* * * OVERRULED IN PART by Stats. 2011, Ch. 539 (See HEERA sec. 3563.3 and comparable parts of other laws); and OVERRULED IN PART by *Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, as recognized in *Oakland Unified School District* (2024) PERB Decision No. 2906, p. 18 * * *

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA NURSES ASSOCIATION, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. SF-CE-762-H PERB Decision No. 2094-H February 2, 2010
REGENTS OF THE UNIVERSITY OF CALIFORNIA, Charging Party, v. CALIFORNIA NURSES ASSOCIATION, Respondent.	Case No. SF-CO-124-H

Appearances: M. Jane Lawhon, Pamela Allen, and Marcie Ellen Berman, Legal Counsel, for California Nurses Association; Littler Mendelson by Robert G. Hulteng, Joshua J. Cliffe, and Joshua D. Kienitz, Attorneys, for Regents of the University of California; Schwartz, Steinsapir, Dohrmann & Sommers by Margo A. Feinberg and Henry M. Willis, Attorneys, for Amicus Curiae International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO; Arnie R. Braafladt, Deputy Chief Counsel, for Amicus Curiae California School Employees Association; Leonard Carder by Arthur Krantz, Attorney, for Amicus Curiae University Council – American Federation of Teachers and University Professional and Technical Employees, CWA Local 9119; Weinberg, Roger & Rosenfeld by Vincent A. Harrington, Attorney, for Amicus Curiae American Federation of State, County and Municipal Employees, Local 3299, AFL-CIO.

Before Dowdin Calvillo, Acting Chair; McKeag and Neuwald, Members.

DECISION

DOWDIN CALVILLO, Acting Chair: These consolidated cases are before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Regents of the University of California (UC) to the proposed decision of an administrative law judge (ALJ).

The amended complaint in Case No. SF-CE-762-H alleged that UC violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by: (1) insisting to impasse on its proposal to add language prohibiting sympathy strikes to the parties' collective bargaining agreement (CBA); (2) conditioning agreement to a successor CBA on the California Nurses Association's (CNA) acceptance of its proposal to prohibit sympathy strikes; (3) refusing to bargain over CNA's proposal regarding nurse-to-patient staffing ratios; and (4) refusing to provide CNA with requested information regarding the patient classification systems (PCS) in use at the UC medical centers. The complaint in Case No. SF-CO-124-H alleged that CNA violated HEERA by giving UC notice of its intent to engage in a one-day strike without the parties having reached an impasse in negotiations.

The ALJ dismissed the allegation that UC refused to bargain over sympathy strike language but concluded that UC refused to bargain over staffing ratios and refused to provide the requested PCS information. Based on these conclusions, the ALJ ruled that CNA's strike threat was lawful because it was provoked by UC's unfair practices.

The Board has reviewed the proposed decision and the record in light of UC's exceptions, CNA's response to the exceptions, the parties' supplemental briefs and responses thereto, briefs of amicus curiae and the relevant law. Based on this review, the Board reverses the proposed decision for the reasons discussed below.[2]

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

[2] UC requested oral argument in this matter. Historically, the Board has denied requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*United Teachers of Los Angeles (Valadez, et al.)* (2001) PERB Decision No. 1453; *Monterey County Office of Education* (1991) PERB Decision No. 913.) Based on our review of the record, all of the above criteria are met in this case. Therefore, UC's request for oral argument is denied.

BACKGROUND

CNA represents a bargaining unit of approximately 9,000 registered nurses, nurse practitioners and nurse anesthetists who work at UC medical centers in San Francisco, Davis, Los Angeles, Irvine, and San Diego, and at the student health centers on UC campuses. On January 27, 2005, UC and CNA began formal negotiations for a successor to the parties' 2002-2005 CBA, which was set to expire on April 30, 2005. Gayle Cieszkiewicz (Cieszkiewicz) was the lead negotiator for UC throughout these negotiations; Joe Lindsay (Lindsay) served in the same role for CNA.

Staffing Ratio Proposal

Article 8 of the 2002-2005 CBA governed staffing. Section A of that article stated in full: "The University shall have a staffing system based on assessment of patient needs in conformance with applicable state regulations."

At the first bargaining session on January 27, 2005, CNA passed a written proposal to amend Article 8(A) to state:

> The University shall have a staffing system based on assessment of patient needs in conformance with applicable state regulations ***including AB 394 and the regulations effected January 1, 2004 pursuant to AB 394. Those regulations and AB 394 are attached hereto as Appendices F and G.***

Appendix F contained the entire text of Assembly Bill (AB) 394 as chaptered on October 10, 1999. Appendix G contained the entire text of sections 70217, 70225, and 70455 of Title 22 of the California Code of Regulations. These regulations, promulgated by the Department of Health Services (DHS) pursuant to AB 394, established specific nurse-to-patient staffing ratios effective January 1, 2004. Section 70217 also included staffing ratios for particular hospital units to take effect on either January 1, 2005 or January 1, 2008.

Lindsay testified that CNA made this proposal for two reasons. First, CNA believed that Governor Arnold Schwarzenegger and UC were attempting to weaken the staffing ratio regulations. In CNA's view, incorporating the ratios into the CBA would preserve the current ratios for the term of the agreement regardless of any changes to the regulations. Second, CNA believed that DHS would not properly enforce the regulations. Thus, CNA wanted to incorporate the staffing ratios into the CBA so it could enforce them through the contractual grievance procedure.

UC responded to CNA's staffing ratio proposal during bargaining on February 17, 2005. Cieszkiewicz told Lindsay that UC's Office of the General Counsel (OGC) advised her that CNA's proposal, as presented, did not constitute a mandatory subject of bargaining. She acknowledged that any effects of the staffing ratios were subject to negotiation. Cieszkiewicz also stated she was still discussing the proposal with OGC but wanted to give Lindsay a "heads up" about OGC's current position. Lindsay responded that he would be "fascinated to hear what they say." Cieszkiewicz testified her statements were intended to put CNA on notice of UC's concern over the negotiability of the proposal and to give CNA an opportunity to respond to that concern.

During bargaining on March 2, 2005, Lindsay attempted to confirm whether UC believed staffing ratios were not a mandatory subject of bargaining. Cieszkiewicz responded that she did not "have a formal legal opinion" on the negotiability of the ratios themselves but reiterated that effects of the ratios, such as "issues of workload, salaries, overtime, [sic] issues, and assignment issues," were negotiable. She then stated UC was reluctant to incorporate legislation into the CBA because it would result in an arbitrator, rather than a judge, making a decision about the law. Lindsay then asked if Cieszkiewicz was "still waiting for a position" on whether staffing ratios are a mandatory subject of bargaining. Cieszkiewicz responded,

"I'm still waiting to hear from OGC, because I'm interested in knowing about this," but stated that UC is "willing to negotiate over the operational affects of the law, but we think it's unnecessary to put it in the contract." Lindsay replied, "Staffing is a working condition," and reiterated CNA's position that staffing ratios are a mandatory subject of bargaining.

On March 16, 2005, UC made its first counterproposal regarding Article 8, Staffing. The written proposal included the language of section A as it existed in the 2002-2005 CBA. The following day, UC made a second counterproposal on Article 8 with the language of section A again as it existed in the 2002-2005 CBA.

Cieszkiewicz testified it was the parties' practice during these negotiations to include the entire relevant article in a written proposal and that if no changes were indicated to a particular provision, the party making the proposal intended that provision to remain as it existed in the prior CBA. Lindsay confirmed both the parties' practice and their understanding of the meaning of an unchanged provision in a written proposal.

The staffing ratio proposal was discussed again at the table on April 20, 2005, when Lindsay indicated CNA was maintaining its position regarding incorporating staffing ratios into the CBA. He then stated, "You indicated in the past that they weren't a mandatory subject of bargaining." Cieszkiewicz replied:

> I think the issues related to staffing workload, schedule, relief, breaks all those things are mandatory subjects of bargaining. The University doesn't believe that putting bargaining ratios into the contract is not something you can take us to impasses over. The law gets interpreted by judges not arbitrators. There is legislative intent behind this. The only way it could be handled in the arbitration process is if we had a lengthy dialog about what each and every piece meant.[3]

[3] This quotation is taken directly from UC's bargaining notes. The spelling, punctuation and wording are those of the note taker and have not been altered.

Lindsay responded that CNA believed staffing ratios were a mandatory subject of bargaining, to which Cieszkiewicz replied, "I will talk to my team."

The parties revisited the subject of staffing ratios during bargaining on April 29, 2005. Cieszkiewicz told Lindsay:

> Article 8, Staffing; we are not proposing any change to this article. We are keeping our commitment to abide by the law, with regard to staffing ratios. This is already in the contract.

Later in the session, CNA passed a revised proposal on Article 8 that included amending section A to read in full: "The University shall have a staffing system based on assessment of patient needs in conformance with ***Appendix F***." Attached to the proposal was a revised Appendix F which contained the language of DHS Regulation 70217 with minor omissions, the standards of competent performance for nurses taken verbatim from section 1443.5 of Title 16 of the California Code of Regulations, and language regarding use of unlicensed personnel taken directly from AB 394 (and codified at Business and Professions Code section 2725.3).

Lindsay explained to Cieszkiewicz that CNA drafted the revised proposal in response to UC's concerns about whether the staffing ratio regulations were a mandatory subject of bargaining. When Cieszkiewicz asked what part of the proposal differed from the law, Lindsay responded that the revised proposal eliminated references to non-represented employees but still addressed "issues that are critical to the performance of the job." Cieszkiewicz again asked if the revised proposal was "directly lifted from the law." Lindsay replied, "This is our proposal. You can prepare a counter."

During bargaining on May 20, 2005, Cieszkiewicz responded to CNA's revised staffing ratio proposal as follows:

> With regard to App F., we took a look at it. What was it about the provisions you put in there? Is there something we can

> change? Most of App F is a direct reflection of the law and we're not interested in putting it in the contract since we abide by the law and the overseer is the state agency. An arbitrator doesn't decide on the rules for patient care. If a nurse wants to discover a particular provision of this law, they could find them in the hospital. We expect the law on staffing and our commitment to abide by the law is acceptable.

