OVERRULED IN PART by County of Kern & Kern County Hospital Authority (2019) PERB Decision No. 2659-M

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, Charging Party, **v.** TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	Case No. LA-CE-660-H PERB Decision No. 1839-H May 12, 2006

Appearances: Brian Young, Labor Relations Representative, for California State Employees Association; Marc D. Mootchnik, University Counsel, for Trustees of the California State University.

Before Duncan, Chairman; Shek and Neuwald, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by the California State Employees Association (CSEA) to a proposed decision (attached) of the administrative law judge (ALJ). The underlying unfair practice charge alleged that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)[1]. In the proposed decision, the ALJ found that CSU had not unilaterally changed its contracting out policy when it entered into an operating agreement with an auxiliary organization to provide for the management of on-campus student housing and related custodial services at the California State University,

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

San Marcos. The ALJ thereupon dismissed the complaint and the underlying unfair practice charge.

The Board has reviewed the entire record in this matter, including the ALJ's proposed decision, CSEA's exceptions and CSU's response. 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.

ORDER

The unfair practice charge and complaint in Case No. LA-CE-660-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Duncan joined in this Decision.

Member Shek's concurrence begins on page 3.

SHEK, Member, concurring: I respectfully concur with the decision of the majority opinion subject to the following rationale. In my opinion, I believe this is a case of first impression, and I deem it necessary to supplement the discussion in the proposed decision. I would adopt the findings in the proposed decision to the extent that they are consistent with this concurring decision.

This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California State Employees Association (CSEA) to a proposed decision of the administrative law judge (ALJ). In the proposed decision, it is found that the Trustees of the California State University (CSU, University or Trustees) had not unilaterally changed its contracting out policy when it entered into an operating agreement with an auxiliary organization to provide for the management of on-campus student housing and related custodial services at California State University, San Marcos (San Marcos). The proposed decision thereupon dismissed the complaint and the underlying unfair practice charge.

The Board has reviewed the entire record in this matter, including the proposed decision, CSEA's exceptions and CSU's response. As discussed below, I would agree that CSEA has failed to establish a unilateral change in policy, and on that basis, I would dismiss the complaint.

PROCEDURAL HISTORY

This action commenced on December 17, 2001, when CSEA filed an unfair practice charge against CSU. The Office of the General Counsel of the Board followed on August 11, 2003, by issuing a complaint against CSU. The complaint alleged that on July 1, 2001, the University unilaterally changed its long-term contracting out policy by entering into a custodial services contract with Merchants Building Maintenance, and on November 13, 2001, by approving a proposal by the San Marcos University Corporation (Corporation), an auxiliary organization of San Marcos, to contract out student housing services. The complaint further

alleged that the Corporation entered into these contracts without first providing CSEA with notice and an opportunity to bargain their effects. By making these changes, the complaint alleged that CSU had violated the Higher Education Employer-Employee Relations Act (HEERA) section 3571 (a) and (c).

The matter was partially settled during the informal conferences on September 29, and November 6, 2003. The issue concerning the custodial services contract with Merchants Building Maintenance was resolved.

A hearing into the remaining issue of the contracting out of student housing services was conducted before the ALJ on July 12, 2004, at the PERB office in Los Angeles. On motion by the ALJ, the complaint was amended at the hearing, to add the allegation that the contracted out student housing services also included custodial services related to the student housing facility.

The matter was submitted for proposed decision on September 10, 2004, after the filing of post-hearing briefs. The ALJ issued the proposed decision on September 23, 2004, finding the complaint and the underlying unfair practice charge to be without merit, and thereby dismissing them.

FINDINGS OF FACT

CSU and CSEA were parties to a collective bargaining agreement (CBA) for the period of July 1, 1999 through June 30, 2001.[1] Relevant to this dispute, Article 3 of the CBA provided, in pertinent part:

> 3.2 When the Employer deems it necessary in order to carry out the mission and operations of the campus, the Employer may contract out work provided that the contracting out does not displace bargaining unit employees. 'Displacement' includes

[1]The CBA expired on June 30, 2001 and was extended by the parties to July 31, 2001. The parties subsequently executed a successor agreement for the period of July 1, 2002 through June 30, 2006.

> layoff, demotion, involuntary transfer to a new classification, involuntary transfer to a new location requiring a change of residence, and involuntary timebase reductions.
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> 3.3 The CSU shall notify the Union when contracting out is to be on a long-term basis. Long term ... is more than one-hundred eighty (180) days. The Union may request to meet and confer on the impact of contracting out work when such contracting out is to be on a long-term basis. The CSU shall meet with the Union for this purpose within thirty (30) days of such a request. Notice to the Union shall be no later than one hundred twenty (120) days prior to the commencement of the contracting out. In emergency circumstances, when the University enters into a contract under which contracting out will commence in less than forty (40) days, when possible, notification shall be made two (2) weeks prior to implementing the contract, but in no event later than ten (10) working days after commencement of the contracting out.

The Need for Student Housing at San Marcos

San Marcos was founded in 1989 and enrolled 448 students in the fall of 1990. It operated in rented facilities before relocating to the permanent campus site in 1992. The campus was developed and built from the ground up.[2] San Marcos initially offered upper division and graduate courses, and in the fall of 1995, admitted the first freshman class. To meet the demand for student housing, CSU San Marcos Foundation[3] (Foundation) entered into a master lease agreement for apartments in an off-campus complex. The demand for student housing continued to exceed the supply[4]. Due to circumstances beyond the Foundation's control, the cost for the lease agreement became increasingly expensive and the quality of service to the students declined steadily.

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[2]A substantial portion of the project costs included construction of additional roadway and utility access necessary to support the new facility.

[3]The Foundation is an auxiliary organization on campus. It is a tax-exempt corporation under Internal Revenue Code (IRC), section 501(c)(3), that accepts gifts on behalf of San Marcos, operates grants, contracts, the food service and the bookstore on campus. Associated Students is another auxiliary organization.

[4]The Foundation was able to rent from 60 to 80 apartments, with a waiting list of 300 students.

The campus had grown to approximately 6,000 students by year 2000, with an annual addition of 500 to 600 new students thereafter. In June 2001, the Foundation ended the master lease agreement to focus on the development of both off-campus housing referral services and the on-campus housing project that was underway.[5]

Financial Feasibility for Student Housing

Associate Vice President for Finance and Business Services of San Marcos, Suzanne Green (Green), testified that in 1998, a student housing advisory committee, consisting of faculty, students, administrators and the Foundation, recommended to both the president of San Marcos and the Foundation, that a private consulting firm conduct a market study concerning on-campus student housing. The market study showed an initial demand of up to 400 beds; and recommended the construction and operation of the first student housing facility to be financed by a public-private partnership. CSU began considering the feasibility of providing on-campus student housing at San Marcos in 1999.

Green stated that San Marcos had neither existing housing stock to help finance the construction of new housing, nor the staffing infrastructure to support the operation of a student-housing program. The general fund was devoted primarily to the development of the academic program, and was unavailable to finance a student housing project. Under the Dormitory Revenue Fund program at that time, the debt service ratio would be 1.25, which meant the annual revenues collected by San Marcos had to be 125 percent of the debt service fee for a fixed rate 30-year mortgage.[6] Under private financing, the debt service ratio would be

[5]Presentation by Richard P. West, San Marcos Executive Vice-Chancellor and Chief Financial Officer, to the Committee on Finance, as an action item dated November 13-14, 2001, entitled, "Campus/Third Party Housing Development and Auxiliary Organization Tax-Exempt Financing at California State University, San Marcos." (Charging Party, Exh. No. 10.)

[6]If the Dormitory Revenue Fund were used as a funding source, the State of California and CSU would charge an annual pro rate fee of "over $100,000" to San Marcos for "the bond financing program through the State." The annual pro rata fee would rise exponentially, at a

1.20, and the Corporation could obtain a mortgage for better terms and lower rates. If the Dormitory Revenue Fund, rather than a private financing through a public-private partnership were used to construct and operate the housing project, the annual per-bed cost would be approximately $1,200 more. Thus, the University's decision to form an auxiliary organization[7] was based on the consideration that the cost of public financing cost would be "substantially more." San Marcos' lack of prior experience in providing student housing also necessitated the involvement by another entity that possessed the expertise in operating this type of facility.

Formation of the San Marcos University Corporation

In May 2001, San Marcos, subject to the review and approval by the University Chancellor's office, formed the Corporation as a nonprofit public benefit corporation under Section 501(c)(3) of the IRC of 1986 as amended; and an auxiliary organization in good standing of San Marcos, pursuant to the requirements under the Education Code, section 89900, et seq. and California Code of Regulations (CCR), title 5, subchapter 6, section 42400, et seq. pertaining to "Auxiliary Organizations." The Corporation's purposes were developing, providing and maintaining affordable housing and other related facilities and activities for the faculty, staff and students of San Marcos.[8]

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rate to be determined by the amount the State of California would charge to the University, and the additional amount the University would charge San Marcos for operating the financing and treasury functions. The housing project, which had to be self-supporting by necessity, would have to absorb the annual fees with revenue generated from the rental contracts of the housing project.

