STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNIVERSITY COUNCIL-AFT, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA (BERKELEY), Respondent.	Case No. SF-CE-1047-H PERB Decision No. 2610-H December 19, 2018

Appearances: Leonard Carder, by Andrew J. Ziaja, Attorney, for University Council-AFT.

Before Banks and Winslow, Members.

DECISION[1]

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the University Council-AFT (UC-AFT) to the proposed decision of a PERB administrative law judge (ALJ), which dismissed the complaint and UC-AFT's unfair practice charge against the Regents of the University of California at Berkeley (University). The complaint, as amended, alleged that in May 2013, the University announced and then implemented plans to close the Young Musician's Program (YMP) at the University's Berkeley campus (UCB), lay off YMP Instructors represented by UC-AFT, and transfer YMP operations to the Young Musicians Choral Orchestra (YMCO), a non-profit corporation established as YMP's successor, without notice and opportunity for bargaining and because of employees' protected activity. This conduct was alleged to have violated the University's duty

[1] Pursuant to the Higher Education Employer-Employee Relations Act (HEERA), section 3563, subdivision (j), the Board has delegated this case for decision to a two-member panel of the Board. (HEERA is codified at Government Code section 3560 et seq.) Unless otherwise specified, all further statutory references are to the Government Code.

to meet and confer over subcontracting decisions and/or their negotiable effects, to constitute a reprisal and/or discrimination against UC-AFT-represented employees for protected activity, and to have interfered with employee and organizational rights.

UC-AFT excepts to three aspects of the proposed decision. First, UC-AFT excepts to the ALJ's conclusion that the University's subcontracting decision was not negotiable. Second, UC-AFT excepts to the ALJ's conclusion that that the University did not unlawfully interfere with protected rights and/or discriminate against UC-AFT-represented employees because of protected activity. Third, UC-AFT excepts to the ALJ's failure to address the complaint's allegation that the University failed to meet and confer over the negotiable effects of its decision to subcontract YMP. The University has neither excepted to the proposed decision nor responded to UC-AFT's exceptions.

The Board has reviewed the proposed decision, UC-AFT's exceptions and the entire record in this matter in light of applicable law. Based on this review, we reverse the proposed decision and conclude that the University violated HEERA by failing and refusing to meet and confer over its subcontracting decision and the effects of that decision, by imposing reprisals against employees because of protected activity, and by interfering with protected rights, as alleged in the complaint.

PROCEDURAL HISTORY

UC-AFT filed its unfair practice charge on November 8, 2013.

On July 21, 2014, PERB's Office of the General Counsel issued a complaint alleging that the University had unilaterally changed policy affecting negotiable matters by announcing on May 13, 2013 that it was closing YMP, and that the University laid off UC-AFT-

represented Instructors employed in that program because of protected activity, including their participation in a grievance challenging YMP's tenure and promotion policies and practices.

On September 3, 2014, the parties attended an informal settlement conference, but were unable to resolve the dispute.

On September 11, 2014, the University answered the PERB complaint by admitting certain facts, denying the material allegations and asserting various affirmative defenses.

On February 5, 2015, UC-AFT amended its charge to include additional evidence and moved to amend the complaint to allege that the decision to close YMP and lay off employees was also motivated by anti-union animus, rather than, or in addition to, animus against employees for protected activity. The ALJ granted UC-AFT's motion on March 11, 2015, without objection from the University.

A formal hearing was held on June 9, 10, and 11, and July 9, 2015, and the matter was submitted for decision on September 15, 2015.

On April 6, 2016, the ALJ issued her proposed decision.

On April 29, 2016, UC-AFT filed its statement of exceptions, supporting brief and a request that the Board take official notice of an arbitral opinion and award.[2]

[2] The 2013 opinion and award by Arbitrator Fred D'Orazio in the matter of International Federation of Professional *& Technical Employees, Local 21 and the City of Oakland* concern the City of Oakland's decision to subcontract the Oakland Museum of California to the Oakland Museum of California Foundation. UC-AFT contends that the arbitrator's decision provides persuasive authority for the present case because it involves similar facts and interprets the parallel meet-and-confer obligations of the Meyers-Milias-Brown Act (MMBA), Government Code section 3500 et seq. Because Arbitrator D'Orazio's decision is not offered as part of the factual record, but as legal authority, we deny UC-AFT's request for official notice. We have, however, reviewed the decision for whatever guidance it may offer in this dispute. (See *Lake Elsinore Unified School District* (2018) PERB Decision No. 2548, pp. 6-7, fn. 5.)

FACTS

Overview

In 1968, the University established YMP as an outreach program at its Berkeley campus to provide musical instruction at no cost to disadvantaged junior high and high school students in the San Francisco Bay Area. Initially, the Program offered only summer courses for 20 students taught by three volunteer instructors. It eventually expanded to a year-round schedule of group and individual courses for 90 students and taught by 50 instructors, with an operating budget of $1.4 million. During its more than four decades at the Berkeley campus, the Program became one of the University's most renowned and successful community outreach programs. Described by some as a "gateway program" for students "who might come to Berkeley and students who might go to college," the Program routinely placed its graduates at some of the best conservatories and universities in the country.