When Lindsay replied that UC's commitment alone was not acceptable, Cieszkiewicz responded, "Then we'll have to find something else that is." Lindsay then explained that CNA wanted the ratios in the CBA so that they would stay in place regardless of any change to the regulations. He further stated, "If you need a record to rely on later in front of the arbitrator, we'll give you one. There are arbitrators skilled on hospital issues." Cieszkiewicz then stated that UC could not define nurse competencies because those are established by law. Lindsay responded that external law is not a bar to parties negotiating for higher standards in a labor contract. Cieszkiewicz ended the discussion by stating:

> We don't see the necessity to put it in the contract since we've agreed to abide by the law. Unless you can say something new that can persuade me then we're not interested in putting it into the contract.

Article 8(A) of UC's last, best and final offer (LBFO) was unchanged from the 2002-2005 CBA.

Request for PCS Information

On September 30, 2004, CNA made a written request for information in anticipation of bargaining over a successor to the 2002-2005 CBA. Item 38 of the request sought:

> Detailed descriptions of the patient classification system (PCS) currently utilized at each facility and unit and any changes under consideration. Provide written staffing plans developed and implemented since January 1, 2002, documented on a shift by shift basis, including: staffing requirements as determined by the PCS, the actual staff and staff mix provided, and the variance between required and actual staffing patterns. Provide reliability testing performed on each system, and the results from such testing and/or review, from January 1, 2002 to the present.

In response to this request, UC produced voluminous records of nurses' acuity sheets for patients and the corresponding staffing determinations from the PCS, as well as analyses of the variations between the PCS determinations and actual staffing. UC also produced the results of reliability testing for each PCS.

During bargaining on April 21, 2005, Lindsay clarified CNA's information request:

> [T]he issue is that the information provided does not deal with the heart of the issue of #38 – let me explain what we are looking for. The request was for information on the patient classification systems – what we received so far was instructions for nurses for implementing acuity systems on each unit, not addressing how the Patient Classification System actually works. To oversimplify, RNs evaluate the acuity of patient illness using various methods, that information is put through the system and formulas are applied to determine staffing for the next shift. We have not gotten the formulas on how it's applied and how the numbers are determined on the other end.

Lindsay testified that CNA wanted the "formulas and methodology" used by the PCS to convert the raw acuity data into staffing determinations.

At the April 27, 2005 bargaining session, Sharon Melberg (Melberg), assistant director of hospital and clinics at UC Davis Medical Center and a member of the UC bargaining team, presented CNA with information about the Patient Index of Nursing Intensity (PINI) PCS in use at the Davis medical center. Lindsay responded that the information was not responsive because it did not contain the formulas used by the PINI system to generate staffing determinations. Melberg replied that the PINI system was leased from a vendor and the formulas used by the software were proprietary and not available to UC.[4] Lindsay responded

[4] Melberg testified that her statements to Lindsay were based on being told that someone at the Davis medical center had written to the vendor requesting the formulas and the request had been denied. However, the individual who allegedly contacted the vendor did not testify and no documentary evidence of the request or denial is contained in the record. Absent this evidence, Melberg's testimony on this point is uncorroborated hearsay that cannot support a factual finding. (PERB Reg. 32176; PERB regs. are codified at Cal. Code of Regs., tit. 8, § 31001 et seq.)

that CNA believed the formulas were necessary "to evaluate proper staffing, CCL [current contract language] & our proposal."

During bargaining on May 18, 2005, the parties discussed the information that had been provided in response to CNA's April 21 request. Lindsay stated that all information provided thus far was nonresponsive and renewed his request for information about how the PCS operates, "including the actual method of translating the daily info into staffing."

At the June 9 bargaining session, representatives from the San Francisco, Los Angeles, San Diego and Irvine medical centers made presentations about how the specific PCS in use at those facilities operated. After the presentations, Cieszkiewicz stated:

> With regard to the information you seek on staffing, every person who is here uses a similar model where we really don't have the formula in our possession. The organizations with whom we contract have that, as it is proprietary.

Each of the medical center representatives confirmed that he or she did not have the PCS formulas. Lindsay then stated: "On the proprietary info to the extent that you're saying it's proprietary and it's 100%, we request a copy of the contracts that indicate that it's proprietary."

During bargaining on June 22, 2005, Cieszkiewicz presented Lindsay with documents in response to his June 9 request for PCS contracts. She presented him with two letters from the law firm representing Catalyst Systems LLC (Catalyst), the vendor of the Evalisys PCS used at the Los Angeles and San Francisco medical centers. The nearly identical letters stated that Catalyst cannot honor UC's request to disclose the contracts to CNA because the documents "contain confidential and proprietary information and trade secrets" and the terms and conditions of the contracts prohibit UC from disclosing this material to third parties.

Cieszkiewicz also provided Lindsay with contracts for the PCS used at the Davis and Irvine medical centers. The Davis contract materials contain a software licensing agreement

that obligates UC "to protect the copyright of the Program and to exercise reasonable controls to protect the confidential nature of the Program and related copyrighted documentation unless Contractor's written consent has been granted." The Irvine contract materials contain no provision addressing the confidentiality of the software or its internal workings.

Cieszkiewicz told Lindsay that OGC was still working with the law firm on releasing the Evalisys contracts for the San Francisco and Los Angeles medical centers and was also working with the vendor of the PCS in use at the San Diego medical center to obtain that contract. Lindsay responded: "For you as the employer to say that the critical pieces of information are proprietary or to say you can't even give us copies of the contracts is mind boggling, it makes it almost impossible for RNs to do their job." Cieszkiewicz replied:

> I don't want you to misquote UC on this. It's not the UC that is not releasing it, it's the attorney for the contractor. We are working with OGC to get them, as soon as we can resolve it we will get them to you. We have given you two locations.

Lindsay testified he did not believe Cieszkiewicz's statements about not being able to obtain the PCS contracts but admitted he had no objective basis for his belief. He also testified that he told Cieszkiewicz he found the Davis and Irvine contracts difficult to read but could not remember any other comments he might have made about them during that bargaining session.

The record does not indicate that CNA renewed its request for the PCS formulas or contracts after June 22, 2005. Nonetheless, UC provided CNA with a copy of the San Diego medical center PCS contract on August 5, 2005. The software licensing agreement contained in the contract stated that UC "acknowledges that the licensed program(s) contain valuable trade secrets of Licensor and agrees to maintain the licensed program(s) confidentially and secretly." There is no evidence that CNA ever discussed this document with UC after it was provided.

Threatened Strike

On June 22, 2005, UC presented CNA with its LBFO. After discussing the terms of the LBFO, Lindsay told Cieszkiewicz, "well we don't have to caucus to let you know that when the nurses start voting next week we will recommend rejection." Cieszkiewicz asked if CNA believed the parties were at impasse. Lindsay responded he did not think so "[b]ecause of the UC conduct in these negotiations regarding to your refusal to bargain over critical issues, RFI, ignorance on RFI and your own proposals." According to UC's bargaining notes, UC presented CNA with the PCS documents immediately after this exchange.

Later that day, CNA posted a recorded message on its negotiations hotline stating UC had given CNA its LBFO and the bargaining team had informed UC it would be recommending that its members reject the offer. The message also discussed a possible strike:

> We will also recommend that nurses authorize the bargaining team to call a strike to protest UC's continued bad faith bargaining. The University has consistently refused to bargain about our proposals regarding staffing and implications of new technology; they have delayed or refused to provide necessary information; and they have showed that they have no desire to recruit or retain RNs at UC.

On June 23, 2005, CNA issued a bargaining alert that stated, in relevant part:

> Because UC's multiple unfair practices are so serious and part of an overall UC plan to sabotage meaningful negotiations and good faith agreement, the CNA team is asking nurses to authorize the team to call a strike if necessary to protest UC's bad-faith bargaining and their insulting final offer to the nurses. Effective strike action now may be the only way to get UC to abandon its illegal and destructive bargaining scheme and restore good faith to the process so a fair contract can be negotiated and ratified.

From June 28 through July 7, 2005, a strike vote was held in the CNA bargaining unit. The strike ballot gave members two choices: (1) reject the LBFO and "authorize the CNA team to call an unfair labor practice strike if necessary;" or (2) accept the LBFO. Ninety-five percent of those who voted chose the first option.

Though the 2002-2005 CBA expired by its terms on April 30, 2005, the parties agreed during bargaining to extend its effective date until July 8, 2005. On that date, CNA gave UC written notice of a 24-hour strike to begin at 6:45 a.m. on July 21, 2005 at all UC locations that employ CNA-represented nurses. The notice gave the following reasons for the strike:

> This strike will be undertaken to protest serious, substantial, and pervasive unfair labor practices by the University of California preceding and in the course of bargaining with CNA over a successor agreement covering Registered Nurses employed by the University in the exclusively, CNA-represented, statewide "NX" bargaining unit.
>
> UC unfair practices which have provoked this strike, include, but are not limited to the following unremedied unlawful conduct:
>
> - Refusal to bargain for new contract protections for competent performance of professional RN responsibilities, and patient safety which provide a financial disincentive to UC's chronic understaffing of nurses and practice of forcing nurses to accept patient care assignments under unsafe conditions.
> - Retaliation against union leaders for exercising their collective and individual rights intended and having the effect of undercutting support for CNA.
> - Fraudulent concealment of unlawful and corrupt methods for tying RN staffing levels to financial objectives rather than patient care needs.
> - Undertaking the conduct and practices described above as well as other unlawful conduct in furtherance of a calculated scheme to sabotage and avoid meaningful, good faith bargaining over terms and conditions that are of critical importance to both Registered Nurses and the patients they care for and protect as patient advocates.
>
> UC's persistent bad faith and deliberate sabotage of negotiations has provoked direct action and strike activity by Registered Nurses as the only avenue available to CNA-represented nurses to vindicate their statutory rights and obtain meaningful bargaining in genuine pursuit of a negotiated agreement.

Sometime after giving this notice, CNA issued a "One Day Strike Manual" to members of the bargaining unit with a strike date of July 21, 2005. CNA officials' comments about the pending strike were published in UC campus newspapers in early to mid-July. One of these

articles indicated that CNA had established an "emergency task force" to provide emergency treatment to patients during the strike.

On July 15, 2005, Cieszkiewicz called Lindsay and asked if there was anything UC could do in negotiations to avoid the strike. Cieszkiewicz asked Lindsay which outstanding issues were most important to CNA. Lindsay responded that wages, benefits, staffing ratios, technology and lift teams were CNA's main unresolved issues. Cieszkiewicz asked if an increase in UC's last offer on wages would avert the strike and Lindsay responded that it would not.