[7]The Foundation Board initially proposed the Foundation to be the entity for providing a new housing project on campus, however, in the interest of protecting the Foundation assets, the San Marcos' finance and operations committees and the Foundation suggested the formation of a subsidiary auxiliary organization to the Foundation. Upon the University Chancellor's advice that there was no provision for a subsidiary auxiliary organization, it was decided to create a separate corporation.

[8]The charitable purposes for which the Corporation was organized, as stated in the Articles of Incorporation filed with the Office of the Secretary of the State of California on May 21, 2001, were

The regulations governing auxiliary organizations require campus presidents to appoint the organization's board of directors. San Marcos president appointed the Corporation's board of directors as follows: the vice president of student affairs, the associate vice president of finance and business services, a member of the faculty, a member of the student body, one community representative, and two ex-officio members, including the chief financial officer and the vice president of finance and administrative services. San Marcos president also appointed an executive director, who was the Corporation's only employee.[9]

The Corporation contracted with the Foundation to provide the administrative functions, for which the Corporation reimbursed the Foundation.[10] The University and the auxiliary organization were separate employers and had separate employment practices. University employees could not be loaned to an auxiliary organization.

Agreements for the Creation of a New Student Housing Project

The University's involvement in the construction of the on-campus student housing project consisted of approving an amendment to the master plan, the operating agreement between the University and the Corporation, and the ground lease from San Marcos to the Corporation. The University's intent was to ensure that the Corporation, as an auxiliary

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> the development, provision, and maintenance of affordable housing and other related facilities and activities for the use and convenience of faculty, staff and students of California State University San Marcos, in order to foster an academic community and environment on and near the campus of California State University San Marcos, and to attract and retain the highest quality faculty, staff and students at California State University San Marcos.

[9]The executive director worked part-time for the Foundation and part-time for the Corporation. Her salary was paid out of the general fund, and fully reimbursed by the Foundation. The Corporation reimbursed the Foundation for its share of her time.

[10] The general fund initially paid for the service needed by an auxiliary organization and performed by University employees, and then recovered both the direct and indirect costs from the auxiliary organization.

organization, would put state property to appropriate use for the construction of student housing.

In the amendment to the San Marcos' master plan approved on November 13, 2001, the University authorized the on-campus student housing project to proceed, supported the engagement of Allen & O'Hara Education Services LLC (Allen & O'Hara) for the design, construction and management of the housing facility, and confirmed the Chancellor's authority to enter into and approve such agreements as are necessary to support the design, construction and management of the San Marcos student housing project and the student residential life program.[11]

San Marcos granted a 35-year ground lease to the Corporation, at a cost of $1, for the construction and operation of a 475-bed student housing facility and the student residential life

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[11] The University's resolution stated, in relevant parts:

> **RESOLVED,** By the Board of Trustees of the California State University, that the trustees:
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> 1. Support the design, construction and management of a 475-bed on-campus student housing facility at California State University, San Marcos, engaging Allen & O'Hara Education Services LLC for this purpose, and authorize the project to proceed.
>
> 2. Confirm the Chancellor's authority to enter into and approve such agreements as are necessary to support the design, construction and management of the San Marcos student housing project and the student residential life program on behalf of the campus and the Board of Trustees, including:
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> a. The ground lease between California State University, San Marcos and the San Marcos University Corporation for the purpose of developing a 475-bed on-campus student housing facility and student residential life program;
> b. Specific agreements negotiated by the San Marcos University Corporation and Allen & O'Hara Education Services LLC for the design, construction and management of the student housing project, and the student residential life program.

program. Green testified that the major benefit of this lease was not monetary, but to provide affordable student housing on the campus.[12] The Corporation was the project owner. At the end of the lease, ownership of both the land and the improvements would be converted to San Marcos.

On December 15, 2001, the University, on behalf of San Marcos, entered into a 10-year operating agreement with the Corporation, setting forth the terms and conditions under which the Corporation may operate as an auxiliary organization in good standing.[13] Pursuant to this agreement, "housing" was one of the functions performed by the Corporation, which had "the right to develop and manage housing on an exclusive basis as long as such functions are operated in compliance with Education Code Section 89900 et seq., and applicable provisions of Title 5, (CCR)." It "may contract with third parties to perform the functions" authorized by and consistent with this agreement. The Corporation:

> agrees to apply the funds and properties coming into its possession to first[,] support project operations and second[,] to support future project expansion or related campus programs and activities as identified by [San Marcos] President.
>
> Operations of [the Corporation] under this [a]greement shall be integrated with [San Marcos] operations and shall be supervised by [San Marcos] officials so as to assure compliance with the objectives stated in Title 5, CCR, 42401.

The Corporation entered into a development and management agreement with Allen & O'Hara, to develop, design, construct the facility, and then staff and manage the facility and residential life program.[14] Allen & O'Hara, based on Green's testimony, had extensive

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[12]Green also testified that it was crucial to calculate the optimum number of beds that would keep the construction cost at a minimum and yet offer affordable housing to the students in the long term.

[13]Operating Agreement Between Trustees and University, and San Marcos University Corporation, executed on December 15, 2001. (Respondent's Exh. No. B.)

[14]The private consulting firm that conducted the market study previously recommended that the Corporation enter into a minimum 10-year management contract with Allen & O'Hara, with a provision for a five-or ten-year extension. The reason for the 10-year term was that

experience in managing housing facilities, which was essential to prevent any financial problems on an annual basis.

The Corporation issued a $28 million tax-exempt non-recourse revenue bond[15] to finance[16] the design and construction of the student housing project. The bonds were solely the Corporation's obligations, secured principally by the leasehold interest in the project and project site,[17] and project revenues.[18] Green testified that the Corporation was "financially distant" from both the University and the Foundation. Neither the University nor San Marcos was obligated for the repayment of the debt.

There is no evidence that the University otherwise participated in the financing, development, or operation of the housing project, or in negotiating or executing the contract with Allen & O'Hara. The Corporation board annually reviewed and approved the operating budget and licensing fees proposals of Allen & O'Hara.

Allen & O'Hara completed construction and began operation of the apartment-style housing project on August 30, 2003.

Allen & O'Hara would subordinate their management fees, i.e., the payment of management fees would be contingent upon the Corporation meeting the debt service ratio. Since the housing project was a relatively small facility by other campus' standards, it was "marginal" from a financial standpoint. For the initial five years of the operation contract, Allen & O'Hara might not be able to collect any management fees.

[15]An independent underwriter contracted with Allen & O'Hara issued the bond.

[16]The Corporation worked with the underwriter to develop financing packages that would support the project. As an auxiliary organization, the Corporation could obtain better private financing, thus reducing the long-term debt service and operating fees associated with the State Dormitory Revenue Fund. The Corporation obtained a three-year fixed rate mortgage that could be refinanced as a variable rate mortgage at any time.

[17]The Corporation owned the housing project as its sole asset.

[18]The pledged Corporation revenues consisted of all the unrestricted revenues earned or received by the student housing project, from the license agreements for the beds sold on an academic year basis and on a 12-month basis.

Management of the Student Housing Project

Allen & O'Hara hired the following non-unit employees to operate and maintain the student apartments: a leasing agent; a full-time building engineer; a director and an assistant director; nine resident agents or resident assistants, and a part-time building maintenance employee.

The building engineer was responsible for ensuring the proper operation of the heating, ventilation and air conditioning systems within the facility. The director managed the operation of the facility in a way that would be safe, and financially viable by staying within an established budget. He supervised all activities and addressed all issues that arose in the facility. He was in charge of personnel decisions and supervised all the employees who worked in the facility. Resident assistants were students who managed the resident wings and performed desk duties[19] in exchange for free housing and a minimal monthly stipend.

Allen & O'Hara had independent control over the student services and the student residential life program (program) in the housing project. Due to the importance of the program on campus, San Marcos' student residential life office gave input to the housing facility manager on the program content.

Allen & O'Hara contracted with San Marcos' Department of Information Technology Systems services, to connect the housing facility to the campus telephone and computing systems and to provide computing help desk services for a fee.[20]

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[19]Brian Young (Young), CSEA labor relations representative, testified that through conversations with a unit employee and a student housing employee, he learned that there were also "desk assistants" who tended the reception desks in the residence halls. In contradiction, Green testified that the resident assistants performed the desk duties. As Green has a greater knowledge of the student housing staffing at San Marcos, I credit her testimony over that of Young, and find there was not a separate classification of desk assistant.