In early 2013, Gibor Basri (Basri), the Vice Chancellor of the University's Division of Equity and Inclusion (E&I), decided to cancel YMP as a University program and to lay off its staff, including UC-AFT-represented Instructors. At or about the same time, five members of YMP's Board of Directors formed YMCO as a separate 501(c)(3) non-profit organization and then hired YMP's former director, Daisy Newman (Newman), as the director of the newly-established organization. YMCO also hired several former YMP Instructors and, after a brief hiatus during the summer of 2013, resumed offering the same musical instruction courses to essentially the same student population. Pursuant to two agreements between the University and YMCO, referred to as the Transition Agreement and the Affiliation Agreement, YMCO assumed ownership of many of the University's resources and assets previously devoted to YMP, including musical instruments, furniture, computers, printers, telephones, and other

office equipment, electronic files, and office supplies. The Transition and Affiliation Agreements also authorized YMCO to represent itself as the "permanent continuation" of YMP and to use University logos to leverage credibility with prospective donors. The University also provided YMCO with $10,000 in "bridge financing" before the Transition and Affiliation Agreements were executed, and, within months of YMP's closure, YMCO began operations in the fall of 2013 as the self-described "successor organization" to YMP.

While the parties disagree over the legal significance of the University's conduct, they generally agree upon such facts as YMP closing and YMCO opening, that all YMP Instructors were laid off, and that some former YMP Instructors were later hired by YMCO to perform essentially the same functions for the same student population, utilizing the same instruments and equipment as they had used during their tenure as University employees.

Daisy Newman's Leadership of YMP, 2003-2013

Newman served as YMP's Director from 2003 until the Program closed in 2013, and was then hired as the director of the newly-established YMCO. Immediately before Newman's arrival in 2003, Karen Baccaro (Baccaro) had been the Program's Acting Director, and she continued to serve as Assistant Director under Newman until 2013. During this period, YMP had a purely advisory Board of Directors, comprised of some of the Programs major donors, while Newman and Baccaro ran the program's day-to-day operations. At different times, YMP was housed in several different departments at the Berkeley campus. When Newman began her employment as director in 2003, YMP was part of the Center for Educational Partnerships, before moving to Student Affairs and, eventually, to E&I, which was established in August 2007. After the Program became part of E&I, Newman reported directly to Assistant Vice Chancellor and E&I's Chief of Staff Elizabeth Halimah (Halimah).

Since at least 1992, UC-AFT was the exclusive representative of YMP Instructors. However, when YMP became part of E&I, the fact that its Instructors were represented by UC-AFT was not well understood either by Newman or E&I administrators. Debra Fong (Fong), the HR Manager assigned to E&I since it was formed,[3] testified that she only began working with YMP in 2009, after Newman terminated an Instructor for alleged misconduct. While investigating that termination, Fong learned that it was common practice for YMP Instructors to provide student instruction in their own homes, and to transport students in their own vehicles. As a result, the Labor Relations Department began working with UC-AFT to create guidelines to limit the University's liability and the risk of injury to YMP participants, who were minor children. These guidelines took effect in the 2010-2011 academic year. As discussed below, the contractual rights of YMP's instructors to excellence reviews and the possibility of continuing appointments also became known to E&I and YMP only after several Instructors and UC-AFT voiced concerns about Newman's failure to conduct such reviews for long-term Instructors.

Upon becoming YMP's Director, Newman's objectives were to expand the Program's donor base through fundraising; to upgrade the quality of instruction and student outcomes; to rebuild a working relationship with the UCB Music Department; and to address disciplinary problems among the Program's students. The actions Newman took to achieve these goals had far-reaching effects on the Program.

[3] The date of Fong's assignment to E&I is not clear from the record. When asked when she began working with E&I, Fong answered: "In 1987 when the division started." However, it appears that E&I was not established until 2007, as Basri described himself as "the founding Vice Chancellor of Equity and Inclusion," a position he has held "[s]ince August of 2007." Similarly, when asked when she began working with YMP, Fong answered: "1989," but then answered "2009." Based on Basri's testimony regarding E&I's establishment, and on Fong's apparent correction to her own testimony, the later date seems more likely.

Fundraising

When Newman arrived, YMP was, in her words, "close to being bankrupt." When YMP was transferred to Student Affairs, Vice Chancellor Padilla informed Newman that there were no funds to spare for YMP, and that the Program's continuing financial viability depended on its ability to raise funds outside of the University-allocated budget. At the time, the Program received an endowed fund from the University, which Newman characterized as "small." Basri testified that YMP consumed "[c]lose to a quarter million dollars of our budget" as well as "a bunch of staff time from my Chief of Staff, my HR person and so on." Whatever the precise amount of the University's contribution, Newman testified that over the course of her tenure, YMP's donor base had increased from approximately 250 to 1,000 individual donors and that she had personally raised sufficient funds to expand the Program significantly. Although there was rarely an overage in the budget at the end of the year, under Newman's leadership, there was at least never a shortfall.