Unfair Practice Charges and Strike Injunction

On June 16, 2005, just days before UC presented its LBFO, CNA filed its unfair practice charge in this matter alleging that UC had engaged in bad faith bargaining by insisting on a CBA provision prohibiting sympathy strikes and had retaliated against unit members by disciplining them for sympathy strike activity. On June 29, CNA filed a first amended charge that provided more factual allegations to support the violations alleged in the original charge.

On July 12, 2005, UC filed its unfair practice charge in this matter alleging that CNA violated its duty to meet and confer in good faith by giving notice of its intent to engage in a pre-impasse strike. UC also requested that PERB seek an injunction to prevent the strike from occurring. Two days later, on July 14, CNA filed a second amended charge adding new allegations that UC refused to bargain over staffing ratios and refused to provide requested information.

On July 19, 2005, the Board granted UC's request for injunctive relief and PERB's Office of the General Counsel issued a complaint on UC's charge. On July 20, the Sacramento County Superior Court issued a temporary restraining order enjoining the strike. As a result, CNA conducted a series of rallies at various UC facilities on July 21, 2005, instead of striking.

On July 26, 2005, PERB's Office of the General Counsel deferred to binding arbitration the allegations in CNA's charge that UC violated HEERA by disciplining nurses for participating in sympathy strike activity. Meanwhile, sometime in late July or early August, the parties resumed bargaining over a successor CBA.

CNA filed a third amended charge on August 17, 2005, which provided further factual allegations in support of the violations alleged in the second amended charge. On August 25, the superior court issued a preliminary injunction that barred CNA from striking until the parties completed the HEERA impasse procedures. On September 1, the parties sought certification of impasse and appointment of a mediator by PERB.

On September 29, 2005, PERB's Office of the General Counsel issued a complaint alleging that UC violated HEERA by: (1) refusing to bargain over its proposal to add language prohibiting sympathy strikes to the CBA; (2) refusing to bargain over CNA's staffing ratio proposal; and (3) refusing to provide CNA with requested PCS information.[5]

In December 2005, during the statutory factfinding process, the parties reached agreement on a CBA for the period of December 20, 2005 through June 30, 2007. The grievances over UC's discipline of nurses for participating in sympathy strike activity were resolved as part of the agreement.

Proposed Decision

The ALJ concluded that UC refused to bargain about nurse-to-patient staffing ratios and refused to provide relevant PCS information, but dismissed the allegations regarding UC's insistence on including a prohibition of sympathy strikes in the successor CBA. The ALJ found that the subject of staffing ratios falls within the scope of representation because ratios

[5] At the hearing, the ALJ granted CNA's oral motion to amend the complaint to allege that UC conditioned reaching an overall agreement on CNA's acceptance of UC's proposal to add language prohibiting sympathy strikes to the CBA.

affect the caseloads of individual nurses. He then concluded UC had refused to bargain over CNA's staffing ratio proposal because "at no time did the University ever propose any substantive change to the staffing ratio language, make a counterproposal, or affirmatively acknowledge its obligation to bargain over CNA's proposal." The ALJ found this to be a per se violation of UC's statutory duty to meet and confer in good faith with CNA.

Regarding the request for PCS information, the ALJ found that the "formulas and methodology" of the various PCS were necessary and relevant to CNA's bargaining over staffing issues. He then concluded UC had not established its defense that the information was confidential because UC had not made a good faith effort to bargain with CNA over providing the information in an alternate form that would avoid disclosure of confidential material. The ALJ ordered UC to "[u]pon request, negotiate over the disclosure of the formulas and methodology of its patient classification systems."

Turning to the threatened strike, the ALJ found that HEERA does not contain a prohibition on strikes and therefore a strike provoked by an employer's unfair practices is lawful under HEERA. He then concluded that CNA's threatened strike constituted an unfair practice strike because it was provoked by UC's bad faith bargaining.

UC's Exceptions

UC excepts to each of the ALJ's conclusions discussed above but does not except to the dismissal of the allegations regarding UC's insistence on including a prohibition of sympathy strikes in the successor CBA. Regarding staffing ratios, UC argues that the subject is not within the scope of representation because staffing decisions are a management prerogative. Even if staffing ratios are within scope, UC contends, the record shows that UC did in fact bargain over CNA's staffing ratio proposal. As to the information request, UC asserts that it provided adequate justification for its failure to disclose the PCS formulas and methodologies,

as well as the vendor contracts for some of the PCS, because UC requested that information from the PCS vendors and the vendors refused to provide the information.

UC argues first that a strike prior to the completion of statutory impasse procedures is per se illegal under HEERA. As an alternative, UC maintains that CNA's threatened strike was unlawful because the weight of the evidence shows the strike was undertaken to force UC to make concessions at the bargaining table and not to protest UC's unfair practices. UC also asserts that the ALJ improperly relied upon evidence of UC's discipline of nurses for participating in sympathy strike activity to determine CNA's motive for threatening to strike. Finally, UC requests that the Board re-open the record in this matter to allow UC to present evidence to support an award of damages to make UC whole for the losses it incurred as a result of CNA's unlawful strike threat.

CNA's Response to Exceptions

CNA responds to each of UC's exceptions but does not raise any exceptions of its own. CNA argues that its staffing ratio proposal was within the scope of representation because, while state law may set a minimum standard in a particular area, parties may agree to greater protections in a CBA. CNA also asserts the ALJ correctly determined that UC had not actually bargained over the staffing ratio proposal. Regarding the request for PCS information, CNA contends the evidence failed to establish that confidentiality interests precluded the disclosure of the PCS formulas and vendor contracts.

As to the threatened strike, CNA points out that PERB precedent clearly recognizes the lawfulness of an unfair practice strike at any time and argues that CNA need only prove UC's unfair practices were a motivating factor in its decision to strike, not the sole reason for the strike. CNA does not address UC's request to re-open the record for the taking of evidence to support an award of damages.

DISCUSSION

Neither party has excepted to the ALJ's dismissal of the allegations regarding UC's insistence on including a prohibition of sympathy strikes in the successor CBA. Accordingly, those allegations are not before the Board. (PERB Reg. 32300(c).)[6] Allegations regarding UC's discipline of nurses for participating in sympathy strike activity were deferred to binding arbitration and subsequently resolved. Therefore, those allegations also are not before the Board.

1. Staffing Ratio Proposal

The ALJ found that the subject of nurse-to-patient staffing ratios is within the scope of representation and that UC refused to bargain over CNA's proposal to include specific staffing ratios in the successor CBA. For the reasons discussed below, we agree that CNA's staffing ratio proposal was within the scope of representation but conclude that UC fulfilled its obligation under HEERA to bargain in good faith over the proposal.

a. Scope of Representation

Under HEERA, the scope of representation is generally limited to wages, hours, and other terms and conditions of employment. In determining if non-enumerated matters fall within the scope of representation as a "term or condition of employment," PERB applies a three-part test. A subject is within the scope of representation if: (a) it involves the employment relationship; (b) the subject is of such concern to management and employees that conflict is likely to occur, and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (c) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental

[6] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32300(c) provides in full: "An exception not specifically urged shall be waived."

policy) essential to the achievement of the employer's mission. (*Trustees of the California State University* (2001) PERB Decision No. 1451-H.)

Applying the nearly identical test for negotiability of non-enumerated subjects under the Educational Employment Relations Act (EERA),[7] the Board has "determined that 'workload,' that is, the quantum of work to be completed during the workday, is negotiable." (*Mt. Diablo Unified School District* (1984) PERB Decision No. 373b.) In *Davis Joint Unified School District* (1984) PERB Decision No. 393, the Board held that a certificated employee organization's proposal to establish a specified ratio between certain specialist employees and students was within the scope of representation. The Board observed that the more students assigned to each specialist, the more work each specialist would be required to perform during the workday. The Board also noted that the ratio would not necessarily infringe on the school district's right to determine staffing levels because the district could control staffing levels by increasing or decreasing the number of students who received the services provided by the specialist employees.

CNA's staffing ratio proposal is analogous to the proposal in *Davis Joint Unified School District*, *supra*. CNA proposed that Article 8(A) be amended to include the nurse-to-patient staffing ratios set forth in regulations adopted by DHS pursuant to AB 394. Those ratios specify that an individual nurse be assigned no more than a certain number of patients per shift based on the type of unit and the particular patients' care needs. Because the amount of work a nurse must do on a particular shift depends on the number of patients to whom he or she is assigned, nurse-to-patient staffing ratios determine the workload of individual nurses. Moreover, staffing ratios do not interfere with the employer's prerogative to determine staffing levels because the employer may control staffing levels by increasing or reducing the number

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

of patients admitted to a particular hospital unit. Accordingly, we find that CNA's proposal to incorporate specific staffing ratios into the CBA fell within the scope of representation under HEERA.

In its exceptions, UC contends, however, that CNA's proposal was not within the scope of representation because the proposal merely sought to incorporate existing law into the CBA. In *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, the Board examined an employee organization's proposal to include in the CBA anti-discrimination language drawn from federal and state civil rights statutes. The Board found that "inclusion of contractual provisions prohibiting discrimination merely reiterates management's existing obligations under state and federal law and, therefore, does not invade any managerial prerogative." The Board concluded that the proposal to add anti-discrimination language was within the scope of representation.

Here, CNA's proposal sought to incorporate the language of existing state statutes and regulations into the CBA. UC admitted during bargaining that it had an obligation to comply with those statutes. Thus, to the extent CNA's proposal merely sought to reiterate UC's existing legal obligations, it was within the scope of representation.

But CNA's proposal also would have allowed CNA to enforce the staffing ratios contained in external law via the grievance procedures in the CBA. When state law sets a minimum standard on a particular subject, parties are free to negotiate more generous terms in a CBA provided the contract term does not circumvent or eviscerate the statutory standard. (*Fremont Unified School District* (1997) PERB Decision No. 1240.) Further, PERB has found that contractual grievance procedures are an appropriate means of settling disputes, such as discrimination claims, that might otherwise be resolved in the courts. (*San Mateo City School District*, *supra*.) Accordingly, the fact that CNA's proposal sought to make staffing ratios

established by outside regulations enforceable through the contractual grievance procedure did not remove the proposal from the scope of representation.