[20]The decision to have University employees perform this function was to ensure security and confidentiality of the University's data and web site. CSEA bargaining unit 9 employees performed this work and San Marcos paid their wages out of the general fund, to

The University Chancellor's office of human resources and labor relations advised the Corporation that San Marcos and union employees would not be involved in the housing project because its owner, the Corporation, was an auxiliary organization.[21]

It is undisputed that no bargaining unit employees at San Marcos were laid off, demoted, transferred involuntarily to new classifications, subjected involuntarily to time-base reduction, or otherwise affected by the employment of non-unit employees at the student housing facility.

Young produced documents to show that CSEA represented three types of bargaining unit employees who worked in student housing at campuses other than San Marcos: clerical and administrative support services in unit 7; operations support services in unit 5; and technical support services in unit 9. The documents contained data for 14 of the 23 CSU campuses, excluding San Marcos or any auxiliary organizations. These documents did not provide an exhaustive list of student housing employees at all CSU campuses, nor did they establish conclusively that all student-housing employees were unit employees. Young testified that CSEA as a union had represented some employees of an unspecified auxiliary organization, but over time, they "tended not to be involved in the auxiliaries because they aren't covered by our collective bargaining agreement." (Sic.)

Based on the CBA, the classification titles within unit 7 included Head Resident II, Head Resident I, and Dormitory Supervisor. Head Residents I and II were full-time employees

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which the Corporation made reimbursement. San Marcos had no control in any way over the payroll or employment of these unit 9 employees.

[21]San Marcos did not make an estimate of the staffing cost at the housing project. The private consulting firm had done a comparative market study of the operating pro forma under the Dormitory Revenue Fund, which would employ University employees, and the public-private partnership, which would employ non-University employees.

responsible for the effective, 24-hour daily operation of a student residence hall and assisting the individual student in adjusting to campus life. A Dormitory Supervisor was in charge of a resident dormitory at a CSU campus; maintaining order and assisting students in problems of dormitory living; and inspecting living quarters for cleanliness.[22]

The classification titles within unit 5 included Lead Custodian and Custodian. A Lead Custodian and a Custodian engaged in custodial duties and related work in an assigned building.[23]

The classification titles of Operating Engineer, Building Service Engineer, Air Conditioning/Refrigeration Mechanic, Facilities Control Specialist, and Supervising Building Service Engineer were included in unit 6, and subject to an agreement between the University and the State Employees Trades Council (SETC).[24] There were no classification titles or definitions that resembled a Leasing Agent in units 5, 7 or 9.

CSEA's Demand to Bargain

At the Board of Trustees meeting on November 13, 2001, Young, CSEA labor relations representative, learned of the University's resolution to approve of an amendment to the master plan, the formation of the Corporation as an auxiliary organization, the ground lease to the Corporation, the operating agreement between San Marcos and the Corporation, and the agreement between the Corporation and Allen & O'Hara for the construction and management of a student housing project. Young contended that the provision of residence hall was a state

[22]The definitions for the positions of Head Resident II, Head Resident I, and Dormitory Supervisor were based on the Classification and Qualification Standards of the CSU System. (Charging Party, Exh. No. 15.)

[23]The definitions for the positions of Lead Custodian, and Custodian were based on the Classification and Qualification Standards of the CSU System. (Charging Party, Exh. No. 16.)

[24]This information was obtained from the CSU website, under "Collective Bargaining Agreements" between CSU and SETC for unit 6, for the period of July 1, 1999 through June 30, 2002.

function that was normally performed by bargaining unit employees. Under this proposal, private sector employees would be performing the same function. He argued that the contracting out of bargaining unit work occurred either when San Marcos delegated the function to the Corporation, or when the Corporation contracted with Allen & O'Hara.

CSEA's then Senior Labor Relations Representative, Teven Laxar (Laxar), testified that he had brought to the attention of the University's Committee on Finance that the work performed by six bargaining units would be adversely impacted, and that none of the unions had received any notice of the proposal or been provided with the opportunity to bargain. To Laxar's personal knowledge, the San Marcos president expressed at the meeting on November 13, 2001, that unit 4 employees would be handling the student life services, but made no mention of the comparative labor costs of hiring bargaining unit members and non-bargaining unit members.

Young demanded in a letter to San Marcos' president, dated November 29, 2001, to bargain over the impact of any long-term contracts for housing services related to the student housing project. The University Assistant Vice Chancellor of Human Resources, Samuel Strafaci (Strafaci), responded in writing on December 12, 2001, stating that the Corporation, a recognized auxiliary organization in good standing, would be the project owner. The Corporation, rather than San Marcos, would be managing all aspects of the housing project, including labor relations matters. Neither HEERA nor the CBA would be violated, since no CSEA-represented employee was being displaced, and no CSEA-represented work was being contracted out. Strafaci also noted that a prior discussion on the project had occurred on September 26, 2000 at the Labor Council meeting where CSEA was represented.[25] Strafaci concluded that the decision was not negotiable, but stated:

[25]According to Strafaci's letter, Steve Wiener, Brenda Brubaker, Donna McArdle, Alan Miles and Mike Irick represented CSEA at the Labor Council meeting.

> Nevertheless, CSU San Marcos would like to meet with CSEA to discuss whatever concerns it has regarding the project. Please contact Joel Block and Melody Kessler to schedule a meeting.

There is no evidence that CSEA responded to Strafaci's offer to meet and confer over the impact of the decision to contract out housing services.

DISCUSSION

The issue in this case is whether or not the University unilaterally changed its contracting out policy under the CBA by entering into an operation agreement with the Corporation, a San Marcos auxiliary organization, to provide for the management of on-campus student housing and related custodial services, in violation of its duty to negotiate under HEERA.

CSEA alleges that the University unilaterally changed the terms and conditions of employment by creating and then engaging an auxiliary organization, the Corporation, to contract out bargaining unit work normally reserved to employees in CSEA-represented bargaining units at San Marcos, without providing CSEA with an opportunity to meet and confer. As an alternative argument, CSEA contends that the University entered into a public-private partnership with Allen & O'Hara through the Corporation, acting as a single or joint employer with the University.

The University contends that it is not the owner of the student housing project and has no contractual relationship with Allen & O'Hara. The Corporation, not CSU, is the owner of the student housing project and the entity that contracts with Allen & O'Hara for the management of the project. The University further contends that the Corporation is a San Marcos auxiliary organization in good standing and an entity legally separate from the University.

Based on the discussion below, I would conclude that the University did not unilaterally change its contracting out policy under the CBA because the University has no

obligation to negotiate its decision to enter into an operating agreement with the Corporation, an auxiliary organization, for the management of on-campus student housing. Provision of student housing services is not a statutorily mandated function of the University, and San Marcos has a past practice of providing student housing through an auxiliary organization. As a result of the operating agreement between the University and the Corporation, no bargaining unit employees are displaced or laid off. The University has no obligation to negotiate the Corporation's contracting out to Allen & O'Hara since the Corporation and the University are neither a single nor joint employers, and the Corporation is not an alter ego of the University. The impact of the University's decision is negotiable under the CBA, however, CSEA's failure to seek negotiations constitutes a waiver of its right to bargain negotiable effects.

The Corporation As An Auxiliary Organization Is Not Subject To PERB's Jurisdiction

CSEA argues that the University can be held responsible for the Corporation's decision to contract out the housing services to Allen & O'Hara because the provision of student housing is a function of the University. The University delegated the housing function to the Corporation through the operating agreement, with the latter acting as a separate entity from the University. I do not find CSEA's argument to be persuasive.

Education Code section 90000, provides that, "Student housing facilities may be established and maintained at any state university for the accommodation of students of the university." The language of Section 90000 permits the University to establish affordable student housing facility, but it does not mandate the University to be the entity solely responsible for the operation and maintenance of student housing at the campuses.

CCR, title 5, section 42500(a)(3) provides that housing is one of the functions that has been determined to be appropriate for auxiliary organizations to perform in accordance with

applicable policies, rules and regulations. Under Education Code section 90002, it is implied that student housing may be operated by an auxiliary organization.[26]

The undisputed facts in the present matter show that San Marcos had never provided student-housing services since it was founded in 1989. The Foundation, an auxiliary organization, initially leased an off-campus apartment complex to meet the growing need for student housing. When demand exceeded supply, the Foundation terminated the lease agreement to focus on the development of both off-campus housing referral services and the on-campus housing project.