Instruction and Student Outcomes

Newman began requiring auditions for new students and shifted YMP's focus from music for music's sake to orchestral musical instruction and preparing students for music studies at conservatories and universities.[4] Initially, Newman solicited student applications with a general mailing. After applicants were selected for auditions, interviews were conducted to ensure that applicants understood the level of commitment required, and to ensure

[4] Newman explained that YMCO's mission statement differed from that of YMP's by virtue of YMCO's focus on getting students admitted to conservatories and four-year universities, as opposed to learning and performing music "for music's sake." However, Newman also acknowledged that this change had already been implemented during her tenure as YMP's director and that she was only able to codify this transition, by formally changing the language of the mission statement, as a result of YMP's transition to a non-University organization.

that they had the necessary parental or custodial support. Once admitted, a student's progress would be judged by their performances and by feedback from the students' instructors.

From October to May, the Program provided private lessons and some group training. Summer sessions were seven weeks long and consisted of daily classes, Monday through Friday. The average student enrollment was 80, but there were fewer students enrolled during the academic year—the summer session might fluctuate by as many as 15 students. Enrollment decreased in September as graduating seniors left, but would rise again in March after the admissions process was completed. Once admitted, students generally stayed in the Program and were not required to re-audition each school year. Newman measured the Program's success by the number of college admissions each year.

Relations with the Music Department

Despite YMP's mission to provide musical instruction, it was not an easy fit with the Music Department, whose focus was primarily on music theory rather than performance. Problems between the UCB Music Department and YMP, which pre-dated Newman's tenure, persisted under her leadership. A particular sore point was YMP's continued requests to use Music Department space and resources, despite the Program's improved fiscal situation.

YMP Personnel Practices and the Churning Grievance

As of 2009, E&I and UC-AFT had a "cooperative relationship." This relationship began to deteriorate, however, when several instructors, with UC-AFT's assistance, voiced concerns about the Program's personnel practices under Newman's direction. Primarily at issue was Article 7b of the Memorandum of Understanding (MOU), which describes the process for continuing appointments, and requires that a committee be formed at (or as near as possible to) the Departmental level, of appointees with sufficient knowledge of the employee's

field of expertise to review such matters as the materials in the employee's academic review file, student evaluations, assessments by former students, assessments from classroom evaluations, and any additional materials provided by the employee.

UC-AFT presented testimony from former YMP Instructors, who had taught in the Program for several years, despite below-market wages and limited resources, including access to practice rooms, concert facilities, and quality instruments. Of primary significance was the testimony of Amy Brodo (Brodo). Newman hired Brodo to teach cello while another cello teacher was on maternity leave. After teaching several summer sessions, Brodo began giving private lessons during the regular school year and eventually taught cello chamber music, Rhythmic Analysis, Cello Orchestra Sectionals, and the Harpsichord Continuo for YMP. On October 17, 2011, Brodo was providing cello lessons at her home studio when parents of her students called to find out why their children had been transferred to another instructor. Brodo called the YMP office and learned that she had been fired. After speaking with other former instructors, Brodo surmised that Newman had terminated her and others after their fifth year of employment to avoid conducting an excellence review, as required by Article 7b of the MOU.

UC-AFT Representative Michelle Squitieri (Squitieri) investigated Brodo's concerns and learned that Newman had not conducted any excellence reviews since becoming YMP's director in 2003. She concluded that Newman had also terminated other YMP Instructors who were eligible for continuing appointments rather than provide an opportunity for greater job security by completing an excellence review, a practice which UC-AFT characterized as

"churning" staff. On or about October 27, 2011, UC-AFT filed a grievance[5] alleging, among other things, that Brodo had been terminated without cause and without notice in violation of various articles of the MOU.[6] Over the next two years, this dispute expanded in scope, and other former YMP Instructors were added to the grievance.

After learning of the University's obligation to conduct excellence reviews, E&I's administrators attempted to bring YMP into compliance with the UC-AFT MOU and University personnel policy. When the grievance was filed, Fong began investigating which YMP Instructors were due excellence reviews. Her investigation was complicated by the fact that YMP Instructors' personnel records were kept in multiple different locations due to the fact that the Program had been transferred to different divisions where it was listed under different organizational identifications. Moreover, because YMP Instructors' personnel files did not include any prior evaluations, there was nothing upon which a review committee could base a determination. This deficiency would have to be corrected before a review committee was convened. Alternatively, Fong acknowledged that the University could "grandfather[ ]" YMP Instructors into continuing appointments without an excellence review.

Newman testified that she only became aware of the excellence review requirement as a result of UC-AFT's grievance. She admitted her displeasure upon learning that she could not terminate Instructors or reduce their teaching loads without following the terms of the MOU. She resented guaranteed salaries or a minimum number of hours for Instructors from one year

[5] The record contained conflicting evidence on whether the grievance was filed on October 27 or November 4, 2011. We find it unnecessary to resolve this conflict, as it would not affect any material issues before the Board.

[6] The parties provided excerpts of the MOU, including Articles 7b, Process For Initial Continuing Appointments; Article 7c, Continuing Appointments; Article 17, Layoff, Reduction In Time, and Reemployment; and Article 22, Merit Review Process.

to the next, as required by the MOU, and considered the greater job security that might result from conducting excellence reviews inappropriate for YMP's circumstances. Newman considered the Churning Grievance a personal "vendetta" against her, and, by her own admission, she was determined not to limit her discretion to hire and fire Instructors at will by conducting excellence reviews or making continuing appointments. When Halimah presented Newman with options for complying with the MOU's excellence review requirement for YMP instructors, Newman refused. She informed Halimah that, before conducting any excellence reviews, she would wait to see whether YMP could "extricate[ ]" itself from its obligations under the MOU.