In sum, we conclude that the entirety of CNA's staffing ratio proposal was within the scope of representation. Consequently, UC was obligated to meet and confer in good faith with CNA over the proposal.

b. Refusal to Bargain

In determining whether an employer has violated HEERA section 3571, subdivision (c) by refusing or failing to meet and confer in good faith with an exclusive representative, 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.) An absolute refusal to meet and confer on a subject within the scope of representation is a per se violation. (*Sierra Joint Community College District* (1981) PERB Decision No. 179.) PERB has found an absolute refusal to bargain when the employer failed to provide the union with any rationale for its proposal to maintain the status quo. (*San Mateo County Community College District* (1993) PERB Decision No. 1030.)

On the other hand, adamant insistence on a bargaining position is not necessarily a refusal to bargain in good faith. (*Oakland Unified School District* (1982) PERB Decision No. 275.) "The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained." (*National Labor Relations Bd. v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229, 231.) PERB has found an employer to have engaged in "hard bargaining," rather than a refusal to bargain, when the employer's proposal to maintain the status quo was supported by rational arguments that were communicated to the union during bargaining. (*California State University* (1990) PERB Decision No. 799-H; *Oakland Unified School District* (1981) PERB Decision No. 178.) "The obligation to negotiate includes

expression of one's opposition in sufficient detail to permit the negotiating process to proceed on the basis of mutual understanding." (*Jefferson School District* (1980) PERB Decision No. 133.)

An employer's refusal to discuss a proposal based on its perception that the proposal concerns a subject outside the scope of representation is a per se violation of the duty to bargain in good faith. (*Sierra Joint Community College District, supra.*) Here, there was no refusal to bargain because UC never denied the negotiability of CNA's staffing ratio proposal during bargaining[8] and, in fact, discussed its substantive objection to the proposal on numerous occasions.

During the first two bargaining sessions at which the parties discussed the staffing ratio proposal, February 17 and March 2, 2005, Cieszkiewicz indicated she was still discussing the negotiability of the proposal with OGC. Also at the March 2, 2005 session, Cieszkiewicz told Lindsay that UC did not want the staffing ratios in the CBA because UC did not want an arbitrator, rather than a judge, to decide whether the law was violated.

At the April 20, 2005 session, Cieszkiewicz told Lindsay that UC was willing to bargain over the effects of the ratios but that UC did not want an arbitrator interpreting the staffing ratio law. She also said that incorporating the language of AB 394 and the corresponding DHS regulations into the CBA would require the parties to discuss every part of the statute and regulations to create a record of the parties' intent for future arbitration. During this discussion, Cieszkiewicz also stated, "The University doesn't believe that putting bargaining ratios into the contract is not something you can take us to impasses [sic] over."

[8] Although UC now argues in its exceptions that staffing ratios are not a mandatory subject of bargaining, there is no evidence that UC took this position during bargaining with CNA in 2005.

At the opening of bargaining on April 29, 2005, Cieszkiewicz told Lindsay that UC is not proposing any change to Article 8 and that UC will keep its commitment to abide by existing law on staffing ratios as reflected in the 2002-2005 CBA. Later in the session, CNA passed a revised proposal that merely stripped the language of AB 394 and the DHS regulations of code section references and added a section of standards of competent performance for nurses taken directly from regulations adopted by the Board of Registered Nursing. When Cieszkiewicz asked how the proposal differed from the law, Lindsay responded that UC was free to make a counterproposal.

At the May 20, 2005 bargaining session, Cieszkiewicz told Lindsay that UC had reviewed CNA's revised proposal, found it to be lifted directly from the law and reiterated UC's position that it would not agree to incorporate the law into the CBA because it did not want an arbitrator to interpret the law. Cieszkiewicz again stated UC's position that it wanted to keep the language regarding staffing ratios contained in the expiring contract. After further discussion, Cieszkiewicz stated:

> We don't see the necessity to put it in the contract since we've agreed to abide by the law. Unless you can say something new that can persuade me then we're not interested in putting it into the contract.

Viewed as a whole, UC's conduct during bargaining does not indicate a refusal to bargain over CNA's staffing ratio proposal. Instead, UC's conduct was strikingly similar to conduct PERB has found in prior cases to constitute "hard bargaining."

For example, in *Oakland Unified School District, supra*, PERB Decision No. 178, the district rejected a proposal to give classified employees earlier notice of layoff and stated that it would not submit a counterproposal. As reasons for the rejection, the district stated that it needed to maintain flexibility in light of financial uncertainty resulting from the passage of Proposition 13 and did not want to interject an arbitrator into the decision to layoff employees.

Without ruling on the merits of the district's position, the Board found it was supported by legitimate and reasonable arguments and that "the District's response was not, on its face, spurious or superficial, but calculated to inform the Association of the problems posed by the proposal." Based on these findings, the Board held that the district had not engaged in bad faith bargaining.

The Board ruled similarly in *California State University, supra.* In that case, the parties were bargaining over parking fees. CSU did not make a counterproposal to the union's initial proposal but stated at the table and in informal discussions with union representatives that it could not agree to anything other than a uniform parking fee schedule because it needed revenue to finance construction of new parking facilities. The Board found CSU's position "was not unsupported by rational arguments" and concluded that CSU's conduct, "when viewed in the context of the parking negotiations, is more like hard bargaining than bad faith bargaining."

We reach the same conclusion in this case regarding UC's conduct. On at least four separate occasions, UC informed CNA that it would not agree to incorporate staffing ratios into the CBA because it did not want an arbitrator to decide whether the staffing ratio law had been violated. Without passing on the merits of UC's position, we find that it was supported by rational arguments and thus UC's refusal to move from that position constituted hard bargaining rather than a refusal to bargain.

CNA argues that UC denied the negotiability of the staffing ratio proposal when Cieszkiewicz stated at the April 20, 2005, bargaining session that UC did not believe CNA could take UC to impasse over the staffing ratio proposal.[9] However, when viewed in the

[9] It is an unfair practice for a party to insist to impasse on a proposal concerning a non-mandatory subject of bargaining. (*South Bay Union School Dist. v. Public Employment*

context of Cieszkiewicz's statements and conduct before, during and after the April 20 bargaining session, this comment cannot singlehandedly support a finding that UC considered the proposal to be outside the scope of representation.

CNA also contends that UC did not bargain in good faith because it never made a counterproposal on staffing ratios. Yet the record shows UC presented counterproposals on March 16 and 17, 2005, in which UC proposed to maintain the existing language of Article 8(A). However, even if UC had not made a counterproposal on section A, its failure to do so would not, by itself, have constituted a violation of HEERA. (*California State University, supra; Oakland Unified School District, supra*, PERB Decision No. 275.)

Nor was UC obligated to make a counterproposal in response to CNA's modified staffing ratio proposal of April 29, 2005. Prior to that date, UC had consistently objected to incorporating staffing ratio laws and regulations into the CBA verbatim. CNA's April 29 proposal still sought to do just that. Accordingly, in light of UC's prior objections, the April 29 proposal was "predictably unacceptable" and UC was not required to respond differently than it had to the original proposal. (*Oakland Unified School District, supra*, PERB Decision No. 178.)

In sum, we conclude that, with regards to CNA's staffing ratio proposal, UC adamantly insisted on a bargaining position supported by rational arguments that were communicated to CNA at the bargaining table. UC never denied the proposal was negotiable or refused to discuss the proposal. Accordingly, we dismiss the allegation that UC violated HEERA section 3571, subdivision (c) by refusing to meet and confer in good faith with CNA over the staffing ratio proposal.

Relations Bd. (1991) 228 Cal.App.3d 502, 507; *Lake Elsinore School District* (1986) PERB Decision No. 603.)

2. Request for PCS Information

The ALJ found that the PCS formulas and vendor contracts requested by CNA were necessary and relevant to CNA's bargaining proposals and that UC violated HEERA by refusing to bargain over how to provide the PCS information in a manner that would avoid disclosure of confidential information. For the reasons discussed below, we agree that the information requested by CNA was necessary and relevant but conclude that UC fulfilled its obligation under HEERA to provide the requested information.

a. Necessary and Relevant Information

The exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation in collective bargaining. (*Stockton Unified School District, supra.*) An employer's refusal to provide such information violates the duty to bargain in good faith. (*Regents of the University of California* (1991) PERB Decision No. 891-H.)

PERB uses a liberal standard, similar to a discovery-type standard, to determine the relevance of the requested information. (*Trustees of the California State University* (1987) PERB Decision No. 613-H.) Information immediately pertaining to a mandatory subject of bargaining is presumptively relevant. (*Regents of the University of California* (2004) PERB Decision No. 1700-H; *State of California (Departments of Personnel Administration and Transportation)* (1997) PERB Decision No. 1227-S.)

As concluded above, nurse-to-patient staffing ratios are a mandatory subject of bargaining. The PCS software used by the UC medical centers determines the appropriate nurse-to-patient staffing ratio for each shift. CNA's April 21, 2005 request for the "formulas and methodology" used by the PCS was aimed at determining the means by which staffing ratios are calculated. Accordingly, because the requested information pertained to a mandatory

subject of bargaining, it was presumptively relevant and UC was required to produce the information absent a valid justification for not doing so.

b. Production of PCS Information

An exclusive representative's right to information is not absolute and PERB has recognized employer defenses for refusing to provide relevant information based on "justifiable circumstances." (*State of California (Departments of Personnel Administration and Transportation)*, *supra.*) For example, an employer is not obligated to provide information that is unavailable to it. (*King City Joint Union High School District* (2005) PERB Decision No. 1777; *State of California (Department of Consumer Affairs)* (2004) PERB Decision No. 1711-S.) As with all defenses to production of relevant information, the employer bears the burden of proving that the requested information was unavailable. (*Bakersfield City School District* (1998) PERB Decision No. 1262.)

"[W]here information requested by a union is in the possession of third parties with whom an employer has a business relationship, such as a subcontractor, the employer is obligated to make a good-faith, reasonable effort to obtain the information from such parties." (*NYP Holdings, Inc.* (2008) 353 NLRB No. 67, *23.) If the third party refuses to provide the information, the employer is not required to do anything more to satisfy its statutory obligation. (*Pittston Coal Group, Inc.* (2001) 334 NLRB 690, 692-693.)

