discretion, Ms. Barton was ordered to leave the premises immediately by supervisor Kathy Marty, who advised Barton that UPTE representatives were absolutely barred from the work area."

In response, the University argues that "this incident is yet another example of Barton's unauthorized excursions into restricted areas," despite "ample alternative means to communicate with employees without violating access rules, collective bargaining agreements, and patient confidentiality."

The work area in the Davis Home Health Care facility to which UPTE seeks access is a secured area. Doors to the facility are kept locked, all visitors must enter through a reception area, and they must be escorted while in the facility. Even other University employees are not permitted to enter the work place unless they are performing work in connection with a social worker and are escorted by an employee of the facility. The evidence presented by the University establishes that there are valid reasons for the security. Confidential medical records are stored at various locations in the work place and used regularly by social workers during the course of the workday. Although patients are not on site, their records are often in plain view while on social workers' desks, and patient names are posted in open view along the walkway leading from the reception area to the work area where the cubicles of social workers are located. Moreover, social workers and supervisors often discuss their cases in the work place. These discussions may include confidential information such as names of patients and nature of the case. Examples of the kinds of issues discussed are spousal and child abuse. As Marty testified, "it happens all day long" and her concern is that non-employees may overhear

confidential information if they are granted unrestricted access. These are legitimate concerns that justify denial of access to the areas where social workers' are located. In a similar setting, the Board has found that an employee organization was not entitled to access to "a chart room, primarily used for record storage, medical team conferences, and other patient-care related purposes." (UCLA Medical Center at p. 13.)

It reaching this conclusion, I note that the University has presented evidence of alternative means of access to communicate with employees at the Davis Home Health Care. Under the procedure, UPTE representatives upon request may meet with employees in the break room or other non-work area. Because the employees Barton attempted to contact have the discretion to schedule their breaks and lunch periods, flexibility in scheduling meetings is enhanced. Marty credibly testified, moreover, that she has informed the receptionist of the procedure, and Livingston has used this approach to meet with employees in the past. Given the specific work environment in the facility, the rule permitting access only to non-work areas like the break room is a reasonable regulation of access rights under section 3568, and it is consistent with the University's right under the MOU "to enforce reasonable access rules and regulations as promulgated at each campus/Laboratory/hospital."

Accordingly, I conclude that the prohibition against UPTE representatives entering work areas of the Davis Home Health Care facility does not constitute a unilateral change in access regulations, nor does it obstruct UPTE's right of access or interfere with employees right to be represented by UPTE.

Computer Classroom Incident: UPTE's next contention that access has been denied stems from the union's attempt to reserve a computer classroom at the Medical Center. The specific allegation in the complaint is as follows: "On May 22, 2001, UPTE representative Joan Randall reserved the computer lab at UC Davis Medical Center through a UCD

supervisor, Rick Lawler. Randall had planned and organized employees to attend the pre-scheduled meeting for the purpose of responding to a workplace mismanagement survey. When management learned of this use, Randall's pre-arranged reservation to the room was canceled and UPTE's communication with employees on these critical workplace issues and employee collective formulation and action in response was terminated."[12]

In response, the University argues that the meeting in the computer lab was a "non-University function," "not directly sponsored by UPTE," and carried out in violation of written guidelines. Based on Randall's representations to Lawler, the University contends, he had no basis to conclude that the reservation was not for a University-related event. In addition, the University asserts that if the reservation had been approved, Koppel testified that he would have permitted the meeting to go forward. It was only after learning that Shimek had not personally approved use of the room, that Koppel cancelled the meeting.

Section 3568 provides that employee organizations have "the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act." As an UPTE steward, therefore, Randall had the presumptive right to use the computer classroom for the purpose of participating in the management survey and encouraging employees to do likewise. There is no dispute that Koppel directed Randall and other participants to leave the classroom and effectively ended their participation in the survey, at least temporarily. The University has advanced several arguments in an attempt to

[12] Randall is an employee in the 99 Unit, and it is not clear if the employees who participated in the survey are in that unit or other units covered by MOUs. Therefore, in resolving the dispute regarding the computer classroom reservation, I will not consider the applicability of the MOUs. The conclusions herein apply only to the statutory rights of UPTE and employees in the 99 Unit.

rebut the presumption and validate Koppel's actions. For the following reasons I find these arguments unconvincing.