In addition to the dispute over excellence reviews, Newman resented various other real or perceived obligations under the UC-AFT MOU. In particular, she opposed what she perceived as the financial obligations of guaranteed salaries and benefits imposed by the MOU.

On or about December 6, 2012, Newman wrote to Basri to complain that, because YMP Instructors were placed in the campus payroll system, the Program was now responsible for paying 15.9 percent of YMP Instructors' benefits, whereas, according to information compiled by Baccaro, the Program had paid only 3 percent of employee benefits the previous fiscal year.[7] Newman concluded by asserting "YMP needs to be extricated from the MOU and the financial liabilities it entails, as soon as possible." As a result of these concerns, Newman set about to "build a case" that, because no other similar programs around the country were unionized,

[7] The record evidence does not establish the accuracy of these figures, and we find it unnecessary to make factual findings on this issue. Additionally, it is not apparent from the evidence whether placement of YMP Instructors in the University's payroll system was mandated, or even mentioned by, the MOU. Rather, as with Newman's interpretation of the MOU, evidence concerning YMP's obligation to pay employee benefit costs was presented to show Newman's state of mind, including her view that YMP Instructors were mistakenly or improperly included as part of the University's unionized workforce.

neither should YMP be required to adhere to minimum salaries and employment conditions determined through collective bargaining.

The Decision To Close YMP and Transfer Operations to YMCO

In the latter part of 2012, Basri began to consider closing YMP. At the hearing, Basri gave a number of reasons for closing YMP. In 2012, E&I was experiencing severe budget cuts and YMP was consuming approximately $250,000 of E&I's annual budget, as well as time spent by Human Resources personnel and other administrators to operate the Program. Basri also testified that YMP's focus and objectives did not fit well with E&I's priorities. E&I was created to work on campus-wide issues of equity and inclusion through responsive research, teaching, and public service; expanding opportunities for access and success; and creating a healthy and engaging campus climate for all campus members. Although certainly consistent with the University's public service mission, in Basri's view, YMP focused exclusively on junior high and high school students rather than current members of the campus community.

YMP was also, in Basri's view, a mismatch for the Music Department at UCB because of its performance-based program and the Music Department's primary focus on music theory. Basri also testified that high school students who had participated in YMP did not necessarily benefit the Music Department because they were typically applying to other performance-based college programs and conservatories rather than to UCB. According to Basri, YMP competed with the Music Department for space and resources, and the only appreciable gain to the University community was the goodwill generated by the Program.

In late 2012, Basri and Halimah began exploring options to transfer YMP to yet another division of the campus. Cal Performances is a performance-based program at UCB, but Cal Performances was not interested in assuming responsibility for YMP. The University

Cooperative Extension, which is a revenue-producing arm of the University, was also unwilling to take responsibility for YMP, because it generated no income. Halimah testified that she presented Basri with options and was involved in the decision, but that it was ultimately Basri's decision to close YMP after it became apparent that no other department was willing to take YMP. Basri testified that he decided to close YMP about the time its Board of Directors decided to separate from the University. Basri was happy to work with YMP to see that its separation from the University occurred in a manner that permitted YMP to continue to prosper, so that the community at large would not lose the benefits of the Program.

Basri denied that Newman played any role in his decision regarding the future of YMP or the decision to transfer operations to a non-University entity. However, the evidence suggests otherwise. It is clear that by late 2012 and in large measure *in response to* UC-AFT's Churning Grievance, Newman adamantly opposed the University's collective bargaining relationship with UC-AFT, which she characterized as a "mistake" that "needs to be fixed." Once Newman determined that YMP's "extrication" from this relationship could not be achieved while remaining a part of the University, Newman became convinced that YMP should cease to be a University program altogether, and continue operations under other auspices. In late 2012, Newman, whose leadership and fundraising skills had been integral to the development and survival of YMP, communicated to Halimah and Basri her desire to "extricate[ ]" YMP from the University's collective bargaining obligations, and her willingness to defy University policy and directives from E&I to achieve that end. Although it was Basri's responsibility, and not Newman's, to make these decisions, the following undisputed chronology of events demonstrates that Newman's influence was at least one factor in Basri's decision to close YMP and transfer operations to a non-University entity.

On November 13, 2012, Basri wrote to Newman, "I've asked [the Campus General Counsel] to research two grand options, each of which would get YMP completely out from under all the personnel issues without damaging the program. I'm hoping it won't take too long to get to the point where we can present them to you and the Board (hopefully in December)." In response to Newman's complaint that placing YMP Instructors in the campus payroll system would significantly increase the Program's costs for employee benefits, Basri responded on December 6, 2012, by expressing his "increasingly firm conviction" that YMP and the University must find "a new arrangement." Basri explained that, after considering the options: "I think we are down to only one that seems to make a lot of sense to me," and he proposed a meeting with Newman and Halimah "to discuss what that might look like." Whether in reference to this message or to some other communication from Basri, Newman acknowledged at the hearing that she "had been given a very strong hint in December of 2012" that YMP was "going to be kicked off the campus."