The University established the Corporation as an auxiliary organization in charge of the on-campus student housing function through the operating agreement dated December 15, 2001. The Corporation was authorized to perform or contract with third parties to perform the functions of developing and managing student housing on an exclusive basis in compliance with Education Code section 89900 et seq., and applicable provisions of CCR, title 5. The Corporation agreed to be fiscally accountable by applying the incoming funds and properties to support project operations and future project expansion or campus programs and activities as identified by San Marcos president. The Corporation's operation would be subject to the supervision by San Marcos officials so as to assure compliance with the objectives stated in CCR, title 5, section 42401.

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[26]Section 90002 provides that,

> All student housing and any other related facilities operated by the College Auxiliary Enterprise Fund are hereby designated a 'project' under the State University Revenue Bond Act of 1947 and subject to the provisions of that act. All assets, liabilities, and fund balances of the College Auxiliary Enterprise Fund are hereby transferred from that fund to a separate account to be established by the trustees within the California State University Dormitory Revenue Fund.

The Corporation was formed as a non-profit corporation under the IRC, section 501(c)(3), and as an auxiliary organization in good standing under Education Code section 89900, et seq., and CCR, title 5, subchapter 6 ("Auxiliary Organizations"), section 42400, et seq.

Education Code, section 89901 defines auxiliary organizations as follows:

> (a) Any entity in which any official of the California State University participates as a director as part of his or her official position.
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> .....
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> (c) Any entity which operates a commercial service for the benefit of a campus of the California State University on a campus or other property of the California State University.
>
> (d) Any entity whose governing instrument provides in substance both of the following:
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> (1) That its purpose is to promote or assist any campus of the California State University, or to receive gifts, property, and funds to be used for the benefit of such campus or any person or organization having an official relationship therewith.
>
> (2) That any of its directors, governors, or trustees are either appointed or nominated by, or subject to, the approval of an official of any campus of the California State University, or selected, ex officio, from the membership of the student body or the faculty or the administrative staff of campus.
>
> (f) Any entity which, exclusive of the foregoing subdivisions of this section, is designated as an auxiliary organization by the trustees.

CCR, title 5, section 42402 provides, in part:

> [A]uxiliary organizations operate as an integral part of the overall campus program. Therefore, for the president to exercise his responsibility over the entire campus program, he shall require that auxiliary organizations operate in conformity with policy of the Board of Trustees and the campus.

California courts have generally recognized that auxiliary organizations are not part of the governmental entities that they promote or assist. The issue of whether auxiliary

organizations are instrumentalities of the state was first addressed in Wanee v. Board of Directors (1976) 56 Cal.App.3d 644 [128 Cal.Rptr. 526] (Wanee). In Wanee. the court held that an employee of the Associated Students Book Store at California State University, Chico, was not entitled to the same protections as a university employee in a dismissal proceeding, because he was not an employee of the college or of any governmental entity, but rather an employee of a private corporation. The book store was a nonprofit corporation and an "auxiliary organization as...is defined in Education Code section 24054.5, subdivisions (b) and (c)."[27] The Court relied on an opinion of the Attorney General, which concluded that an auxiliary organization was a nongovernmental body for social security purposes, created to promote the welfare of the college, and not a public agency carrying out a governmental function. (47 Ops.Cal.Atty.Gen 8-11,10 (1966); cited in Wanee at p. 648.)

In Coppernoll v. Board of Directors (1983) 138 Cal.App.3d 915, 918 [188 Cal.Rptr. 394], the court held that a terminated full-time, "regular" and "indefinite term" employee of the San Diego State University Foundation, Inc., was entitled to comparable working conditions to those provided to university employees, including an administrative action review for his dismissal. The court recognized that Education Code section 89900(c), required the operation of auxiliary organizations to conform to regulations established by the Trustees to ensure comparability of working conditions. The court cited Wanee in its dictum to state that San Diego State University Foundation, Inc., a nonprofit organization formed to manage major funds and endowments, etc. for the university, was an auxiliary organization that was not part of the state body that it aided or assisted.

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[27]Former Education Code section 24054.5, enacted in 1959, was amended and supplemented, and repealed by Stats. 1976, c. 1010, section 2, operative April 30, 1977; and amended by Stats.1983, c. 143, section 154, and replaced by the Reorganized Education Code, section 89901.

In California State University v. Superior Court (2001) 90 Cal.App.4th 810 [108 Cal.Rptr.2d 870], the court addressed whether state university auxiliary organizations were "state agencies" for purposes of the California Public Records Act (CPRA). CPRA defines a "state agency" to mean every state office, officer, department, division, bureau, board, and commission or other state body or agency. The court concluded a nongovernmental auxiliary organization was not a "state agency" for purposes of the CPRA, and the words "state body" and "state agency" simply did not include a nongovernmental organization.

The Board held that the Foundation, a nonprofit corporation established for the purpose of assisting and promoting educational activities in the community college district under the Educational Employment Relations Act (EERA),[28] was a true separate entity and not an instrumentality or alter ego of the district.[29] (San Diego Community College District (1988) PERB Decision No. 662, pp. 23-29 (San Diego Community College District)). The Board's conclusion was not disputed on appeal. (San Diego Adult Educators v. Public Employment Relations Bd. (1990) 223 Cal.App.3d 1124, 1129 [273 Cal.Rptr. 53] (San Diego Adult Educators), partially reversed on other ground.) The Board held in another case that a similarly organized foundation was neither an alter ego of the college district nor a single employer, but was a separate entity not subject to PERB's jurisdiction. (Redwoods

[28]EERA is codified at Government Code section 3540, et seq.

[29]The Foundation was established as a public benefit non-profit corporation under the California General Nonprofit Corporation Law. It had no members and was governed by a five-member board of directors. Each member of the District Board of Trustees designated a member to the Foundation board. The Foundation paid rent to the District for the use of one office located in the Chancellor's office in the District building. The Foundation had its own personnel policies, checking and investment accounts.

Community College District (1997) PERB Decision No. 1242, adopting the ALJ's proposed dec. at p. 23 (Redwoods).)[30]

Applying the laws on auxiliary organizations to the evidence in the present case, I find the Corporation to be a public benefit non-profit auxiliary organization formed for the purposes of developing, providing and maintaining affordable housing and other related facilities and activities for the faculty, staff and students of San Marcos. Notwithstanding San Marcos president's authority to appoint the Corporation's board of directors pursuant to the regulations governing auxiliary organizations, and an executive director, the University and the auxiliary organization, by law, are separate employers that have separate employment practices. Although the operations of San Marcos and the Corporation are integrated, San Marcos has no control over the operation or management of the Corporation. San Marcos is not involved in the development, operation, or negotiation and execution of the contract with Allen & O'Hara. The Corporation and San Marcos are financially distant from each other. The University is not liable for the repayment of the revenue bonds, which are solely the Corporation's obligations.

In compliance with the University's Executive Order No. 682 adopted in 1981, supplementing CCR, title 5, section 42402, the CSU president is required to review auxiliary programs and budgets and to require discontinuance of activities not in conformity with policies of the Board of Trustees and campus. In the absence of any evidence to show that San Marcos and the Corporation share common ownership, the Corporation is a true separate entity and not part of San Marcos which it aided or assisted. Nor is the Corporation an instrumentality or alter ego of the University. The Corporation is therefore considered as a

[30]CSEA cited Hornet Foundation, Inc. (1985) PERB Decision No. 521-H, in its opening statement at the hearing before the ALJ. This case is not controlling here since the parties had since settled their dispute, and there was no factual finding whatsoever to show the relationship between the State University System and the Hornet Foundation. Considering the lapse of 20 years since the Board first reviewed that case, any facts, if available, relating to that same issue would have been antiquated and therefore unreliable.

separate nongovernmental employer whose labor relations with its employees are not subject to the Board's jurisdiction.

The University's Decision To Enter Into An Operating Agreement With The Corporation Is Lawful

CSEA contends the University unilaterally changed the terms and conditions of employment by using an auxiliary organization, the Corporation, to contract out bargaining unit work normally reserved to employees in CSEA-represented bargaining units at San Marcos, without providing CSEA with an opportunity to meet and confer.

To determine whether there has been a violation of HEERA section 3571(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant).)

A change in policy may be to a term of a collective bargaining agreement or to a past practice. (Grant; Rio Hondo Community College District (1982) PERB Decision No. 279.) Upon the expiration of a collective bargaining agreement, the employer may not unilaterally change the terms set without the union's consent. (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1296-S.)

Pursuant to Article 3 of the CBA, I find that the University has no obligation to bargain with CSEA its decision to enter into an operating agreement with the Corporation, and CSEA has waived its right to bargain the University's decision to contract out provided there is no

displacement of bargaining unit members. The University's action is also entirely consistent with its past practice and right to exercise managerial prerogative.