The University contends the incident involved no University function and therefore UPTE had no right to use the computer classroom. The University has adopted too narrow a view of the events surrounding the computer lab incident, particularly the purpose of the survey and UPTE's participation. Participation in a survey to evaluate management conduct towards employees falls within the right to "form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations and for the purpose of meeting and conferring." (section 3565.) PERB has long held that criticizing a managerial employee on an employment related matter is protected conduct. (See e.g., State of California (Department of Transportation) (1982) PERB Decision No. 257-S, pp. 6-7; Regents of the University of California (1992) PERB Decision No. 949-H, adopting proposed decision of administrative law judge at pp. 6-7.) It follows that a union-supported survey of employees to gauge the "extent of bullying" in the workplace by managers is similarly protected.

The fact that the project originated with an individual who is unaffiliated with the University has little bearing here. UPTE and other unions participated in the survey and encouraged others to do the same. The purpose was to gather employee feedback about the manner in which managers related to employees, with the obvious goal of improving working conditions for those employees who work under managers perceived to be "bullies." I conclude that this is a "matter of employer-employee relations" under section 3565 and can hardly be characterized as unrelated to the University.

Granted, there may have been some initial confusion about the nature of the survey and the role of Namie, and Koppel may not have fully known of the survey or UPTE's involvement

at the time he entered the computer classroom on May 22, 2001. However, in a short time he knew or should have known the subject of the survey and that it was supported by UPTE. Even if UPTE was not the originator of the survey, it was no mystery that UPTE supported it strongly. The entire discussion that took place in the computer classroom on May 22, 2001, need not be repeated here. Even according to Koppel, when he asked Randall if the room was being used for a "University-related function," she gave him her UPTE business card, identified herself as a union representative, and said the survey was "union supported." Koppel even conceded that he assumed Randall worked for UPTE. If Koppel didn't know about the survey or UPTE's involvement when he arrived at the classroom on May 22, 2001, he surely became aware of it during the discussion that followed. Yet he proceeded to cancel the meeting. The claim that Koppel did not know the nature of the survey or UPTE's role is rejected.

The assertion that Koppel would have permitted the meeting to go forward if the reservation had been approved in accordance with established procedures is similarly unconvincing. Koppel insisted in his testimony that he had concerns about whether the room had been reserved. He said reservation procedures must be followed: "It makes no difference whether it's union or otherwise." If Koppel was concerned about whether the classroom had been properly reserved, it not evident from this record.

It may be true that Shimek had not approved the reservation. But Shimek is not the person who ordinarily reserves rooms like the computer classroom. Lawler is the person who is in charge of reservations and he approved Randall's request to use the room in accordance with established procedure. The procedure does not state that the room must be used exclusively for information systems training and computer classes. It states that the room "primarily" is used for such purposes. The room may also be reserved for other reasons under

the plain terms of the procedure. As the procedure states, the classroom "may be used by individuals on a case-by-case basis" when it is not in use. Even employees who are anticipating to be laid off may use the classroom to update or create resumes. The only restriction, it seems, is that the classroom be used during regular work hours with proper supervision. While Randall had reserved the classroom after work hours for at least some of the allotted time, another trainer happened to be available that night to monitor use of the room. Both Randall and Lawler agreed that she would do so. And Lawler was present at all times during the discussion that took place on May 22, 2001. Yet Koppel failed to consult him about whether Randall's reservation was appropriate, despite the fact that he knew Lawler played a central role in reserving rooms in the building.[13] The claim that Koppel revoked the reservation based on concerns about proper reservation is rejected.