Applying the above principles, we find that some of the requested information was unavailable to UC. On June 9, 2005, in response to UC's assertion that the formulas and methodology for the PCS in use at all of its medical centers were proprietary, Lindsay requested UC's contracts with the PCS vendors. At the June 22 bargaining session, Cieszkiewicz provided Lindsay with two letters from the law firm representing Catalyst, the vendor of the Evalisys PCS in use at the Los Angeles and San Francisco medical centers. The

nearly identical letters stated that Catalyst cannot honor UC's request to disclose the contracts to CNA because the documents "contain confidential and proprietary information and trade secrets" and the terms and conditions of the contracts prohibit UC from disclosing this material to third parties. These letters show that UC requested the PCS formulas and contracts from the Evalisys vendor and that the vendor refused to provide both. This satisfied UC's obligation under HEERA. Therefore, we conclude UC did not refuse to provide requested information regarding the PCS in use at the Los Angeles and San Francisco medical centers.

As to the Davis and Irvine medical centers, Cieszkiewicz provided Lindsay with documents during the June 22, 2005 bargaining session that she represented to be the vendor contracts for the PCS in use at those locations. Lindsay testified that he told Cieszkiewicz the documents were difficult to read. However, he could not recall any other comments he made about the documents and neither party's bargaining notes contain any statement by Lindsay regarding the contracts.

When an employer partially complies with an information request and the exclusive representative fails to communicate its dissatisfaction, or reassert or clarify its request, no violation will be found. (*Trustees of the California State University* (2004) PERB Decision No. 1732-H; *Oakland Unified School District* (1983) PERB Decision No. 367.) The record does not indicate that Lindsay expressed dissatisfaction with the documents produced, or reasserted or clarified CNA's request for PCS information on or after June 22, 2005. Accordingly, we conclude UC did not refuse to provide requested information about the PCS in use at the Davis and Irvine medical centers.

Regarding the San Diego medical center, Cieszkiewicz told Lindsay during bargaining on June 22, 2005, that OGC was still working to obtain a copy of the contract from the vendor. UC ultimately provided CNA with a copy of the San Diego PCS contract on August 5, 2005.

The record does not indicate that CNA ever expressed dissatisfaction with the documents produced on August 5, or reasserted or clarified its request for PCS information on or after that date. Consequently, we conclude UC did not refuse to provide requested information regarding the PCS in use at the San Diego medical center. Further, because UC had to obtain the vendor's approval to disclose the contract to CNA, we find that UC's delay in providing the San Diego PCS contract was reasonable and therefore did not amount to a refusal to provide the information. (See *Chula Vista City School District* (1990) PERB Decision No. 834 ["Unreasonable delay in providing requested information is tantamount to a failure to provide the information at all."]; *Union Carbide Corp.* (1985) 275 NLRB 197, 201 [delay in producing requested information may be found reasonable when the delay was justified by the circumstances].)

In sum, we conclude that UC satisfied its statutory obligation to provide information in response to CNA's request for the PCS "formulas and methodology" and vendor contracts. Accordingly, we dismiss the allegation that UC violated HEERA section 3571, subdivision (c) by refusing to provide CNA with necessary and relevant information regarding the PCS.

3. Threatened Strike

The ALJ found that HEERA does not prohibit strikes and that a strike provoked by an employer's unfair practices is lawful under HEERA. He then concluded that CNA's threatened strike was not an unfair practice because it was provoked by UC's bad faith bargaining, refusal to provide information and discipline of nurses for participating in sympathy strike activity. For the reasons discussed below, we agree that unfair practice strikes are lawful under HEERA but conclude that CNA's threatened strike was not an unfair practice strike and therefore violated HEERA section 3571.1, subdivision (c).

a. Legality of Strikes under HEERA

Neither PERB nor the courts have addressed the legality of strikes under HEERA. In the face of this silence, UC urges the Board to adopt the principle expressed in the lead opinion in *Compton Unified School District* (1987) PERB Order No. IR-50 that, because the statute does not explicitly grant a right to strike, *any* strike is a per se violation of the statute. An examination of decisions addressing the legality of strikes under EERA is instructive on this point.

In *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, the California Supreme Court declined to address the legality of public employee strikes but nonetheless held that a strike prior to the completion of EERA's statutory impasse procedures could constitute an "illegal pressure tactic" in violation of EERA section 3543.6, subdivisions (c) and (d).[10] (*Id.* at pp. 8-9.) Four years later, PERB held in *Modesto City Schools* (1983) PERB Decision No. 291 that EERA grants public school employees a right to strike. In 1985, a plurality of the California Supreme Court recognized that a strike by public employees is lawful under the common law unless the strike "creates a substantial and imminent threat to the health or safety of the public." (*County Sanitation Dist. No. 2 v. Los Angeles County Employees' Assn.* (1985) 38 Cal.3d 564, 586.) The Court also found that nothing in the Meyers-Milias-Brown Act (MMBA)[11] prohibits strikes by employees of local government agencies. (*Id.* at pp. 572-573.)

In *Compton Unified School District*, *supra*, a majority of the Board overruled *Modesto City Schools*, *supra*. The lead opinion found that EERA prohibits all strikes, even in the face

[10] EERA section 3543.6, subdivision (c) makes it unlawful for an employee organization to "[r]efuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative." Subdivision (d) of that section makes it unlawful for an employee organization to "[r]efuse to participate in good faith in the impasse procedure set forth in [EERA]."

[11] The MMBA is codified at Government Code section 3500 et seq.

of the Court's ruling in *County Sanitation District No. 2*, *supra*, that the similar language of the MMBA contains no such prohibition. Though it did not rely on *County Sanitation Dist. No. 2*, *supra*, the concurring opinion found no prohibition on strikes in the language of EERA and returned to the approach taken by the Supreme Court in *San Diego Teachers' Assn.*, *supra*, that whether a strike is an unfair practice is to be determined by the facts of the particular case. PERB has taken this approach in subsequent decisions addressing strikes. (*Santa Maria Joint Union High School District* (1989) PERB Order No. IR-53; *Vallejo City Unified School District* (1993) PERB Decision No. 1015.) Furthermore, and of particular relevance to this case, *Compton Unified School District*, *supra*, did not overrule prior PERB decisions recognizing the legality of unfair practice strikes.

As the above authority indicates, it is well-established that EERA does not prohibit all strikes by public school employees. We find nothing in the language of HEERA that compels a different conclusion regarding employees of higher education employers. Thus, we reject UC's argument that any strike constitutes a per se violation of HEERA.

In the alternative, UC argues that PERB should declare any strike at a health care institution to be a per se violation of HEERA "due to the extreme risk to public health and safety" posed by such a strike. The legality of strikes at private sector health care institutions has been recognized since at least 1974, when the National Labor Relations Act (NLRA)[12] was amended to bring health care institutions under the jurisdiction of the National Labor Relations Board (NLRB). (See 29 U.S.C. § 158, subd. (g) [requiring union to give 10 days notice prior to strike at any health care institution].) Moreover, whether a strike at a health care institution poses an imminent threat to public health or safety is to be determined on a case-by-case basis.

[12] The NLRA is codified at 29 U.S.C. section 151 et seq.

(*County Sanitation Dist. No. 2, supra*, 38 Cal.3d at p. 585.) Accordingly, we decline to adopt a rule that any strike at a health care institution is per se an unfair practice.

Given the similarity between the language and purpose of EERA and HEERA, we hold that HEERA does not prohibit strikes by employees of higher education employers. We also hold that whether a strike constitutes an unfair practice is to be determined on the facts of the particular case.

b. Legality of CNA's Strike Threat and Preparations

It is undisputed that the strike noticed by CNA would have occurred as scheduled on July 21, 2005, had the superior court not enjoined it. Because the strike never took place, we must decide whether the threat to strike and CNA's preparations leading up to the strike constituted an unfair practice in and of themselves.

In *South Bay Union School District* (1990) PERB Decision No. 815, the Board held that a strike threat and strike preparations prior to the exhaustion of statutory impasse procedures may constitute an unfair practice if the threat and preparations were intended to place pressure on the employer to reach agreement at the bargaining table. The Board examined the employee organization's conduct under the "totality of the circumstances" test but did not identify any specific factors to guide PERB's determination of when a strike threat and preparations constitute an unfair practice.

After considering PERB's prior decisions regarding strike activity, we believe that, to constitute an unfair practice, a strike threat and preparations must be: (1) in furtherance of an unlawful strike; and (2) sufficiently substantial to create a reasonable belief in the employer that the strike will occur. Our analysis in this case begins with the lawfulness of CNA's threatened strike.

A strike prior to the exhaustion of statutory impasse procedures creates a rebuttable presumption that the employee organization is refusing either to negotiate in good faith (if the strike occurs before impasse is declared) or to participate in the impasse procedures in good faith. (*Sacramento City Unified School District* (1987) PERB Order No. IR-49; *Westminster School District* (1982) PERB Decision No. 277; *Fresno Unified School District* (1982) PERB Decision No. 208; *Fremont Unified School District* (1980) PERB Decision No. 136.) The presumption of illegality is rebuttable, however, by proof that the strike was provoked by the employer's unfair practices and that the employee organization in fact negotiated and/or participated in impasse procedures in good faith. (*Westminster School District*, *supra*; *Fremont Unified School District*, *supra*.) Absent such proof, the presumption stands, and a violation is established. (*Westminster School District*, *supra*; *Fresno Unified School District*, *supra*.)

To establish that a strike is an unfair practice strike, the employee organization must prove that: (1) the employer committed an unfair practice (*Basic Industries, Inc.* (2006) 348 NLRB 1267, 1274); and (2) the employer's unfair practice provoked the strike (*Rio Hondo Community College District* (1983) PERB Decision No. 292). As the Board explained in *Rio Hondo Community College District*, *supra*:

> Provocation is a question of fact. Under the NLRA, for a strike to be deemed an unfair practice strike, it must be caused by an unfair labor practice. The mere fact that an unfair labor practice is committed prior to a strike does not necessarily render that strike an unfair practice strike. [Citations.] Rather, the burden rests with the striking employee organization to prove, in the nature of an affirmative defense, that the District's unfair labor practice in fact caused the strike. To ascertain the actual cause of a strike, it is necessary to consider the record as a whole [citation], including such indicators as union statements as to the cause of the strike in testimony [citation] at the time a strike vote was taken, or in the content of picket signs and handbills used during the strike [citation], the closeness in time between the unfair practice and the strike, union expression of opposition to the unfair practice prior to the strike [citation], and the nature and

seriousness of the unfair practice, as well as any other relevant evidence.