Section 3.2 of the CBA stated that the University was permitted to contract out work when it was deemed necessary to carry out its mission and operations, provided that the contracting out did not displace bargaining unit employees. "Displacement" included "layoff, demotion, involuntary transfer to a new classification, involuntary transfer to a new location requiring a change of residence, and involuntary time base reductions." Under Section 3.3 of the CBA, the University was obligated to notify CSEA of the contracting out if it were more than one hundred eighty (180) days, and CSEA had the right to request to meet and confer on the impact.[31]

CSEA has waived its right to bargain the University's decision to enter into the operating agreement with the Corporation by Section 3.2 of the CBA. The language of Section 3.2 is clear and explicit, and grants the University the right to contract out work so long as no unit members are displaced. No unit members are displaced because housing has never been a function of San Marcos, and none of its employees has ever performed housing-related work, or worked at a housing facility.

CSEA introduced documentary evidence to show that CSEA represented three types of bargaining unit employees in student housing or residence halls at 14 of the 23 CSU campuses, excluding the San Marcos campus. The data contained in these documents did not establish conclusively that all CSU student-housing employees were unit employees, nor did they establish that any bargaining unit employees at San Marcos, with the exception of the unit 9 employees, held similar job positions that were held by the Allen & O'Hara employees at the

[31] There was a discussion in the proposed decision concerning whether, and if so, under what circumstances would CSU have notice and bargaining obligations if Sections 3.2 and 3.3 of the CBA were read conjunctively or disjunctively. Pursuant to the discussion to follow, such a distinction is unnecessary.

student-housing project. Young testified that employees of auxiliary organizations were not covered by CSEA's collective bargaining agreement.

The preponderance of the evidence shows that the positions created by Allen & O'Hara are distinguishable from the classifications within bargaining units 5 and 7 represented by CSEA. Even if they can be found to be similar, the undisputed evidence establishes that no bargaining unit members at San Marcos are laid off, demoted, transferred involuntarily to new classifications, subjected involuntarily to time-base reduction, or otherwise affected by the employment of non-unit employees at the student housing facility. I would therefore find no violation with respect to Section 3.2, or within the meaning of HEERA.

The University's action is consistent with past practice. San Marcos was a new campus built from the ground up. It lacked the infrastructure, particularly affordable student housing, to support a growing population of students, faculty and staff. Guided by a private market study and the substantially higher cost of the Dormitory Revenue Fund, San Marcos explored the possibility of using a public-private partnership to build and manage an on-campus student housing facility. The University established the Corporation as an auxiliary organization in good standing of San Marcos pursuant to Education Code section 89900, et seq. and CCR, title 5, and as a public benefit non-profit corporation under section 501(c)(3) of the IRC of 1986 as amended. As an auxiliary organization, the Corporation would obtain the financing and be totally liable for repayment of the revenue bonds in exchange for a 35-year ground lease and ownership of the housing facility as its sole asset for the duration of the lease. It is noteworthy that as a past practice, the responsibility of providing or managing student housing at San Marcos has always been assumed by an auxiliary organization, initially the Foundation, and later the Corporation.

Both the University and San Marcos exercised their managerial prerogative when they established and contracted with the Corporation to expand the scope of available housing

services to the San Marcos community. The University's decision to enter into an operating agreement with the Corporation on behalf of San Marcos was necessitated by the need for affordable student housing. It is a managerial decision at the core of entrepreneurial control, and thus, not negotiable. (See Ventura County Community College District (2003) PERB Decision No. 1547, at p. 19 (citing to Fibreboard Paper Products Corp. v. N.L.R.B. (1964) 379 U.S. 203, 223 [85 S.Ct. 398] (Fibreboard) (concurring opinion of Justice Stewart).)[32]

CSEA argues that the conclusion in Redwoods should be adopted as the conclusion in the present case as the facts in these two cases are nearly identical. In Redwoods, the Board found a community college district's decision to lay off employees and contract the operation of student housing services to an auxiliary organization to be a violation under EERA. The complaint in Redwoods alleged that the community college subcontracted the operation of dormitory services to an auxiliary organization without providing the union with notice and an opportunity to bargain. The community college defended its actions by arguing that it was within its management right to abandon the operation of dormitories and transfer that activity to an auxiliary foundation. Rejecting this argument, the Board held that the decision did not turn on a change in the nature and direction of the district's operation. Instead, the Board concluded, the district terminated bargaining unit employees and contemporaneously subcontracted their work to an outside entity that continued to perform the work in a similar manner under similar circumstances. (Redwoods, adopting ALJ proposed dec. at p. 22.)

Although both Redwoods and the present case involve a private auxiliary organization being contracted to provide student housing, there is a critical distinction. The present case is distinguishable from Redwoods due to the lack of evidence that the university contracted out

[32]See also Otis Elevator Company (1984) 269 NLRB 891 [116 LRRM 1075]); San Diego Adult Educators at p. 1133. A decision to eliminate bargaining unit work entirely constitutes an exercise of managerial prerogative that changes the scope or direction of the operation, and therefore does not necessarily require negotiations.

existing bargaining unit work related to student housing. The evidence is undisputed that no bargaining unit employees previously performed student-housing services on the San Marcos campus. As the alleged bargaining unit work never existed at San Marcos, there was neither transfer of work out of the bargaining unit, nor displacement and/or substitution of bargaining unit members. I would therefore find the decision to enter into the operating agreement to be non-negotiable.[33]

There is also a lack of evidence to support CSEA's allegation that San Marcos's decision to form the Corporation and the University's resolution to enter into an operating agreement with the Corporation were motivated by labor costs. Even CSEA conceded that at the Trustees' meeting on November 13, 2001, the San Marcos president did not mention the comparative labor costs of hiring bargaining unit members and non-bargaining unit employees. The University's decision was based on the financial feasibility of constructing and managing a student housing project. As stated in Fibreboard, a decision concerning the manner of financing may affect job security, but it hardly involves conditions of work to render the decision negotiable. (Fibreboard at p. 223.) I would therefore find CSEA's allegation that the Resident Assistant positions were created to save labor costs to be without merit.

The University Has No Duty To Bargain The Corporation's Contract With Allen & O'Hara

CSEA alleges that the University unilaterally changed its policy under Section 3.3 of the CBA when if failed to bargain the impact of the long-term contract between the Corporation and Allen & O'Hara for the operation and management of the student housing

[33]I believe my concurrence is consistent with the rationale as Lucia Mar Unified School District (2001) PERB Decision No. 1440 (Lucia Mar), in which the Board held, based on distinguishable facts, that the school district's decision to discontinue providing student transportation services, lay off all its bus drivers and contemporaneously subcontract all its transportation work to a private entity was subject to negotiation because it did not constitute "core restructuring." (Lucia Mar, adopting the ALJ's proposed dec. at pp. 39-40.)

facility. As a pre-requisite to finding an obligation to bargain the impact of this contract, there must be a finding that the University and the Corporation are in reality a single employer or joint employers, and that the Corporation is the alter ego of the University.

The Board has found that a general non-profit corporation, the foundation, formed for the purpose of assisting and promoting the educational activities of the district, is not an employer under EERA. Although there was much overlapping of management, purpose, supervision, and operation, there was no common ownership that would permit a finding that the foundation was an alter ego of the district, or that the foundation and the district were a single owner. (San Diego Community College District at p. 13; citing Crawford Door Sales Co (1976) 226 NLRB 1144 [94 LRRM 1393] (Crawford); and Radio and Television Broadcast Technician's Union, Local 1264 v. Broadcast Service (1965) 380 U.S. 255 [58 LRRM 2545] (Broadcast Service).)

The University and the Corporation Are Not A Single Employer

The Board has held that two or more distinct legal entities may constitute a "single employer" for purposes of enforcing the various collective bargaining statutes under its jurisdiction. In a case involving two school districts that operate as "common administration school districts," with separate boards of education but a common superintendent and administrative structure, the Board has held that they are two separate employers rather than a single employer. (Paso Robles Union School District et al. (1979) PERB Decision No. 85 (Paso Robles).) The Board based its final analysis on the separate economic status and exclusive policy-making authority of each district, which determined its ability to negotiate about those matters within the scope of negotiations. (Paso Robles at p. 10.) To determine whether a "single employer" finding is appropriate, the Board has adopted the test utilized by the National Labor Relations Board (NLRB). (San Diego Community College District at p. 13, affd. in part & revd. in part in San Diego Adult Educators; Fresno Unified School

District (1979) PERB Decision No. 82 at pp. 4-5.) Under the NLRB test, four factors are examined: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control. (Broadcast Service.)