In addition, it appears that at least part of Koppel's concern was that individuals who have no connection to the University were conducting the survey, and thus the meeting did not involve a University event. The University's local regulation governing use of meeting rooms by employee organizations provides:

> Unless otherwise modified by specific sections of a collective bargaining agreement, employee organizations may use University rooms for meetings attended principally by University employees and held outside the normal working hours of the employees attending. Room usage is subject to the availability of space and payment of established fees to cover costs. Arrangements for the use of rooms on campus are made by the Campus Events and Information Office, Medical Center arrangements may be made through UCMD Conference and A/V Services. [PPSM section XII. B.]

[13] The University argues that use of the computer classroom is reserved for employees of the Medical Center, and Randall may have misinformed Lawler when she secured the reservation that only such employees would attend the meeting. Assuming this to be true, the appropriate response by the University on May 22, 2001, would have been to ask non-Medical Center employees to depart rather than cancel the entire meeting.

There is nothing in this regulation that would restrict use of the classroom based on the presence of one or more individuals who are not affiliated with the University. In fact, it envisions non-University employees participating in meetings, providing that employee organizations may use University rooms for meetings attended "principally" by University employees. Even Shimek testified that this provision does not prohibit participation by a person not affiliated with the University, and if Randall had followed the appropriate reservation procedure he would have had no objection to UPTE using the room for the purpose of conducting the survey. Thus, any concerns by Koppel based on the fact that the Namies were not affiliated with the University carry little weight.

Another local regulation provides that employee organizations and their representatives "are prohibited from using University . . . computers . . . unless specifically permitted by a collective bargaining agreement." (PPSM section 380-21.XII.) Under the same reasoning set forth above in the discussion of Ealy's restriction on access to the Chiles Road facility, I find PPSM section 380-21.XII unreasonable on its face. Section 3568 grants employee organizations a right of access to "means of communication" and "institutional facilities." PERB has found that computer resources fall within this general right. (See e.g., Trustees of the California State University at pp. 4-5) Statutory guarantees such as the right of access stand alone, and need not be incorporated into a collective bargaining agreement to become effective. Accordingly, to the extent that the University relied on PPSM section 38-21.XII authority to deny use of the computer classroom, such reliance is misplaced.

Lastly, there is no basis for the claim that granting access to the computer classroom would create a security problem. Granted, the building is a secure facility that contains computer equipment. However, there is no evidence of the location of the equipment, and it seems unlikely that any of it would be part of the classroom reserved by UPTE. Nor is there

evidence that by gaining access to the classroom, employees would have access to confidential information. The password provided by Lawler to participants in the survey enabled them to log on only to the network. It would not permit access to any confidential information in the Medical Center. And although participants are not permitted access to the classroom without supervision, Lawler and Randall agreed that an information systems trainer would be available to monitor the use of computers. The access granted UPTE and employees who participated in the survey would pose no greater risk than granting access to others under the procedure that Lawler uses to reserve the computer classroom.

In these circumstances, I conclude that the University's argument is overstated. The University has not met it's burden of rebutting UPTE's presumptive right of access. (See e.g., UCLA Medical Center at. p. 11.) Accordingly, I find that the University has unreasonably obstructed UPTE's right to use an institutional facility, in violation of section 3571(b). By the same conduct, the University has interfered with the right of employees to participate in the activities of an employee organization, in violation of section 3671(a).

Veterinary Medical Teaching Hospital Incident: UPTE's next contention stems from the allegation that Barton was denied access to the VMTH. The specific allegation in the complaint is as follows: "On June 26, 2001, Barton sought access to VMTH, where she regularly had direct access to employees. Barton entered a laboratory staffed by [animal technologists] who have discretion to determine their break and lunch periods. Barton was informed by Robert Martinez of [Davis Campus] Labor Relations that the area was off limits to UPTE. Barton was also confronted by supervisor Cindy Savely who charged that Barton was in a restricted area and demanded that she leave. These confrontations occurred in the plain view of many employees and had the effect, if not the purpose of chilling employee interest in UPTE."

In response, the University asserts that two credible witnesses dispute the allegations in the complaint. First, Savely unequivocally testified that she did not confront Barton on June 26, 2001, or on any other date, and she has no knowledge of Martinez speaking to Barton about access. Second, Martinez testified that he has no knowledge of a discussion between Savely and Barton, he never told Barton that a laboratory staffed by animal technicians was "off limits" to UPTE, and he never told anyone at VMTH to escort UPTE representatives from restricted areas. Therefore, the University contends, there is no credible evidence to support the allegation regarding denial of access to the VMTH.