We need not reach the issue of provocation because CNA has failed to prove that UC committed any unfair practices. As discussed above, CNA failed to prove that UC bargained in bad faith over CNA's staffing ratio proposal or refused to provide requested PCS information. Further, the ALJ's conclusion that UC did not bargain in bad faith over its proposal to add a prohibition of sympathy strikes to the "no strike" clause of the CBA stands because neither party excepted to it. (*City of Torrance* (2009) PERB Decision No. 2004; *Palos Verdes Peninsula Unified School District/Pleasant Valley School District* (1979) PERB Decision No. 96.) Thus, none of the unfair practices alleged in the complaint were proven by CNA.

In addition to the evidence introduced in support of the three allegations in the complaint, the ALJ also considered evidence of UC's discipline of nurses for engaging in sympathy strike activity in determining provocation for the strike. UC contends that the ALJ improperly admitted this evidence over UC's relevance objection and improperly considered it in the proposed decision. We agree on both points.

As discussed above, to establish that a strike was an unfair practice strike, the employee organization must establish that the employer committed an unfair practice. The allegation that UC unlawfully disciplined nurses for engaging in sympathy strike activity was deferred to binding arbitration on July 26, 2005. Thus, as the ALJ acknowledged in the proposed decision, PERB could not find that UC's discipline of nurses constituted an unfair practice. Therefore, any evidence regarding that discipline was not relevant and should not have been admitted or considered by the ALJ.

Based on the totality of the circumstances, we conclude CNA failed to rebut the presumption that its threatened pre-impasse strike was an unfair practice because it did not

prove that UC engaged in any unfair practices that could have provoked CNA's strike. Instead, we find the record clearly demonstrates that CNA's threat of strike and strike preparations were done for the purpose of placing pressure on UC to reach agreement at the bargaining table prior to the exhaustion of statutory impasse procedures.[13]

Turning to CNA's strike threat and preparations, it is difficult to imagine pre-strike conduct more substantial than CNA's in this case. CNA members took a much-publicized strike vote from June 28 through July 7, 2005, with over 95 percent of the bargaining unit voting in favor of a strike. On July 8, 2005, CNA gave UC written notice of a 24-hour strike to begin at 6:45 a.m. on July 21, 2005, at all UC locations that employ CNA-represented nurses. Sometime after notice was given, CNA issued a "One Day Strike Manual" to members of the bargaining unit with a strike date of July 21, 2005. CNA officials' comments about the pending strike were published in UC campus newspapers in early to mid-July. One of these articles indicated that CNA had established an "emergency task force" to provide emergency treatment to patients during the strike. Based on this undisputed evidence, we find that CNA's strike threat and preparations were sufficiently substantial to support a reasonable belief by UC that the strike would occur as noticed.

For these reasons, we find that CNA failed to meet and confer in good faith in violation of HEERA section 3571.1, subdivision (c) by credibly threatening to engage in, and making extensive preparations for, a pre-impasse economic strike.[14]

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[13] Because we find CNA's threatened strike was unlawful on these grounds, we need not address whether the strike would have been unlawful under *County Sanitation District No. 2*, *supra*, as an imminent threat to public health and safety.

[14] Because we find CNA's threatened strike would have constituted an unfair practice, we need not and do not address whether the threat of, or preparations for, a lawful strike could constitute an unfair practice.

4. Remedy

Prior to the hearing, CNA filed a motion in limine to exclude evidence of strike-related damages, or in the alternative, to bifurcate the hearing and only take evidence of damages if it was determined that CNA's threatened strike was unlawful. The ALJ granted the motion, ruling that the amount of monetary loss can be determined in compliance proceedings and declining to rule on CNA's argument that PERB has no statutory authority to award strike damages. In its exceptions, UC contends that if the Board finds CNA's strike threat and preparations violated HEERA, it should reopen the record to allow UC to present evidence of damages it sustained as a result of CNA's unfair practice. To determine if further evidence is necessary, we must first address whether PERB may award damages in this matter.[15]

a. PERB's Authority to Award Make Whole Damages for Unlawful Strike Activity

The Board's remedial powers are set forth in HEERA section 3563.3:

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

The issue of PERB's authority to award damages for unlawful strike activity has arisen in several cases. (*Los Angeles Unified School District* (1990) PERB Decision No. 803; *El Dorado Union High School District* (1985) PERB Decision No. 537; *Westminster School District*, *supra*.) In each case, the record failed to establish that the employer suffered any

[15] Amicus curiae University Council – American Federation of Teachers and University Professional and Technical Employees, CWA Local 9119, contend that the Board should remand this issue to the ALJ. Typically, the Board will remand a case to an ALJ for further hearing when additional factual evidence is necessary to decide the case. (*San Diego Unified School District* (1991) PERB Decision No. 885.) PERB's remedial authority is a purely legal issue that does not require the presentation of additional facts by the parties. Moreover, the Board has the authority to issue a decision in a case without an ALJ having previously rendered a proposed decision. (PERB Reg. 32215.) Accordingly, we find no reason to remand this issue to the ALJ.

actual monetary loss as a result of the strike activity. Accordingly, the Board has never ruled on whether it has the authority to award damages as a component of make whole relief for unlawful strike activity.

UC contends that an award of damages is both authorized by HEERA and appropriate in this case. Conversely, CNA and amici curiae proffer several reasons why the Board lacks authority to award damages. For the following reasons, we hold that PERB has the authority to award damages to make an employer whole for expenses necessarily incurred or economic harm suffered as a direct result of unlawful strike activity.

"An administrative agency may - consistently with the 'judicial powers' doctrine - make restitutive money awards provided (i) doing so is reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purposes, and (ii) the 'essential' judicial power remains ultimately in the courts, through review of agency determinations." (*McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 359.) In *Walnut Creek Manor v. Fair Employment and Housing Comm.* (1991) 54 Cal.3d 245, the California Supreme Court delineated the scope of an administrative agency's remedial authority. Applying *McHugh*, *supra*, the Court held that administrative agencies have the inherent authority to award "restitutive damages," which it defined as "expenditures incurred or economic harm suffered by one party in consequence of another party's violation of a law or regulation the agency is empowered to enforce." (*Id.* at p. 263.) The Court observed that "[r]estitutive damages, in short, are akin to special damages, i.e., they are quantifiable amounts of money due an injured private party from another party to compensate for the pecuniary loss directly resulting from the second party's violation of law." (*Ibid.*) The Court thus upheld the Fair Employment and Housing Commission's (Commission) award of "out-of-pocket expenditures for increased rent and utilities" to a plaintiff who had been unlawfully denied housing because of his race and

marital status. (*Id.* at p. 266.) The Court found such damages were easily quantifiable and incidental to the Fair Employment and Housing Act's (FEHA) regulatory purpose of preventing discrimination in housing.[16] (*Id.* at pp. 263-264.)

The Court further held that, in the absence of express statutory authorization, administrative agencies have no authority to award compensatory or punitive tort damages. (*Id.* at p. 264.) Rather, those types of damages may only be awarded by a court. (*Ibid.*; *Youst v. Longo* (1987) 43 Cal.3d 64, 80.) Accordingly, the Court ruled that the Commission exceeded its authority by awarding the plaintiff damages for emotional distress. (*Id.* at p. 265.)

PERB's interpretation of its remedial authority has been consistent with the rule set forth in *Walnut Creek Manor*, *supra*. PERB has long recognized that it has broad authority to award "make whole" relief to remedy an unfair practice, including an award of out-of-pocket expenses. (*County of San Joaquin (Health Care Services)* (2003) PERB Decision No. 1524-M; *Los Angeles Unified School District* (2001) PERB Decision No. 1469; *West Covina Unified School District* (1993) PERB Decision No. 973; *Temple City Unified School District* (1990) PERB Decision No. 841.) Nonetheless, PERB's remedial authority is limited to remedies that address rights granted by the applicable statute. "Not every individual monetary or other personal loss related to a violation of [the statute] is compensable under PERB law." (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186.) Thus, the Board has held PERB has no authority to award damages for emotional or psychological injury resulting from an unfair practice. (*State of California (Secretary of State)* (1990) PERB Decision No. 812-S.) The Board has also recognized that PERB's power to remedy unfair practices does not allow PERB to award punitive damages. (*Mark Twain Union Elementary*

[16] The FEHA is codified at Government Code section 12900 et seq.

School District (2003) PERB Decision No. 1548; *State of California (Secretary of State)*, *supra*.)

CNA and amici curiae assert that PERB cannot award make whole damages for unlawful strike activity because HEERA does not expressly grant PERB the authority to award such damages. In support of this argument, CNA and amici curiae rely on *Dyna-Med, Inc. v. Fair Employment and Housing Comm.* (1987) 43 Cal.3d 1379, and *Peralta Community College Dist. v. Fair Employment and Housing Comm.* (1990) 52 Cal.3d 40. In *Dyna-Med, supra*, the Court held that the FEHA did not authorize the Commission to award punitive damages. (43 Cal.3d at p. 1404.) Similarly, the Court ruled in *Peralta Community College Dist.*, *supra*, that the FEHA did not grant the Commission authority to award damages for emotional distress. (52 Cal.3d at p. 60.) Both of these decisions involved damages that went beyond making the injured party whole for monetary losses directly attributable to the statutory violation. Indeed, the decisions addressed precisely the type of damages, punitive and emotional distress damages, that PERB has expressly held it has no authority to award. Therefore, because they do not address make whole relief, *Dyna-Med, supra*, and *Peralta Community College District*, *supra*, do not preclude PERB from awarding "restitutive damages" to make a public employer whole for expenses necessarily incurred or economic harm suffered as a direct result of unlawful strike activity.

In a similar vein, CNA and amici curiae contend the California Supreme Court has held that injunctive relief is the only remedy available for unlawful public sector strike activity. We disagree that *El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d

946,[17] and *City and County of San Francisco v. United Assn. of Journeymen etc. of United States & Canada* (1986) 42 Cal.3d 810, can be read so broadly.