In the present case, there is minimal overlap in management between the University or San Marcos and the Corporation. San Marcos' president is required by the regulations governing auxiliary organization to appoint the Corporation's board of director. He also appointed the corporation's only employee, the executive director, who does not report to him. The Corporation contracted with the Foundation to perform the administrative functions, for which the Corporation reimburses the Foundation. There is an absence of evidence showing that San Marcos' president otherwise controls or manages the Corporation's operation. Although the two entities share a common interest in the provision of on-campus student housing, there is no common ownership between them. The Corporation owns the student housing project, and is solely responsible for obtaining the financing for the project and guaranteeing repayment of the debt. The Corporation is "financially distant" from both the University and the Foundation. Neither the University nor San Marcos has any financial liability for the repayment of the revenue bonds, and operation of the Corporation or the housing project. The Corporation, rather than the University, is the entity responsible for facilitating the design, construction and operation of the student housing. Accordingly, I would find the University and the Corporation to be separate employers, and not a single employer within the meaning of HEERA.[34]

The University and the Corporation Are Not Joint Employers

CSEA next contends that the University and the Corporation are joint employers. A "joint employer" relationship exists where two or more employers exert significant control

[34]Accordingly, I would find the statement in the proposed decision that "CSU and the Corporation have some overlap in management" to be overbroad.

over the terms and conditions of employment for the same group of employees, without pooling their authority so as to be considered a "single employer." (United Public Employees v. Public Employment Relations Bd. (1989) 213 Cal.App.3d 1119, 1128 [262 Cal.Rptr. 158].)

In the present case, there is no evidence that the University or San Marcos maintains a right to control and direct the activities of the Corporation's only employee, the executive director, or the employees of Allen & O'Hara. There is no evidence that the University or San Marcos possesses sufficient control over the employment conditions of Allen & O'Hara employees to enable it to bargain with a labor organization as their representative. The record does not support a finding that the University or San Marcos has authority over such fundamental employment matters as entering into employment contracts, hiring, promoting, granting permanent employment status, assigning work, transferring, evaluating, disciplining, and laying-off all Allen & O'Hara employees. (Alameda County Board of Education and County Superintendent of Schools of Alameda County (1983) PERB Decision No. 323 at pp. 14-15.)

CSEA contends that the University's Additional Employment Policy regarding all employees who are employed on a more-than-full-time basis, including those of auxiliary organizations, evidences the University's control of Corporation employees.[35] This contention is without merit because neither the Corporation nor the University employs, the student housing employees at San Marcos. Even assuming the Corporation employs the housing employees; there is no evidence that the University also employs them. Thus, I would not find the University and the Corporation to be joint employers.

[35]The Additional Employment policy provides guidelines for CSU employees appointed to multiple positions, which equate to more than full-time, limiting additional employment to 125 percent of full-time. The policy also applies to employees of auxiliary organizations.

The Corporation Is Not An Alter Ego of the University

CSEA further alleges that the Corporation is the "alter ego" of the University. The alter ego doctrine generally describes a situation where one employer entity will be regarded as a continuation of a predecessor, and the two will be treated interchangeably for purposes of applying labor laws. (N.L.R.B, v. Hospital San Rafael. Inc. (1994) 42 F.3d 45, 49 [148 LRRM 2153] (Hospital San Rafael).) In determining alter ego status, the NLRB and the federal courts have considered a range or criteria including the similarities between the old and new companies in relation to management, business purpose, operation, equipment, customers and supervision, as well as ownership, (See also Crawford.) Another factor in determining alter ego status is whether the alleged alter ego entity was created and maintained in order to avoid labor obligations and the application of collective bargaining statutes. (Hospital San Rafael at p. 50.) An alter ego status is found in cases involving a mere technical change in the structure or identity of the employing entity, simply to avoid the effect of the labor laws, without any substantial change in its ownership or management. (Hospital San Rafael at p. 51.)

Applying the above criteria to the facts in the present case, the most important distinction is that the Corporation is not a continuation of the University. It was established as an auxiliary organization in good standing of San Marcos, which is not part of the University or San Marcos that it assists. The laws on auxiliary organization and non-profit corporation, and the Education Code govern the operation and management of the Corporation, and the relationship between the Corporation and the University or San Marcos. Accordingly, the Corporation is a separate nongovernmental employer not subject to PERB's jurisdiction.

There is no evidence of common ownership between the two entities, or common supervision of the Corporation's employees, as the Corporation and the University have separate personnel and personnel policies. The Corporation, which was created solely for the

purpose of performing the housing function, cannot be considered as a successor to San Marcos which has never performed the function of providing student housing services. More significantly, the University or San Marcos did not undergo any technical change in its structure or identity as a result of establishing the Corporation, and accordingly, I cannot impute any avoidance of the effects of labor law on either entity. Based on the above analysis, I would conclude that the Corporation is not the alter ego of the University within the meaning of the applicable laws.

Duty To Meet And Confer On The Impact Of The Operating Agreement

CSEA alleges that the Corporation's decision to contract with Allen & O'Hara has eliminated housing positions that could have provided opportunities for career advancement, limited the growth of the bargaining unit, and also impacted the workload of the employees who were required to provide services on both the campus and in the residence hall.

The evidence in the record shows that positions created for the San Marcos student housing project by Allen & O'Hara are not similar to the job classifications of any existing bargaining unit work at San Marcos. The record is devoid of all evidence pertaining to the classification titles of bargaining unit employees at San Marcos. Absent such evidence, it is impossible to determine whether, and if so, under what circumstances any bargaining unit employees at San Marcos are impacted. Even assuming for the purpose of argument that CSEA was able to show the impact of the University's decision to enter into the operating agreement with the Corporation, CSEA has waived its right to bargain the impact of the decision.

An employer has a duty to provide an exclusive representative with notice and a reasonable opportunity to negotiate prior to taking action, which affects matters within the scope of representation. (Mt. Diablo Unified School District (1983) PERB Decision No. 373.) However, where an exclusive representative "receives actual notice of the decision, the effects

of which it believes to be negotiable, the employer's 'failure to give formal notice is of no legal import.'" (Sylvan Union Elementary School District (1992) PERB Decision No. 919 (Sylvan), citing Regents of the University of California (1987) PERB Decision No. 640-H.)

When considering an effects bargaining allegation, the charging party must show that it made a request to bargain the effects of the decision and identified the negotiable areas of impact. (Sylvan; City of Richmond (2004) PERB Decision No. 1720-M, citing Newman-Crows Landing Unified School District (1982) PERB Decision No. 223.) An exclusive representative's failure to request to bargain is considered a waiver of its right to bargain. (Sylvan.)

The parties' contracting out policy, as set forth in Section 3.3 of the CBA, requires the University to notify CSEA when contracting out on a long-term basis. The provision permits CSEA "to meet and confer on the impact of contracting out when such contracting out is to be on a long-term basis." On November 13, 2001, CSEA learned that the Board of Trustees had amended San Marcos' master plan and authorized it to enter into an operating agreement with the Corporation. Although the University did not provide CSEA with notice before amending San Marcos' master plan, CSEA had actual notice that San Marcos had been authorized to enter into an operating agreement with the Corporation. CSEA did not refute Strafaci's statement in his letter to CSEA dated December 12, 2001, that a prior discussion on the project had occurred on September 26, 2000, at the Labor Council meeting where CSEA was represented. Thus, as stated above, the failure to provide CSEA with notice "is of no legal import." (Sylvan.)

As CSEA was aware that San Marcos intended to enter into an operating agreement with the Corporation, the burden was on CSEA to request effects bargaining. In a letter dated November 29, 2001, CSEA demanded to bargain the impact of the long-term contracts for student housing services. Strafaci responded on December 12, asserting that the decision to

contract out was not negotiable, but he invited CSEA to schedule a meeting to discuss any concerns. There is no evidence that CSEA made any attempt to schedule a meeting to bargain over any identified negotiable impacts of the University's decision to enter into an operating agreement with the Corporation. CSEA's failure to seek negotiations constitutes a waiver of its right to bargain negotiable effects. Thus, I would find that CSEA has not established that the University failed to bargain the impact of its decision in good faith.

Furthermore, the Corporation is a separate legal entity from the University for purposes of HEERA. As such, the Board has no jurisdiction over the conduct of the Corporation. The terms of the CBA, including the provisions of Article 3, are not applicable to the Corporation. Thus, I would conclude that neither the University nor the Corporation has an obligation to provide CSEA with notice and opportunity to bargain the impact of the Corporation's decision to contract with Allen & O'Hara to provide housing services.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-660-H PROPOSED DECISION (9/23/04)

Appearances: Brian Young, Labor Relations Representative, for California State Employees Association; Marc D. Mootchnik, University Counsel, for Trustees of the California State University.

Before Ann L. Weinman, Administrative Law Judge.