On January 29, 2013, Newman again complained, this time to Halimah, that private, hourly musical instruction for minors "is not a unionized activity in any [ ] program, nationally," and that including YMP Instructors in a collective bargaining unit was "a mistake" that "needs to [be] fixed." Newman expressed frustration that the process of "extricating" YMP from its collective bargaining obligations was taking too long: "If this is a legal process, then let us move forward to get it done. It is not an impossible task."

By February 2013, Basri had communicated his plan to Newman and the YMP Board, which met in early March to consider the fate of the Program. On March 5, 2013, Newman wrote to Basri, asking whether he had "determined a timeline for YMP's exit?" Basri replied the same day, indicating that he had been "waiting for the Board's opinion on whether [YMP's

separation from the University] was the direction we are all agreed upon." He advised Newman that, contingent on the YMP Board's approval, he would "start the serious work on all the legal, HR, and financial issues (after which we should have a better idea of the timeline)."

On March 6, 2013, Newman reported that the YMP Board had "come to an agreement that separating from the [U]niversity is the best option for YMP," and that a majority of the Board had voted to authorize negotiations with the Chancellor "to structure a new organizational arrangement for YMP. . . ." Basri responded the same day to thank Newman for her report, and to say that, while the Board's decision did not surprise him, he hoped that "everyone went away feeling like things are moving in the right direction." Basri advised Newman that he would "work with the Chancellor to figure out the next steps."

On April 19, 2013, as UC-AFT and the University's Labor Relations officials were exploring settlement of the Churning Grievance, Labor Relations Specialist Debra Harrington (Harrington) sent an e-mail message to UC-AFT President Bob Samuels (Samuels). Harrington prefaced her settlement proposal with the following statement: "As we discussed, the University is seriously considering whether it should continue with the YMP program." Although Harrington's message gave no indication that the University had, as yet, reached a firm decision on the subject, other evidence in the record indicates otherwise. At or about the same time, Basri had approved a conditional grant of $10,000 from the University to YMCO. On May 1, 2013, Mike Doyle, a member of the former YMP Board and the newly-created YMCO Board, wrote Basri to thank him for expediting release of the grant funds.

On May 13, 2013, Harrington sent Samuels an e-mail message stating, in part, "I am following up on my previous e-mail to you regarding Berkeley YMP to let you know that, after careful consideration of the programmatic[ ] considerations, the campus has decided to close

the Young Musicians Program, effective June 1, 2013." Fong's office issued layoff notices to all YMP Instructors on May 23, 2013, and the following day, the University issued a public statement whose title read: "Young Musicians Program to be transferred to new Non-profit Organization." The statement explained "that YMCO will be taking over the administration and management of the Young Musicians Program (YMP)." It further noted that "some members of the YMP Advisory Board formed YMCO to continue the mission" of' YMP. Additionally, the University's statement explained that"[t]o support the start-up of the new organization, the University will provide bridge financing to YMCO and annual grants from existing endowments to support ongoing operations, as well as providing access to Hertz Hall for concerts and recitals."

YMCO was granted IRS tax status as a 501(c)(3) non-profit corporation on June 19, 2013. Its application described the organization as the "successor" to another organization, by virtue of "assum[ing] operations of certain activities previously administered by [¶ . . . ¶] a program within the University's Divisions [sic] of Equity and Inclusion . . . known as the Young Musicians Program." YMCO's incorporation was completed by a five-member Board of Directors. At least three of the founding members of YMCO's Board of Directors were Board Members for YMP: Mike Doyle, Dick Morrison, and Richard Olsen. Olsen, who is the Chair of YMCO's Board, has a background in finance and devoted his time and expertise to both closing YMP and founding YMCO. He signed YMCO's application to the IRS for non-profit status under penalty of perjury.

The Transition and Affiliation Agreements

The transfer of YMP assets to YMCO was accomplished primarily through the execution of two documents: the Transition Agreement and the Affiliation Agreement. Both

the Transition Agreement and the Affiliation Agreement were effective on October 24, 2013. Basri explained that, over the years, YMP had acquired a number of endowed funds and donations, which had been administered by the University. According to Basri, rather than return these funds, the simplest and easiest solution was to keep them with the University and "have them serve a purpose similar to that [which] the donors had given them for . . ." by "grant[ing] the income from those endowments to an outside organization that accomplished that [same] purpose. . . ." Under this arrangement, Basri will review YMCO's annual proposal for grant funds and, upon approval, release such funds to YMCO.

The Transition Agreement functions primarily to transfer physical assets from YMP/UCB to YMCO. Section 1 of the Transition Agreement discusses the transfer of various categories of assets like physical property, equipment, contracts, vendor licenses, and other agreements entered into in connection with the program as well as intangible assets like goodwill, copyrights, trademarks, patents, and intellectual property described in an attached schedule. The Transition Agreement also explicitly states that the parties will enter into an Affiliation Agreement to set the terms for "the ongoing cooperation of the parties and periodic grant funding to YMCO from current endowments held for the benefit of the Program." The Transition Agreement makes the following Recitals:

> A. The University has operated the Young Musicians Program at Berkeley, which provides music training programs for at-risk youth (the "Program") within its Division of Equity & Inclusion.
>
> B. As a provider of music training programs for at-risk youth, the Program is outside the traditional mission of the University, and the University has determined that the transfer of the Program to a separate legal entity would be the best method to continue the success of the Program.