The allegations in the complaint are that Martinez told Barton that a laboratory staffed by animal technicians was "off limits" to UPTE, and that "Barton was . . . confronted by supervisor Cindy Savely who charged that Barton was in a restricted area and demanded that she leave." Martinez denied that he made the comment attributed to him in the complaint, and Savely denies that the confrontation occurred. Therefore, resolution of these issues turns on the outcome of the credibility disputes involving Barton, Martinez and Savely.

For the following reasons, I resolve the credibility dispute between Barton and Savely in favor of Savely. Savely was a convincing witness who credibly testified that she never told Barton to leave the VMTH. Asked if she would ever ask Barton to leave the main corridor on the second floor of the VMTH, Savely emphatically testified, "I would not."

Not only was Savely a credible witness, she demonstrated a generally sound understanding of access rights as they involve patient care areas. She described the nature of the second floor environment and the specific kinds of patient care functions that are performed there in the hallway, yet she correctly declined to characterize the corridor as a patient care area where union access may be denied. (See e.g., UCLA Medical Center at pp. 10-11.) Asked what would happen if a union representative's presence in the main corridor

coincided with patient care activity, Savely said the representative would simply be asked to step aside until the matter was addressed. Even Savely's e-mail complaint to Herthel in early June 2001 was reasonable. In it she expressed a concern that union representatives were in the dialysis room for about 30 minutes while an employee was doing dialysis. In general, Savely impressed me as an employee who is aware of union access rights and has not overreacted to the presence of the union at the VMTH. Savely testified, moreover, that her relationship with Barton has always been cordial. Barton and other UPTE representatives have returned to the VMTH after June 2001 without incident. Even Barton conceded that Savely has been "extremely nice" during her visits. Against this background, I find it unlikely that Savely attempted to bar Barton from the hallway on the second floor.

It is more likely that Fitzgerald, who reports to Savely, may have asked Barton to leave the VMTH. As Savely testified, a few months before the hearing in this matter Fitzgerald reported that she had asked Barton to leave an area in the VMTH. There are similarities between the allegation in the complaint and the encounter between Fitzgerald and Barton that suggest Barton is mistaken about this incident. The Fitzgerald/Barton incident occurred on July 27, 2001, about one month to the day after Savely allegedly told Barton to leave the VMTH, and the facts surrounding the encounter (Barton was confronted in a hallway and told the area is off limits) are similar to those alleged in the complaint. Even Barton's suggestion to talk to Martinez about access is present in the incident involving Fitzgerald.

In addition, Martinez substantially corroborated Savely's testimony on all relevant points. He also credibly denied ever telling Barton that a laboratory staffed by animal technicians is "off limits" to UPTE. In crediting Martinez' testimony, I note that even Barton's testimony undercuts the allegation against him in that she testified that Martinez was the person to be contacted on access rights. Specifically, when Barton allegedly was informed by

Savely to leave the premises, she (Barton) responded, "why don't you talk to Martinez. He and I are working on, you know, improving, you know, kind of working toward a more principled relationship." And Barton testified that she told Savely, "I just spoke to [Martinez] on the phone and he assured me it's okay that I'm there as long as I don't go in any patient care areas and everywhere I'm going is okay." It seems unlikely that Barton would attribute such comments to Martinez if he had attempted to restrict her access.

Barton's testimony regarding the allegations about VMTH access is less convincing. Her testimony about certain aspects of her June 26, 2001, visit to the VMTH cast doubt on the accuracy of her recollection. She first testified that the person who advised her of access guidelines was Max Gerdes, a supervisor or leadperson. But in fact Gerdes is a horseshoer. When this was brought to her attention, she recalled that the person who advised her of access parameters was a supervisor named "Mark," but she could not recall his last name. I recognize that these are minor matters. Nevertheless, they reflect less than convincing recall of the events of June 26, 2001. Further, Barton testified that she has never met Moira Fitzgerald, but Fitzgerald's e-mail suggests otherwise. Lastly, Barton's testimony is inherently inconsistent, as least as it relates to Savely. On the one hand, she testified that Savely directed her to leave the VMTH and thus denied her reasonable access rights. On the other hand, Barton conceded that Savely has cooperated and she now had "complete access to those areas without any restriction." These factors, taken together, suggest that Barton's memory about this incident is less than complete.