PROCEDURAL HISTORY

On December 17, 2001, California State Employees Association (CSEA) filed an unfair practice charge against Trustees of the California State University (CSU) alleging that CSU unilaterally changed its long-term contracting-out policies by entering into a custodial services contract with Merchants Building Maintenance in July 2001, and by approving a proposal by its auxiliary San Marcos University Corporation (Corporation) for a housing services contract, all without first providing CSEA with notice and an opportunity to bargain the effects of those contracts. On August 11, 2003, the General Counsel of the Public Relations Employment Board (PERB or Board) issued a complaint alleging that by the above conduct CSU violated the Higher Education Employer-Employee Relations Act (HEERA) section 3571(a) and (c).[1]

[1] HEERA is codified at Government Code section 3560, et seq. Section 3571(a) makes it unlawful for a higher education employer to "interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter." Section 3571(c) makes it unlawful to "Refuse or fail to engage in meeting and conferring with an exclusive representative."

Informal conferences were held on September 29 and November 6, 2003, in PERB's Los Angeles offices, resulting in the resolution of the issue concerning the custodial services contract. Formal hearing on the remaining issue, the housing services contract, was held on July 12, 2004. At the hearing, evidence was presented indicating that the Corporation also unilaterally contracted out for custodial services related to the housing services, upon which CSEA moved to amend the complaint to include this allegation. The motion was granted.

Upon the filing of post-hearing briefs, the matter was submitted for decision on September 10, 2004.

FINDINGS OF FACT

The facts are virtually undisputed.

CSU is a higher education employer within the meaning of HEERA section 3562(g). CSEA is an employee organization within the meaning of section 3562(f)(l), representing non-faculty employees of CSU. Article 3 of the parties' collective-bargaining agreement (Agreement)[2] provided in pertinent part:

> 3.2 When the Employer deems it necessary in order to carry out the mission and operations of the campus, the Employer may contract out work provided that the contracting out does not displace bargaining unit employees. ...
>
> 3.3 The CSU shall notify the Union when contracting out is to be on a long term basis. Long term ... is more than one hundred eighty (180) days. The Union may request to meet and confer on the impact of contracting out work when such contracting out is to be on a long-term basis. The CSU shall meet with the Union for this purpose within thirty (30) days of such a request. Notice to the Union shall be no later than one hundred twenty (120) days prior to the commencement of the contracting out.

[2] The Agreement expired on June 30, 2001 and was extended by the parties to July 31. After expiration, the parties reached impasse and subsequently executed a successor agreement on December 12. There was no agreement in effect between July 31 and December 12, 2001.

Back in 1997, CSU saw the need for housing at its growing San Marcos campus. An outside firm was hired to perform a market study, which revealed that it would be economically unfeasible for CSU to finance a housing project, but rather that it should set up an auxiliary which could contract with outside firms and achieve lower financing costs. In that regard, Suzanne Green (Green), associate vice president, finance and business services, testified that, while the university must maintain a debt/service ration of 1.25 and could only obtain a 30-year fixed mortgage, a private auxiliary could maintain a ration of 1.20 and obtain a better mortgage rate.

In May 2001, CSU formed the Corporation as a non-profit corporation under the Internal Revenue Code and a qualified auxiliary organization under Education Code section 89900, et seq., and California Code of Regulations, title 5, Subchapter 6 ("Auxiliary Organizations"), section 42400, et seq. Section 42402 provides in part:

> [A]uxiliary organizations operate as an integral part of the overall campus program. Therefore, for the president to exercise his responsibility over the entire campus program, he shall require that auxiliary organizations operate in conformity with policy of the Board of Trustees and the campus. [[3]]

Section 42500(a) provides in part:

> The following functions have been determined ... to be appropriate for auxiliary organizations to perform in accordance with applicable policies, rules, and regulations:
> (3) Housing.

[3] Supplementing section 42402 is CSU's Executive Order No. 682, adopted in 1981, which provides that "The [CSU] president is required to review auxiliary programs and budgets and to require discontinuance of activities not in conformity with policies of the Board of Trustees and campus." Accordingly, in a speech on January 12, 2003, at the CSU Auxiliary Organizations Association Conference, CSU Chancellor Charles Reed (Reed) stated that the university had developed "best practices" guidelines for its auxiliaries, conducts regular audits, negotiated an investment program, and had "successful collaborations on policy issues, notably on collective bargaining."

The Corporation's Board of Directors is appointed by CSU's president and consists of CSU's vice president of student affairs, its associate vice president of finance and business services, one member of the faculty, one member of the student body, one community representative, and two ex-officio members: the chief financial officer and the financial vice president. The Corporation's only asset is the housing project and it has only one employee, an executive director[4] appointed by CSU's president.

On May 15, 2001, CSU's Board of Trustees entered into a 10-year operating agreement with the Corporation and granted the Corporation a 35-year ground lease, at a cost of $1, for that portion of the campus on which the project would be built.[5] To finance the project, the Corporation issued and sold shares in a $30 million bond, and signed a 10-year contract with Allen & O'Hara Education Services LLC (Allen & O'Hara) to develop, design, construct, furnish, operate, and maintain the project, and lease the apartments to eligible students.

On November 13, 2001, CSU's Board of Trustees approved the project's master plan by the following resolution:

> **RESOLVED,** By the Board of Trustees of the California State University, that the trustees:
>
> 1. Support the design, construction and management of a 475-bed on-campus student housing facility at California State University, San Marcos, engaging Allen & O'Hara Education Services LLC (Allen & O'Hara) for this purpose, and authorize the project to proceed.
>
> 2. Confirm the Chancellor's authority to enter into and approve such agreements as are necessary to support the design, construction and management of the San Marcos student housing project and the student residential life program on behalf of the campus and the Board of Trustees, including:

[4] The executive director works part-time for the CSU Foundation, another auxiliary organization, and part-time for the Corporation. Her salary is paid by the Foundation, which is reimbursed by the Corporation for its share of her time.

[5] Upon expiration of the lease, the property will revert back to CSU.

a. The ground lease between California State University, San Marcos and the San Marcos University Corporation for the purpose of developing a 475-bed on-campus student housing facility and student residential life program;

b. Specific agreements negotiated by the San Marcos University Corporation and Allen & O'Hara Education Services LLC for the design, construction and management of the student housing project, and the student residential life program.

The agenda item for the meeting states that Allen & O'Hara "will design and construct the facility, and then staff and manage the facility and residential life program for a minimum of ten years." However, minutes of the meeting, taken by a CSEA labor representative, reflect that Chancellor Reed and Dr. Alexander Gonzalez, president of the San Marcos campus, both stated that while Allen & O'Hara would manage and maintain the facility, all other functions, including residential and student life,[6] would be operated by CSU campus employees.

The housing project opened for occupancy on August 30, 2003, and Allen & O'Hara hired the following non-unit employees: a leasing agent; a full-time building engineer; a director and assistant director; nine "resident agents," i.e., students who manage the resident wings in exchange for free housing and a minimal monthly stipend;[7] and a part-time building maintenance employee.[8] CSEA claims that the resident agents (and, according to CSEA, the

[6] The "residential life" program refers to organized student activities.

[7] Brian Young (Young), CSEA labor relations representative, testified that, through conversations with a unit employee and a student housing employee, he learned that there are also "desk assistants" who tend the reception desks in the residence halls. In contradiction, Green testified that the desk duties are performed by the resident agents. As Green has a greater knowledge of and involvement with the student housing staffing at San Marcos, I credit her testimony over that of Young, and find that there is no separate classification of desk assistant.

[8] Green admitted that early on in the development of the project, the Human Resources department advised her that unit employees need not be employed because the project would be operated by an auxiliary. However, CSU contends that it was not motivated by labor cost.

desk assistants) and building maintenance employee are holding unit positions, and produced documentary evidence that these or similar positions have been filled by unit employees at other CSU campuses. However, these documents do not provide an exhaustive list of student housing employees at all CSU campuses, nor do they establish conclusively that all student housing employees are unit employees.

It is undisputed that no unit employee at San Marcos was laid off, suffered reduced hours, or was otherwise affected by the employment of non-unit employees at the housing project.

Allen & O'Hara contracted with CSU to provide telephone and computer services to the residences, because the telephone and computer equipment there would be connected to the same networks as those at the San Marcos campus and would be subject to the same acceptable use policies. This work was performed by CSEA unit employees, whose services were paid for by CSU and in turn charged to the Corporation.

There is no evidence beyond approval of the master plan, the operating agreement, and the ground lease, that CSU participated in the financing, development, or operation of the housing project, or in negotiating or executing the contract with Allen & O'Hara.