C. The Chancellor of the University of California, Berkeley approved the transfer of operation of the Program to YMCO, subject to certain terms and conditions.

D. Following such approval, YMCO was incorporated under the California Nonprofit Public Benefit Corporation Law. YMCO is recognized by the Internal Revenue Service ("IRS") as a tax-exempt organization described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code") and is recognized as tax-exempt by the California Franchise Tax Board under California Revenue and Taxation Code Section 23701d.

E. The University now desires to transfer operation of the Program to YMCO, and YMCO desires to operate the Program, on the terms and conditions set forth herein.

The Affiliation Agreement contains the following relevant language:

AGREEMENT

1. University, UCB, and UCBF[8] Obligations.

(a) Grant Funding. In consideration for YMCO's willingness to continue operation of the Program of the same nature, purpose and scope and with the quality consistent with past operation by UCB, the University will provide YMCO with the First Year Operating Grant, the Start Up Expense Grants and Endowment Support Grants, as set forth herein.

[¶. . .¶]

(d) License. The University will permit YMCO to use certain University marks in accordance with the provisions of Section 3 below.

(e) Facilities. The University will allow YMCO to have one recital per quarter in Hertz Hall, free of charge, on a mutually agreed schedule.

(f) Ceremonial Events. The University will allow YMCO to perform at ceremonial events on the UCB campus at the invitation of authorized members of the University community.

[8] University of California, Berkeley Foundation.

2. YMCO Obligations:

(a) Endowment Grants. YMCO will provide a written proposal not later than June 30 each year for annual support to the University and UCBF, for funding from the Start Up Grants and Endowments as described in Paragraph 1(a)(ii) and (iii).

(b) Governance. YMCO will be operated solely for the purposes described in, and will be governed in accordance with, its Articles of Incorporation and Bylaws.

(c) Quality. YMCO will operate the Program in accordance with the following Mission Statement:

"YMCO shall recruit economically disadvantaged students into a rigorous program providing academic tutoring and musical instruction with an end goal of gaining admission to accredited colleges and universities offering full or partial financial aid. Students accepted into YMCO will have demonstrated their skills through competitive auditions and will have provided evidence of their ability to continuously maintain a 3.0 or better grade point average from admission to acceptance at a four year institution of higher learning. YMCO's services will be provided without cost to its students."

[¶. . .¶]

(e) YMCO Personnel. YMCO will maintain systems and personnel sufficient to enable it to carry out all of its duties, obligations and functions under this Agreement. YMCO will be responsible for all matters pertaining to the selection, employment, and supervision of its employees, including, without limitation, compliance with applicable law. No YMCO employee will be considered to be an employee of the University entitled to any benefits provided by the University to its employees, including but not limited to pension or other healthcare benefits.

(f) YMCO as a Separate Entity. All correspondence, solicitations, activities and advertisements concerning YMCO will be clearly discernable as being from YMCO and not the University, as follows:

[¶. . .¶]

(j) Independent Contractors. The University and YMCO are independent contractors, and nothing in this Agreement will be

> interpreted as creating an agent-principal, joint venture, partnership, limited liability company, or any legal relationship other than independent contractors.

Under the Transition and Affiliation Agreements, the University is not involved in YMCO's day-to-day operations, such as hiring, firing or directing staff. Nor does it define the pedagogy related to the program or make student admissions decisions. The University thus argued before the ALJ that the Transition and Affiliation Agreements do not establish an ongoing relationship, because there was no specific product or service to be produced or performed by YMCO for the University. However, while the Transition Agreement is primarily concerned with the one-time transfer of University assets to YMCO, the Affiliation Agreement does envision an ongoing relationship, as evidenced by its language governing termination and renewal and by Basri's testimony regarding annual grant funding.

Section 6, subdivision (a), of the Affiliation Agreement provides that, unless affirmatively terminated by one of the parties for failure to cure a material breach of this or one of the parties' other agreements, "the initial term of this Agreement will commence on the Effective Date and will terminate on the day before the 5th anniversary of the Effective Date." However, even this five-year anniversary date is not a true "termination" of the Agreement, as subdivision (b) of the same section provides that the Agreement "will automatically renew for an additional five (5) year term, unless either party provides written notice not later than [ninety] (90) days prior to the expiration of the initial term. " The University's "affiliation" with YMCO may thereafter "be renewed for additional five (5) year terms by written agreement" of the parties.

The ongoing nature of the University's relationship to YMCO was further evidenced by Basri's testimony. According to Basri, YMCO would be required to "issue a proposal each

year explaining what the outside program was doing, who it was serving, and how it was accomplishing these activities." Basri would then review the organization's grant proposal and decide "whether the proposal warranted receiving the grant, and decide whether or not to grant funds." Thus, according to the University, it "could decide, prospectively, not to provide future funds to [ ] YMCO."