When the testimony of Barton is weighed against that of Martinez, Savely and the totality of the evidence regarding the access issue at the VMTH, the balance tips in favor of Martinez and Savely. I find, therefore, that Martinez never told Barton that a laboratory

staffed by animal technicians was off limits, nor did Savely direct Barton to leave the VMTH. The allegation that Martinez and Savely denied UPTE access to the VMTH is rejected.

In addition, UPTE's contention that the past practice of UPTE access was unilaterally changed finds no support in the record. This issue requires little discussion other than to note that Barton and other UPTE representatives have returned to the VMTH after June 2001 without incident. Even Barton conceded that Savely has been "extremely nice" during her visits.

North Core Two Laboratory Incident: UPTE next contends that Barton was denied access to the North Core Two Laboratory. The specific allegation in the complaint is as follows: "In or about August 2001, Barton was distributing flyers to UPTE members' mailboxes at the UCD main hospital (N2 area), a common UPTE practice and accepted form of communication. UCD manager Gwen Williams confronted Barton and directed her to leave the premises immediately. Barton made subsequent attempts to distribute the flyers over the next three days, but on each occasion UCD blocked her access and prohibited access to employee mailboxes."

The University responds that the laboratory is a restricted area for numerous health and safety reasons, and it may be entered only through locked doors accessible by a key code. According to the University, Barton's conduct in restricted areas of the laboratory disrupted employees on their work time and increased the likelihood of error through distraction. By her own admission, the University continues, Barton was unaware of the nature of the work performed in the laboratory or the chemicals used to conduct the tests. She therefore endangered her own safety, the safety of laboratory employees, and the health and confidentiality of patients. For these reasons, the University concludes, the allegation that Williams unreasonably denied Barton access to the laboratory should be dismissed.

The dispute in the North Core Two Laboratory involves access to employees are covered by the HX Unit MOU. Article 2, section B, of that agreement provides that "union representatives shall have access to patient care areas only as necessary for travel to and from union business. UPTE representatives shall not contact employees in, or use patient care areas when conducting union business." Article 2, section B.6, defines a "patient care area" as, among other things, "patient care rooms, operating rooms, laboratories, clinics, and other treatment and patient care areas."

There can be no dispute here that the area in which Williams confronted Barton is a laboratory. Under the plain language of the agreement, Barton had no right of access to the laboratory to contact employees or otherwise conduct union business, except as necessary to travel to and from union business. Nevertheless, Barton routinely entered the laboratory to do precisely what the agreement prohibits; she said she entered the laboratory to distribute union materials and make contact with employees. She proceeded through the chemistry and urinalysis area and the hematology and coagulation area. She entered the room in the chemistry and urinalysis testing area where mail slots and coat racks are located and dropped off materials. Clearly, Barton's entry into these areas of the laboratory was prohibited by the MOU.

Granted, an UPTE representative is permitted access to patient care areas "as necessary for travel to and from union business." In this instance, however, it was not necessary to do so. A break room was located at the north end of the main hallway, in close proximity to the laboratory. The room was available to distribute UPTE materials and meet with employees. In fact, Williams testified that she made it a point to inform employees that they were permitted to meet with union representatives in the break room while on their lunch or break periods, and employees have the discretion to determine when such periods occur during the work day.

Under these circumstances, it is difficult to conclude that it was necessary for Barton to enter the laboratory as part of travel to and from union business.