By letter of November 29, 2001, CSEA, having learned of CSU's November 13 adoption of the project's master plan, requested bargaining regarding any long-term contracts for maintenance or servicing of the housing project. In its December 12 response, CSU stated that the owner and operator of the project was the Corporation, not CSU, therefore neither HEERA nor the parties' Agreement were applicable. Thus, it is clear that CSEA had no opportunity to bargain the effects of the project or the contract with Allen & O'Hara.

CSEA contends that CSU violated its duty to bargain the effects of its decision to enter into long-term contracts either when it signed the operating agreement with the Corporation or

when the Corporation, which CSEA contends is either an alter ego or a joint employer with CSU, entered into its contract with Allen & O'Hara. CSU contends that the Corporation is a separate entity over which it has no control.

ISSUES

1. Did the Corporation violate HEERA when it contracted with Allen & O'Hara to provide housing services?

2. Did CSU violate HEERA when it signed an operating agreement with the Corporation?

CONCLUSIONS OF LAW

In determining whether a party has violated HEERA section 3571 (c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant).)

A change in policy may be to a term of a collective bargaining agreement or to a past practice. (Grant; Rio Hondo Community College District (1982) PERB Decision No. 279.) Upon the expiration of a collective bargaining agreement, the terms set forth therein may not be unilaterally changed by the employer without the union's consent or waiver. (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1296-S.)

Here, as noted above, section 3.2 of the parties' Agreement grants CSU the right to unilaterally contract out provided no unit employee has been displaced. As no unit employee has been displaced, I must conclude that the policy stated in section 3.2 has not been changed.

Section 3.3 of the Agreement provides that when contracting out is to be long-term, CSU must provide CSEA with notice and an opportunity to bargain the impact of the contracting out. If section 3.3 is to be read in conjunction with section 3.2, then notice and opportunity to bargain would apply only when unit employees have been displaced, which is not the situation here. It is only if section 3.3 is read in the disjunctive that CSU would have notice and bargaining obligations. It is undisputed that CSEA was given neither notice nor an opportunity to bargain the impact on bargaining unit employees of CSU's decision to contract with the Corporation or the Corporation's decision to contract with Allen & O'Hara. Thus, assuming arguendo that section 3.3 applies here, the next question is whether CSU's conduct was within the scope of representation, or whether CSU otherwise had an obligation to bargain.

CSU argues that its decision to form the Corporation was not based on labor cost, therefore it did not fall within the scope of representation. CSU further argues that it is not the owner or operator of the housing project, therefore it had no duty to bargain regarding the project's employees.

The Corporation's Bargaining Obligation

Auxiliary organizations are generally not considered public employers nor are they subject to PERB's jurisdiction. (Regents of the University of California (1999) PERB Order No. Ad-293-H (Regents); Fresno Unified School District (1979) PERB Decision No. 82.)

In San Diego Community College District (1988) PERB Decision No. 662 (San Diego) the employer, in order to reduce the high cost of bargaining unit instructors' salaries, had ceased providing foreign-language classes; these classes were then offered by its non-profit

foundation, which employed non-unit instructors. In declining jurisdiction over the foundation, the Board stated:

> ... Although there was much overlapping of management, purpose, supervision, and operation, key elements prevent the Foundation from being considered a public employer. There is no common ownership that would permit a finding that the Foundation is an alter ego of the District. (Crawford Door Sales Co. (1976) 226 NLRB 1144.) Nor, because of the lack of common ownership, can the Foundation and the District be considered a single employer. (Television Broadcast Technicians Union. Local 1264 v. Broadcast Service (1965) 380 US 255.) Finally, the Foundation cannot be an ostensible agent of the District. Even though the District may inadvertently have caused third parties to believe that the Foundation was its agent, California law requires that it also be shown that third parties changed position in reliance upon that representation. No evidence was presented here to show any change in position. (Fn. omitted.)

However, the Board found that the college district, by contracting with the foundation, continued to offer the same service, and that work formerly performed by bargaining unit members was now being performed by non-unit employees "at the specific behest of the District." Thus, the employer had violated its bargaining obligation to the union by unilaterally contracting out unit work. Similarly, in Redwoods Community College District (1997) PERB Decision No. 1242 (Redwoods), the employer's unilateral decision to transfer the operation of student housing services to an auxiliary was found unlawful.

Here, as in San Diego, CSU and the Corporation have some overlap in management, as CSU officers serve on the Corporation's Board of Directors and its executive director is appointed by the CSU president; and they have a shared purpose here, i.e., providing student housing. However, also as in San Diego, there is no common ownership between the two entities. The Corporation owns the student housing project in its entirety. The fact that the land it sits on was leased to the Corporation by CSU for $1 does not show that the Corporation is a sham entity. Nor does the advice of CSU's Human Resources department, that unit

employees would not be involved in the project, indicate that CSU created the Corporation in order to avoid its bargaining obligations. I therefore cannot find the Corporation to be either an alter ego or a single employer with CSU. (San Diego and cases cited therein.)

In its post-hearing brief, CSEA argues that CSU and the Corporation are joint employers because "The auxiliary has no independent existence and is under the direct and complete control of CSU." However, there is no evidence that CSU participated in the financing or construction of the project, the hiring of its employees, or its employment policies or practices. (Regents; Alameda County Board of Education et al. (1983) PERB Decision No. 323.) CSEA also contends that CSU's control of Corporation employees is evidenced by CSU's Additional Employment Policy regarding employees, including those of CSU auxiliaries, who are employed on a more-than-full-time basis.[9] However, the student housing employees at San Marcos are employed neither by the Corporation nor by CSU, but rather by Allen & O'Hara. Further, even if they were employed by the Corporation, there is no evidence that any of them are also employed by CSU. Thus, I do not find that the Additional Employment Policy has any bearing on the instant situation, nor do I find CSU and the Corporation to be joint employers.

Accordingly, I find that PERB has no basis for asserting jurisdiction over the conduct of the Corporation. This conclusion does not conflict with the California Code of Regulations section 42402 Or Executive Order 682, quoted above, which provide only that CSU's president ensure that auxiliaries conform to university and campus policies. Nothing in section 42402, or in the whole of Subchapter 6, can be read to require that an auxiliary be party to, or comply with, CSU's collective bargaining agreements or its recognition of employee organizations.

[9] The policy sets a limit of 125 per cent on "the total amount of employment an individual may have within the CSU system."

CSU's Bargaining Obligation

The decision to substitute one group of employees for another performing the same work, where the decision does not effect a change in the nature and direction of operations, is a mandatory subject of bargaining. (Lucia Mar Unified School District (2001) PERB Decision No. 1440 (Lucia Mar)[10]; San Diego; Redwoods.) In reaching this principle, PERB has taken guidance from federal decisions, e.g., First National Maintenance Corporation v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705], Fibreboard Paper Products, Inc. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609]. But here, unlike Lucia Mar and Redwoods. CSU did not transfer bargaining unit work out of the unit or substitute one group of employees for another; the evidence is undisputed that no unit employees ever performed work at the San Marcos housing project.[11] That some student housing services at other campuses are performed by bargaining unit employees does not of itself mandate that housing services be performed by bargaining unit employees at San Marcos. And unlike San Diego, there is no evidence here that CSU created the Corporation for the purpose of saving labor costs or otherwise avoiding its bargaining obligation to CSEA. Rather, the Corporation was formed because it could obtain better financing for the project and could relieve CSU of financial liabilities for the development and construction of the student housing, as well as for its maintenance.

Thus, I find that CSU was not obligated to bargain with CSEA regarding its decision to form the Corporation or to enter into the operating agreement.

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[10] In Lucia Mar, the administrative law judge, whose decision was adopted by the Board, stated that where there has been only a substitution of employees but the nature and direction of the employer's operation are not changed, it is not necessary to analyze whether the employer's decision turned on labor cost.

[11] Except for the installation of telephone and computer equipment.

Generally, an employer who has no obligation to bargain its subcontracting decision must still bargain the effects of that decision on bargaining unit employees. And indeed this is what may have been required by section 3.3 of the parties' Agreement. However, CSEA presented no evidence that any San Marcos unit employee was laid off, lost work hours, or was otherwise affected by the existence or operation of the Corporation, nor did CSEA present any reason that CSU should have anticipated such a result.[12] Thus, I do not find that CSU was obligated to give CSEA notice and opportunity to bargain regarding the effects of its decisions to form the Corporation or to enter into the operating agreement.

Accordingly, I find that CSU's conduct did not result in a change of the policy stated in section 3.3 of the Agreement, nor did CSU violate its statutory bargaining obligations.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the complaint and underlying unfair practice charge in Case No. LA-CE-660-H, California State Employees Association v. Trustees of the California State University, are without merit and they are hereby DISMISSED.

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

[12] This lack of impact evidence suggests that CSEA's concern was with CSU's decisions rather than their effects.

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. (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).)

Ann L. Weinman
Administrative Law Judge