However, according to Basri, "the Young Musicians Program had over the years garnered a number of endowed funds and donations and things of that sort," which, given the unique nature of the program, could not realistically be used for any other existing University program. After consulting with the University's attorneys, Basri concluded that the "simplest thing to do would be to keep [these endowed funds and donations] and still have them serve a purpose similar to that that the donors had given them for," i.e., to simply "grant the income from those endowments to an outside organization that accomplished that [same] purpose." Ongoing funding for YMCO through donations earmarked for YMP "would be a great deal simpler, both for the Legal department and for me [than] any other sort of way to deal with those things." Moreover, while the University could deny funding if YMCO's annual grant proposal did not meet the timeline and other criteria specified in the Affiliation Agreement, Basri acknowledged that, as a practical matter, the funds would not be used for any other program but would simply accumulate in the account.

In addition to its ongoing funding from the University under the Affiliation Agreement, YMCO may also continue using performance spaces on the UCB campus.

UC-AFT MOU Regarding Management Rights and Contracting Out

The UC-AFT MOU did not reserve to the University any right to contract out bargaining unit work, nor waive UC-AFT's right to bargain over contracting out such work. The Management Rights clause found in Article 28 of the MOU reads:

> Except as otherwise limited by this MOU, the UC-AFT agrees that the University has the right to establish, plan, direct, and control the University's missions, programs, objectives, activities, resources, and priorities, including Affirmative Action plans and goals; to establish and administer procedures, rules and regulations, and direct and control University operations; to alter, extend, or discontinue existing equipment, facilities, and location of operations; to determine or modify the number, qualifications, scheduling, responsibilities and assignment of NSF; to establish, maintain, modify or enforce standards of performance, conduct, order and safety; to determine the processes and criteria by which NSF[9] performance are evaluated *[sic]*; to establish and require NSF to observe current University rules and regulations; to discipline or dismiss NSF; to establish or modify the academic calendars; to assign work locations; to schedule hours of work; or to recruit, hire, or transfer NSF. Such management of the University is vested exclusively in the University its officers, agents and bodies as delegated by the Board of Regents.

There was no evidence in the record to indicate that the MOU otherwise reserves or waives any rights to negotiate decisions to subcontract or transfer bargaining unit work.

THE PROPOSED DECISION

The ALJ addressed the complaint allegations as two issues: (1) whether the University was obligated to meet and confer over the decision to subcontract the work of YMP Instructors to YMCO and, if so, whether the University fulfilled that obligation, and (2) whether the

[9] Although not explained in the record, the term "NSF" refers to instructional faculty and non-faculty employees in UC-AFT's bargaining unit. (*Regents of the University of California* (2014) PERB Decision No. 2398-H, p. 5.) PERB may take administrative notice of matters in its own files, including Board decisions from other cases. (*County of Santa Clara* (2015) PERB Decision No. 2431-M, p. 5, fn. 5.) We do so here solely to provide context for an unidentified term whose meaning is not material to the outcome.

University's decision to close YMP and lay off YMP Instructors interfered with or was motivated by protected activity without legal justification or defense. For the subcontracting issue, the ALJ reviewed PERB and judicial precedent and summarized the law as follows:

> If the decisions to lay off bargaining unit members and affiliate with YMCO to provide music instruction were the type of decision that would not significantly abridge the employer's freedom to manage the business, then the employer's failure to give the union notice and an opportunity to meet and confer could violate the statute. However, if the employer's decision to lay off YMP Instructors and close YMP involved a change in the employer's basic operation, then the employer's decision was not within the scope of representation, even if layoffs were the result.

In this case, the ALJ found that the decision to close YMP and contract with YMCO for similar services was not within the scope of representation, and that the University had therefore not engaged in unlawful unilateral subcontracting under *Fibreboard Paper Products Corp. v. NLRB* (1964) 379 U.S. 203 (*Fibreboard*) and similar authorities. Analogizing to *Stanislaus County Department of Education* (1985) PERB Decision No. 556, the ALJ reasoned that, because the University's continued involvement with YMCO was limited to monitoring operations and providing funding but did not involve hiring employees, setting salaries or directly providing services, the Transition and Affiliation Agreements did no more than establish the University as a funding conduit rather than the kind of integrated relationship that, according to the ALJ, would make the subcontracting decision negotiable. The ALJ reasoned that, in both *Stanislaus* and the present case, the program in question was not one that the employer was required to provide, and the funds utilized for that service originated from outside of the respondent employer's coffers.

The ALJ credited Basri's explanation that the University's affiliation with YMCO was a legitimate and reasonable solution to the problem of what to do with a program that, while

immensely popular, did not fit into the strategic goals of existing University departments or programs. According to the ALJ, because the University was not required to serve the population of students targeted by YMP, but the grant funds were earmarked for YMP students, the University could cease operating YMP, but could not use YMP-designated funds for any other purpose. The University's relationship with YMCO thus stemmed from the University's desire to dispense funds for a similar purpose, rather than a need to secure the specific services offered by YMP. Viewed in this light, whether the University would continue to operate a purely voluntary outreach program for non-UC students was a managerial prerogative about the scope of the University's mission and not a negotiable decision regarding the wages, hours or other terms and conditions of employment of former YMP instructors.