The MOU aside, the University has met its burden to rebut any presumptive right of access UPTE had to the laboratory. The work setting of the laboratory does not reasonably lend itself to union meetings and distribution of materials by outside organizers. Because blood, urine and other bodily fluids are present in the laboratory, these areas are considered contaminated areas. Employees test blood, spinal fluid, and other fluids manually and by machine. Specimens of these fluids potentially are contaminated with hepatitis and HIV, and toxic chemicals are stored in the laboratory and used in the testing process. Employees wear protective clothing because of the nature of the work. And distractions or disruptions in the testing areas may produce errors that have adverse consequences for patients.[14]

This work setting is unlike the work areas to which the Board permitted access in UCLA Medical Center, perhaps the leading case in determining appropriate access to patient care areas. In that case, the Board permitted access essentially to corridors on patient care floors in an acute care hospital.

> In this regard, we stress that the access ordered herein is to employee lounges, classrooms, and locker rooms which are neither frequented by patients nor used for delivery of health care. These locations can be effectively sealed off from patient care areas by closing doors. We are not establishing a right of nonemployee representatives to contact employees in or to linger in corridors. UC is free to regulate visitor conduct, and to take reasonable steps to insure that union representatives do not use corridors for any purpose other than to reach areas to which access is allowed. [UCLA Medical Center at p. 10.]

[14] Presence of outsiders in the laboratory does not alter this conclusion. The limited evidence on this point indicates that outsiders have been permitted to enter in narrow circumstances, and they have been closely monitored by Williams.

In the same case, union representatives were denied access to non-immediate patient care areas where medical procedures were performed. (UCLA Medical Center at pp. 10-11 [access not permitted to corridors used for physical therapy by ambulatory patients or to transport patients between treatment areas; access denied to sitting rooms on patient floors where medical consultation takes place].)

It is concluded that the University has presented sufficient evidence of the "operational realities" of the work place to rebut any presumptive right of access Barton had to the laboratory. (See Lawrence Livermore Laboratory at p. 14 [consideration of the operational realities of the laboratory is necessary to determine whether particular restrictions on access are reasonable].) In reaching this conclusion, I have considered the availability of alternative access to employees through use of the breakroom and bulletin boards. (See UCLA Medical Center at p. 15 [availability of alternative access "important factor" to be considered in striking balance regarding access].) Accordingly, I find that the University's regulation of access to the laboratory is reasonable under the circumstances. It is consistent with the purpose of the Act, which is to ensure effective organizational communication, while addressing legitimate operational concerns about disruption in the work place. (Long Beach at p. 4.)

UPTE next claims that Williams' conduct in interfering with Barton's access to the laboratory constitutes a unilateral change in practice. To establish an unlawful unilateral change, UPTE must show that the University implemented a change in an established practice. (See e.g., Grant at p. 9.) A practice is one that is unequivocal, clearly acted upon, readily ascertainable over a reasonable period of time, and accepted by both parties. (See Hacienda La Puente Unified School District (1997) PERB Decision No. 1186, adopting proposed decision of administrative law judge at p. 13.) The evidence does not establish that a practice permitting UPTE access existed in the laboratory.

Williams has never acquiesced to a practice that permitted Barton access to the laboratory. In fact, Barton's presence in the laboratory has long been a matter of dispute. Williams has confronted her in the laboratory on several occasions and debated the access question with her. An unfair practice charge was filed against Barton that stemmed from her presence in the laboratory, and the University argued in that case that access should not be permitted. The instant case is yet another example of the University disputing UPTE's access to the laboratory. Plainly, Williams' conduct in this matter does not constitute a change in a settled practice, and, moreover, her conduct is consistent with the MOU. Therefore, the allegation that there has been a unilateral change in the access practice at the laboratory is rejected.[15]

Department of Pathology Incident: UPTE next contends that Barton was denied access to the Department of Pathology to meet with cytotechnologists. The specific allegation in the complaint is as follows: "In or about August 21, 2001, UPTE representative Barton entered a laboratory staffed by cytotechnologists to distribute UPTE 'Bargaining Updates' to members. She was told to 'leave immediately' and harassed by supervisor Robin Davis."