In *El Rancho Unified School Dist.*, *supra*, the Court found that PERB's inability to award the full array of damages available in a civil tort action did not divest PERB of exclusive initial jurisdiction over whether a strike constitutes an unfair practice. (*Id.* at p. 960.) In discussing why PERB is a more appropriate body than the courts for determining the proper remedy for unlawful strike activity, the Court suggested that an injunction, with the possibility of contempt sanctions for its violation, would better accomplish the Legislature's goal of curtailing public school employee strikes than "an after-the-harm-is-done award of damages." (*Id.* at p. 961.) However, the Court did not hold, as CNA asserts, that injunctive relief is the *only* remedy available for unlawful strike activity.

In *City and County of San Francisco*, *supra*, the Court held that "until the Legislature enacts to the contrary, the illegality of a strike without more is not grounds for a damage suit by the employer." (*Id.* at p. 819.) In reaching this conclusion, the Court observed that public employee strikes are now governed by specific collective bargaining statutes and courts should not create judicial remedies that conflict with the remedies provided by those statutes. (*Id.* at

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[17] UC asks the Board to take judicial notice of three briefs filed with the Supreme Court in *El Rancho Unified School District*, *supra*. PERB may take judicial notice of materials from other legal proceedings when the materials are relevant to issues before the Board. (*The Regents of the University of California, University of California at Los Angeles Medical Center* (1983) PERB Decision No. 329-H.) Because the Supreme Court's decision in *El Rancho Unified School District*, *supra*, speaks for itself, we find the briefs are not relevant to this matter and therefore decline to take judicial notice of them.

UC also asks the Board to take judicial notice of two temporary restraining orders. The first, issued by the Sacramento Superior Court against CNA on July 20, 2005, is already a part of the record in this matter. The second, issued by the San Francisco Superior Court against the American Federation of State, County and Municipal Employees, Local 3299, on July 11, 2008, is not relevant to the issues before the Board in this matter. Accordingly, we decline to take judicial notice of the July 11, 2008 injunction.

p. 816.) Nevertheless, the Court also recognized that some types of strike damages fall outside the purview of collective bargaining statutes and thus may be awarded by the courts, such as damages for "tortious acts occurring during the conduct of a strike," e.g. personal injury or property damage, or damages for breach of a contractual "no strike" clause. (*Id.* at p. 819.)

CNA places particular reliance on the following passage from this decision:

> There remain today relatively few cases in which the imposition of a judicial remedy of tort damages would not impinge directly upon an established administrative mechanism for resolving disputes between a public employer and its employees. The possible scope of a damage remedy has been so greatly narrowed that one senses that it would be fundamentally unfair to hold a few public employee unions liable for damage awards when teachers' unions, state employee unions, and many local employee unions would not be liable for the same conduct.

(*Id.* at p. 816.)

We disagree that this language precludes PERB from ordering *any* damages to remedy unlawful strike activity. Consistent with *McHugh*, *supra*, and *Walnut Creek Manor*, *supra*, we find this passage merely states the Court's view that, because teachers' unions, state employee unions and other unions under the jurisdiction of PERB would not be liable for the full array of damages available in a civil tort action, it would be unfair to impose such broad liability on the union representing the City's plumbers.[18]

Taken together, these Supreme Court decisions establish that: (1) courts may not award damages for unlawful strike activity by public employees, except in the limited circumstances set forth in *City and County of San Francisco*, *supra*, and (2) PERB cannot award the full array of damages available in a civil tort action. Significantly, in none of these decisions did the

[18] The striking employees in *City and County of San Francisco*, *supra*, were subject to the MMBA. At the time of the Court's decision, the MMBA was enforced in the courts. Effective July 1, 2001, the Legislature granted PERB jurisdiction over the MMBA (with a few exceptions). (Stats. 2000, ch. 901, § 8.)

Court hold that PERB has no authority to award damages to make an employer whole for unlawful strike activity. Consequently, these decisions simply say that it is for PERB, not the courts, to decide in the first instance whether a monetary make whole remedy would effectuate the purposes of the applicable collective bargaining statute on the facts of each case.[19]

CNA and amici curiae further argue that PERB lacks authority to award damages for unlawful strike activity because the Agricultural Labor Relations Board (ALRB) has no such authority. In support of this argument, CNA and amici curiae rely heavily on a court of appeal case interpreting the Agricultural Labor Relations Act (ALRA).[20] In *United Farm Workers of America v. Agricultural Labor Relations Bd.* (1995) 41 Cal.App.4th 303, the court held that ALRA section 1160.3[21] does not grant the ALRB "the authority to award compensatory damages to persons injured in their business or property" by a union's unlawful secondary boycott. (*Id.* at p. 325.) This case has no bearing on PERB's authority to award strike damages as part of make whole relief for three reasons.

First, *United Farm Workers of America, supra*, did not involve damages as part of a make whole remedy but rather an award of compensatory damages to a grocery retailer that

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[19] An award of damages by PERB is subject to judicial review pursuant to HEERA section 3564, subdivision (b).

[20] The ALRA is codified at Labor Code section 1140 et seq.

[21] ALRA section 1160.3 provides, in relevant part:

> If, upon the preponderance of the testimony taken, the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, to take affirmative action, including reinstatement of employees with or without backpay, and making employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the employer's refusal to bargain, and to provide such other relief as will effectuate the policies of this part.

suffered monetary losses as a result of unlawful secondary boycott activity by the farmworkers union. The instant case, however, does not involve a secondary boycott. Thus, the court of appeal's ruling that the ALRB did not have statutory authority to award compensatory damages for unlawful secondary strike activity does not provide guidance on whether PERB can award make whole damages for unlawful primary strike activity.

Second, the statutory provisions setting forth the remedial powers of the ALRB and PERB are different. ALRA section 1160.3 "authorizes its make-whole remedy against employers but not labor organizations." (*Ibid.*) HEERA section 3563.3 contains no similar limitation. HEERA was enacted three years after the ALRA. Thus, had the Legislature intended to include a similar limitation on PERB's remedial authority in HEERA, it presumably knew how to do so. (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 75.) Given the difference in language between the two provisions, we cannot interpret HEERA section 3563.3 to contain the same limitation on the Board's remedial authority that ALRA section 1160.3 imposes on the ALRB. (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 596.)

Third, the limitation on the ALRB's remedial authority appears to be unique to the agricultural labor relations context because unions have been ordered to pay damages to an employer under other labor relations statutes. For example, the NLRB has ordered a union found to have bargained in bad faith to pay the employer's negotiation expenses. (*Teamsters Local 122 (August A. Busch & Co.)* (2001) 334 NLRB 1190, 1195.) In that case, the NLRB held that a traditional affirmative bargaining order would not restore the status quo because of the financial losses suffered by the employer, "financial losses which the Respondent directly caused, and intended to cause, by its strategy of bad faith bargaining." (*Ibid.*) The NLRB has also ordered a union to reimburse an employer for expenses incurred under a CBA when the

employer's agreement to the CBA was coerced by the union's illegal strike. (*National Labor Relations Bd. v. Warehousemen's Union Local 17* (9th Cir. 1971) 451 F.2d 1240, 1243; *United Slate, Tile & Composition Roofers, Local 36 (Roofing Contractors Assn. of So. Cal.)* (1968) 172 NLRB 2248, 2252.) Thus, under the NLRA, a union may be ordered to pay damages to make the employer whole for expenses incurred as a result of the union's refusal or failure to bargain in good faith.

Paralleling their ALRB argument, CNA and amici curiae assert that PERB has no authority to award damages for unlawful strike activity because the NLRB cannot do so. However, the cases cited in support of this argument do not involve damages as part of a make whole remedy. In both *Dyna-Med, Inc*, *supra*, and *Peralta Community College District*, *supra*, the California Supreme Court observed that federal courts have held the NLRA limits the monetary remedy for an unfair labor practice to back pay. (*Dyna-Med, Inc*, *supra*, 43 Cal.3d at p. 1397; *Peralta Community College Dist.*, *supra*, 52 Cal.3d at p. 59.) However, the cases cited in support of the Court's observation held that the NLRB has no authority to award punitive or general compensatory damages, such as emotional distress damages. As noted above, PERB has previously held it has no authority to award such damages.

Nor are the NLRB decisions cited by amici curiae availing. *District 1199, Union of Hospital and Health Care Employees (Francis Schervier Home and Hospital)* (1979) 245 NLRB 800, and *Iron Workers Local No. 783 (BE&K Construction Co.)* (1995) 316 NLRB 1306, both held that the NLRB lacked authority to order a union to reimburse an employer for property damage caused by the union during an unlawful strike. As the California Supreme Court clearly held in *City and County of San Francisco*, *supra*, such damages are compensable in a civil action in California and thus are not awardable by PERB. (42 Cal.3d at p. 819.)

In *National Maritime Union (The Texas Co.)* (1948) 78 NLRB 971, a union committed an unfair labor practice by engaging in a strike that caused the employer to accept a hiring hall contract that discriminated against non-union members. (*Id.* at pp. 975-979.) The NLRB held that the monetary remedy for the unfair labor practice was limited to back pay for the discharged employees. (*Id.* at pp. 988-989.) Relying on legislative history, the NLRB found that by granting federal courts jurisdiction to hear suits seeking damages for certain types of unlawful strike activity, Congress intended to preclude the NLRB from awarding strike damages other than back pay. (*Id.* at pp. 989-991.) Here, the legislative history of HEERA is silent regarding both strikes and the remedies therefor.[22] Thus, unlike *National Maritime Union*, *supra*, there is no clear indication that the Legislature intended to prohibit a make whole award of damages for unlawful strike activity under HEERA.