The University, in response, asserts that its conduct in regulating access to the laboratory was reasonable. The University points out that the laboratory is considered a restricted area to protect the safety of employees and patients by avoiding contamination or infection and to avoid mixing tissue samples. Further, the University reasons that it is entitled under the MOU covering the HX Unit and local policy to restrict access to the facility. Nevertheless, the University continues, Barton entered the laboratory, disrupted employees and

[15] Given the above findings and conclusion regarding access to the laboratory, it is unnecessary to address the application of the 1998 settlement agreement in Unfair Practice Charge No. SF-CE-93-H to this issue.

refused to leave when confronted by Davis. The University notes that several alternative means of communications exist at the laboratory. Rather than harassing Barton on August 21, 2001, the University concludes, Davis offered her these alternatives, but Barton rejected them.

Like the access dispute in the North Core Two Laboratory, this dispute involves access to a laboratory. As discussed above in more detail, the MOU covering the HX Unit includes a laboratory within the definition of a patient care area, prohibits union representatives from contacting employees in such areas for union business, and permits access to patient care areas only as necessary for travel to and from union business.

Contrary to the access provisions set out in the MOU, Barton entered the cytology screening area on August 21, 2001, to meet with two cytotechnologists and deliver UPTE materials. She entered the laboratory precisely to contact employees about union business; she was not traveling to or from union business. Davis confronted her, correctly stated that access to the laboratory was not permitted, and pointed out that a break room was available for meetings. The evidence also establishes that there was no change in actual practice. Barton's entry into the laboratory on August 21, 2001, was the first time she did so.

In these circumstances, I find that Davis did not change access policy with respect to access rights to the laboratory on August 21, 2001. Her response to Barton's presence in the laboratory was in line with rules already contained in the MOU.

The MOU aside, the University has met its burden to rebut any presumptive right of access Barton had to the laboratory. Like the work setting in the North Core Two Laboratory, the work area in this situation does not reasonably lend itself to union meetings and distribution of union material by outside union representatives. Access to the areas is restricted. Although employees in the screening area are not required to wear protective clothing, employees in the accessioning and processing areas wear such clothing. Employees

in the screening area work in small cubicles adjacent to each other, and the work requires precision. Employees examine large numbers of cells per slide, they must identify atypical cells through a microscope, mark them and make a preliminary diagnosis before forwarding them to a pathologist. Accuracy and time therefore is critical, with timelines established to examine each slide. In addition, the work area is not an expansive one. Given the small number of cytotechnologists and the closeness of their workstations, it is not difficult to envision one cytotechnologist being distracted by a work area meeting between a fellow cytotechnologist and a union representative.

It is concluded, therefore, that the University has presented sufficient evidence of the "operational realities" of the work place to rebut any presumptive right of access Barton had to the laboratory. (See Lawrence Livermore Laboratory at p. 14.) In reaching this conclusion, I have considered the availability of alternative access to employees through use of the breakroom and bulletin boards. (See UCLA Medical Center at p. 15.) Davis informed Barton that a break room was available to meet with employees. She also testified that e-mail, mailboxes and bulletin boards were available to communicate with employees. In fact, Barton testified that if she had known a breakroom was available she would have notified the employees and used it for the meeting. Moreover, employees have the discretion to determine the timing of their breaks and lunch periods, thus facilitating the scheduling of meetings in the break room.

Accordingly, I find that the University's regulation of access to the laboratory is reasonable under the circumstances. It is consistent with the purpose of the Act, which is to ensure effective organizational communication, while addressing legitimate operational concerns about disruption in the work place. (Long Beach at p. 4.)

REMEDY

Pursuant to section 3563.3, PERB has the remedial authority

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

The following conduct by the University has been found to be unlawful under HEERA. First, it has been found that the University denied UPTE the right of access by prohibiting all demonstrations inside Mrak Hall, in violation of section 3571(b), and, by the same conduct, interfered with right of employees to participate in the activities of an employee organization, in violation of section 3571(a). By implementing the absolute ban on all demonstrations inside Mrak Hall without affording UPTE notice and an opportunity to negotiate, the University also violated section 3571(c). Second, it has been found that the University unlawfully banned Barton from the entire Davis campus and Medical Center and thereby prohibited her from conducting a ratification vote. By this conduct, the University has interfered with the right of employees to participate in the activities of an employee organization, in violation of section 3571(a), and denied UPTE the right to represent employees, in violation of section 3571(b). Third, it has been found that the University interfered with the right of employees to participate in the activities of an employee organization by denying UPTE use of a computer classroom to conduct an employment-related survey, in violation of section 3571(a). By the same conduct, the University denied UPTE reasonable access rights to an institutional facility, in violation of section 3571(b). Fourth, it has been found that the University has unilaterally changed access provisions concerning unscheduled visits and employee use of telephones for union membership recruitment at the Chiles Road facility, in violation of section 3571(c). By the same conduct, the University has obstructed UPTE's right of access, in violation of section

3571(b), and interfered with the right of employees to participate in the activities of an employee organization, in violation of section 3571(a).

It is appropriate to direct the University to cease and desist from such activity. It is also appropriate to direct the University to rescind its absolute prohibition on demonstrations inside Mrak Hall. It is unnecessary to direct the University to rescind its ban on Barton from the Davis campus, as it has already expired.

It is also appropriate that the University be required to post a notice incorporating the terms of this order at the Davis campus and Medical Center where notices to employees are customarily posted. Posting of such a notice, signed by an authorized agent of the University, will inform employees that the University has acted in an unlawful manner, is being required to cease and desist from such activity, and will comply with the terms of the order. It effectuates the purposes of HEERA that employees are informed of the resolution of this controversy and the University's readiness to comply with the ordered remedy. (See e.g., The Regents of the University of California (1990) PERB Decision No. 826-H, p. 13.)

All other allegations in the complaint are dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it has been found that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA) by denying the right of access to the University Professional and Technical Employees, CWA Local 9119, AFL-CIO (UPTE), failing to negotiate in good faith with UPTE about access rights, and interfering with the right of employees to participate in activities of an employee organization. By this conduct, the University has violated Government Code section 3571 (a), (b) and (c).

Pursuant to Government Code section 3563.3, it is hereby ordered that the University and its representatives shall:

A. CEASE AND DESIST FROM:

1. Denying UPTE the right of access to represent employees by (a) prohibiting all demonstrations inside Mrak Hall; (b) banning representative Pilar Barton from the Davis campus and Medical Center for thirty (30) days; (c) prohibiting Pilar Barton from conducting a contract ratification vote on the Davis campus; (d) denying the right to use a computer classroom to conduct an employment-related survey; (e) prohibiting unscheduled visits by UPTE representatives to the Chiles Road facility; and (f) prohibiting employee use of University telephones for union membership recruitment at the Chiles Road facility.

2. Failing to negotiate with UPTE by unilaterally (a) implementing an absolute ban on all demonstrations inside Mrak Hall; (b) prohibiting unscheduled visits by UPTE representatives to the Chiles Road facility; and (c) prohibiting employee use of University telephones for union membership recruitment at the Chiles Road facility.

3. Interfering with the right of employees to participate in the activities of an employee organization by (a) prohibiting all demonstrations inside Mrak Hall; (b) banning UPTE representative Pilar Barton from the Davis campus and Medical Center for thirty (30) days; (c) prohibiting Pilar Barton from conducting a contract ratification vote on the Davis campus; (d) denying UPTE the right to use a computer classroom to conduct an employment-related survey; (e) prohibiting unscheduled visits by UPTE representatives to the Chiles Road facility; and (f) prohibiting employee use of University telephones for union membership recruitment at the Chiles Road facility.

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

1. Within ten (10) workdays of service of a final decision in this matter, post at all work locations at the Davis campus and Medical Center where notices to employees are customarily posted, copies of the Notice attached hereto as the Appendix. The Notice must be signed by an authorized agent of the University, indicating that the University will comply with the terms of the 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.

2. Upon issuance of a final decision, make written notification of the actions taken to comply with this order to the San Francisco Regional Director of the Public Employment Relations Board in accord 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 Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (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 mailed by certified or Express United States mail,

as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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, 32140, and 32135(c).)

Fred D'Orazio

FRED D'ORAZIO
Administrative Law Judge