Additionally, the argument that PERB should follow the NLRB on this matter fails to consider important differences between private and public sector collective bargaining. It is well-established that Congress, in enacting the NLRA, intended to leave certain "economic weapons" unregulated by the Act. (*Machinists v. Wisconsin Employment Relations Comm'n* (1976) 427 U.S. 132, 143-144.) Hence, one of labor's most important "economic weapons," the pre-impasse economic strike, is not an unfair labor practice under the NLRA unless it violates one of the Act's prohibitions on specific strike activity. (See *National Labor Relations Bd. v. Fleetwood Trailer Co.* (1967) 389 U.S. 375, 379 [legal economic strike is protected activity under NLRA]; 29 U.S.C. § 158, subd. (b) [listing specific types of illegal

[22] We grant CNA's request that the Board take judicial notice of two legislative history documents. The first, Senate Floor Analysis of AB 1091 (which would eventually be enacted as HEERA), dated August 29, 1978, states that the bill is "[s]ilent on the issue of strikes or lockouts." The second, an Assembly Republican Caucus memorandum dated May 31, 1977, notes that AB 1091 "does not mention 'the right to strike' and therefore current law prohibiting strikes prevail."

strike activity].) Similarly, a private employer may lawfully exert economic pressure on a union before impasse is reached by locking out employees. (*American Ship Building Co. v. National Labor Relations Bd.* (1965) 380 U.S. 300, 310.) Moreover, a private employer faced with a pre-impasse economic strike may hire permanent replacement workers. (*National Labor Relations Bd. v. Mackay Radio & Telegraph Co.* (1938) 304 U.S. 333, 346.)

California's public sector collective bargaining statutes do not establish a similar scheme of unregulated pre-impasse "economic weapons." Both the California Supreme Court and PERB have long held that an economic strike prior to the completion of statutory impasse procedures is presumptively an unfair practice because it amounts to an "illegal pressure tactic." (*San Diego Teachers Assn.*, *supra*, 24 Cal.3d at pp. 8-9; *Westminster School District*, *supra*; *Fresno Unified School District*, *supra.*) Additionally, public employers lack the "economic weapons" that private employers possess. Because a public agency must continue to provide services to the public, a lockout is usually not a viable option in the public sector. (*Fremont Unified School District* (1990) PERB Order No. IR-54.) Moreover, it is rarely feasible for a public employer to hire permanent replacements for striking workers, particularly when the bargaining unit, like the one in this case, is geographically extensive and includes many employees with highly specialized skills. Thus, for all practical purposes, a public employer lacks the "economic weapons" to effectively combat a pre-impasse economic strike.

Once the parties have exhausted the statutory impasse procedures, a union may lawfully engage in an economic strike and the employer may lawfully implement terms and conditions of employment reasonably comprehended within its last, best and final offer. (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 900, citing *National Labor Relations Bd. v. Katz* (1962) 369 U.S. 736, 745.) An economic strike prior to the completion of impasse procedures constitutes a failure to participate in impasse

procedures in good faith. (*Westminster School District, supra*; *Fresno Unified School District, supra*; *Fremont Unified School District, supra*, PERB Decision No. 136.) Likewise, when an employer unilaterally implements terms and conditions of employment prior to completion of impasse procedures, it has failed to participate in the impasse procedures in good faith. (*Moreno Valley Unified School Dist. v. Public Employment Relations Bd.* (1983) 142 Cal.App.3d 191, 205.) In such cases, PERB orders the employer to undo the unilateral change and make employees whole for any losses suffered as a result of the employer's unfair practice. (E.g., *Regents of the University of California* (2004) PERB Decision No. 1689-H [ordering that employees be reimbursed for additional health care premiums paid as a result of employer's unilateral change in premium contributions]; *Oakland Unified School Dist. v. Public Employment Relations Bd.* (1981) 120 Cal.App.3d 1007, 1015 [affirming Board order requiring school district "to reimburse employees' expenses incurred as a result of the change in [health plan] administrators"].)

CNA and amici curiae assert that PERB cannot order an employee organization to make an employer whole for monetary losses caused by an economic strike that constitutes a failure to participate in impasse procedures in good faith. A system whereby a failure to participate in impasse procedures in good faith subjects an employer, but not an employee organization, to monetary liability is contrary to the express purpose of HEERA "to foster harmonious and cooperative labor relations." (*Regents of the University of California* (1999) PERB Decision No. 1359-H.) This is so because absent the potential award of a monetary make whole remedy, a public sector employee organization could use a pre-impasse economic strike to pressure the employer into granting bargaining concessions with no potential harm to either the organization or its members, other than members' loss of pay during the strike, because the employer can neither lockout employees nor hire permanent replacements. Thus, an award of

damages to make the employer whole for unlawful strike activity furthers the purpose of HEERA by maintaining the relative bargaining power of the parties until the statutory impasse procedures have been completed.

CNA and amici curiae argue that imposing a remedy in this case would "necessarily have a chilling effect on the exercise of lawful collective bargaining rights and would radically alter the delicate balance of power embedded in HEERA's current form." CNA's plan to strike, however, was made for the purpose of exerting economic pressure on UC by withholding quality healthcare from California citizens. As such, this conduct was neither lawful nor protected. To suggest that imposing a remedy for illegally leveraging the health and safety of patients for the purpose of economic gain would somehow have a chilling effect on the exercise of lawful collective bargaining rights is, at the very least, disingenuous. Indeed, the only conduct that might be "chilled" by an award of damages in this case is pre-impasse strike activity that PERB has long held to be an unfair practice.

For the above reasons, we hold that HEERA section 3563.3 grants PERB the authority to order an employee organization to pay damages to make an employer whole for necessary expenses incurred and economic losses suffered as a direct result of the employee organization's unlawful strike activity prior to the completion of statutory impasse procedures.

This holding encompasses not just damages arising from a strike itself but also any damages incurred as a direct result of the strike threat and preparations. Because a threat of, and preparations for, an unlawful strike constitute an unfair practice in and of themselves, the remedy for unlawful pre-strike activity is not dependent on the occurrence of a strike or on the existence of recoverable damages resulting from the strike. A contrary holding would allow an employee organization to escape liability for damages caused by its activity in preparation for

an unlawful strike by calling off the strike at the last minute or by engaging in such conduct with the knowledge that a court will likely enjoin the strike.

Additionally, a holding that PERB may award make whole damages for unlawful strike activity does not mean that PERB must or will award damages in every case. As the California Supreme Court observed in *San Diego Teachers' Assn.*, *supra*, PERB's authority to fashion an appropriate remedy for an unfair practice includes the "discretion to withhold as well as pursue the various remedies at its disposal." (24 Cal.3d at p. 13.)

We also emphasize that our holding does not diminish the importance of seeking injunctive relief to prevent an unlawful strike from occurring nor do we hold or imply that damages are a substitute for injunctive relief. To this end, we reaffirm the Board's holding in *Fresno Unified School District*, *supra*, that damages will not be awarded unless the employer first seeks "to mitigate its losses or bring about the termination of the strike by requesting that PERB seek an injunction against it." The failure to seek injunctive relief may also be a factor in determining whether the employer sought to mitigate damages arising from a strike threat or strike preparations.

b. Determination of Compensable Damages for Unlawful Strike Activity

For guidance in determining what damages are compensable as make whole relief for unlawful strike activity, including a strike threat and strike preparations, we turn to the Board's decision in *Westminster School District*, *supra*. In that case, the employee organization engaged in a one-day strike that the Board found to be an unfair practice. The district sought to recover the cost of substitute teachers for the day, the printing and mailing of letters to parents informing them of the strike, a substitute teacher training session and overtime for employees who staffed a telephone tree in order to communicate in the event of a strike. The Board found that the substitute training session and telephone tree were not a direct result of

the strike because neither "served to obtain substitutes or otherwise insure student attendance and compensation therefore." Rather, the benefits derived from them, if any, were "highly speculative and incapable of quantification." The Board then found that the district's savings on striking teachers' salaries was more than the district expended on substitute teachers and the printing and mailing of letters to parents. Accordingly, the Board found "no compensable loss as a result of the strike."

Thus, compensable damages include, but are not limited to, the cost of replacement workers and revenue lost because of the unlawful strike activity. The employer's pre-strike preparations are compensable only if they were necessary to maintain continuity of operations during the strike and proper to mitigate any reasonably foreseeable effects of the strike. Any expenses whose benefits were speculative or cannot be quantified, or that were only indirectly related to the strike, are not compensable. Further, the employer's expenses and losses are to be offset by any savings realized as a result of the strike activity.

Because the ALJ excluded all evidence of strike-related damages, the record before us contains no evidence upon which we can ascertain whether UC is entitled to damages as part of a make whole remedy. Accordingly, the record must be reopened to allow UC to introduce relevant evidence of its expenses, losses and savings from July 8, 2005, when CNA gave notice of its intent to strike, until July 20, 2005, when the superior court enjoined the strike.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the California Nurses Association violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571.1, subdivision (c) by threatening to engage in a one-day strike on July 21, 2005, and engaging in preparations for that strike. The Board hereby REMANDS Case No. SF-CO-124-H to the Administrative

Law Judge to take evidence on the issue of the Regents of the University of California's damages and to make recommended findings of fact and conclusions of law solely on the issue of damages.

The amended complaint and underlying unfair practice charge in Case No. SF-CE-762-H are hereby DISMISSED.

Member McKeag joined in this Decision.

Member Neuwald's concurrence and dissent begins on page 51.

NEUWALD, Member, concurring and dissenting: I agree with my colleagues that the California Nurses Association (CNA) violated the Higher Education Employer-Employee Relations Act (HEERA) by threatening to engage in, and preparing for, an unlawful pre-impasse strike. I respectfully dissent, however, from the determination that an award of strike preparation damages is appropriate under the circumstances of this case.

In this case, the injunctive relief remedy afforded by HEERA was entirely effective to terminate CNA's threatened strike activity. CNA gave sufficient notice of its intent to strike to enable the Regents of the University of California to invoke the Public Employment Relations Board's (PERB) authority to seek injunctive relief. Given that CNA complied immediately with the injunction and the parties have now participated in the statutory mediation and factfinding process and reached an agreement, the legislative goal of developing harmonious and cooperative labor relations has been achieved. (HEERA, § 3560(a).)[1] I believe that in this case the availability to PERB of injunctive relief and contempt sanctions "are far more likely to accomplish the Legislature's goal of 'foster[ing] constructive employment relations (§ 3540)' and 'the longrange minimization of work stoppages' than an after-the-harm-is-done award of damages." (*El Rancho Unified School Dist. v. National Education Assn.* (1983) 33 Cal.3d 946, 961.) Because the injunction and subsequent utilization of the statutory mediation and factfinding process were successful in enabling the parties to reach an agreement, awarding a monetary remedy at this time would not serve to foster harmonious and cooperative labor relations and is therefore unwarranted.

[1] HEERA section 3560(a) states: "The people of the State of California have a fundamental interest in the development of harmonious and cooperative labor relations between the public institutions of higher education and their employees."