In support of this conclusion, the ALJ also relied on *San Diego Adult Educators v. Public Employment Relations Bd.* (1990) 223 Cal.App.3d 1124, review den. Dec. 13, 1990 (*San Diego Adult Educators*) to address the timing of Basri's decision to close YMP and the University's ostensibly separate decision to enter into the Transition and Affiliation Agreements to support a separate, non-profit organization established to fulfill, essentially, the same purpose. Although Basri decided to close YMP about the same time that the YMP Board resolved to separate from the University, the ALJ found that UC-AFT had failed to prove that the University decided to lay off YMP instructors *because* it signed the Transition and/or Affiliation Agreements. According to the ALJ, no facts demonstrated that the University had any intention of continuing the Program or providing the same service when it announced that it would cease operating YMP and lay off its employees.

Turning to the complaint's interference and discrimination allegations, the ALJ first determined that a *Carlsbad*[10] interference analysis, which considers whether employer conduct harms protected rights without regard to the employer's motive, intent or purpose, was not applicable in this case. Relying on *Textile Workers' Union of America v. Darlington Manufacturing. Company* (1965) 380 U.S. 263 (*Darlington*), a case interpreting section 8(a)(3) of the federal National Labor Relations Act (NLRA),[11] the ALJ reasoned that, because wholly or partially ceasing operations is a fundamental managerial prerogative about the nature and scope of services to be provided, the decisions to close YMP and transfer operations to a non-University entity could constitute unlawful interference only if the underlying subcontracting decision constituted a violation of the duty to bargain or some other independent unfair practice. The ALJ explained:

> If the employer engaged in unlawful subcontracting, conduct which is inherently destructive of employees' rights, and which does not require a finding of anti-union motive to constitute a statutory violation, the *Carlsbad* standard is appropriate. On the other hand, if the employer's conduct was the lawful exercise of its managerial prerogative to close all or part of its business operation, then such conduct amounts to a statutory violation only if it is motivated by an unlawful anti-union animus.

Because the ALJ had previously concluded that the University's decision to close YMP and transfer its operations was not unlawful subcontracting, but a lawful exercise of a managerial prerogative to reduce or eliminate services, she declined to apply a *Carlsbad* analysis and dismissed the complaint's interference allegation.

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[10] *Carlsbad Unified School District* (1979) PERB Decision No. 89. (*Carlsbad*)

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

The ALJ then considered the complaint's discrimination and retaliation allegations by asking whether the record demonstrated that the University's otherwise lawful subcontracting decision was improperly motivated by protected activity. Relying again on *Darlington*, *supra*, 380 U.S. 263, the ALJ reasoned that when an employer is alleged to have exercised a managerial prerogative by reducing services or partially closing operations to discriminate against or discourage protected activity, the charging party must demonstrate that the partial closure or elimination of services was intended to glean some impermissible advantage in the *ongoing* employment relationship or to influence the conduct of the employer's *remaining* employees. Under the *Darlington* analysis, as interpreted by the ALJ, the relevant adverse action affecting employment conditions is the diminution of bargaining-unit work and the corresponding loss of power suffered by the employees' representative at the bargaining table, while the loss of income, job security and other employment benefits suffered by laid-off employees are not germane, as they are merely the consequence of the employer exercising its managerial prerogative to alter the scope or nature of the enterprise.

The ALJ acknowledged that the parties had not briefed *Darlington* or its application to a public employer's decision to discontinue and/or subcontract a program or service for allegedly discriminatory reasons. Consequently, no evidence was presented on whether E&I employs a sufficient number of statutorily-protected individuals in other programs or services such that it would realize a budgetary savings or otherwise benefit by discouraging unionization among its other employees. Nor was any evidence presented that other employees of E&I were actually or potentially deterred from protected activity out of fear that their programs or services would also be discontinued in reprisal for protected activity.

Nevertheless, because the University's closure of YMP involved the exercise of a fundamental managerial prerogative, the ALJ fashioned a hybrid test for discrimination, which combined the reasoning of *Darlington* with elements of PERB's discrimination analysis under *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*) and similar cases. According to the ALJ, to prevail on its allegation that the University discriminatorily exercised its managerial prerogative to eliminate YMP operations or services and/or lay off YMP Instructors in reprisal for protected activity, UC-AFT must demonstrate that: (1) YMP Instructors exercised rights under HEERA; (2) the University's decisionmaker(s) knew of the exercise of those rights; (3) the University laid off YMP Instructors; and (4) the layoff decision was substantially motivated by YMP Instructors' protected activity, and designed to gain some improper advantage over *other* employees of the University. The ALJ also noted that, under the traditional *Novato/Wright Line*[12] burden shifting analysis, if UC-AFT could establish each of the above elements, then the University may still escape liability by presenting evidence that, even if it acted in part for an unlawful purpose, some other, non-discriminatory objective was the true reason it chose to reduce or eliminate services and lay off employees. (*Novato, supra*, PERB Decision No. 210, p. 14; *Regents of the University of California* (1987) PERB Decision No. 640-H, p. 12; see also *Wright Line, supra*, 662 F.2d at pp. 904–905; *Martori Brothers. Distributors. v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721.)

Applying this modified *Darlington*/*Novato* analysis, the ALJ found that employees had engaged in protected activity by pursuing the Churning Grievance; that the relevant decisionmakers, including Halimah and Labor Relations officials, were aware of the grievance;

[12] *NLRB v. Wright Line, a Div. of Wright Line, Inc.* (1st Cir. 1981) 662 F.2d 899 (*Wright Line*).

that the University took adverse action by closing YMP, laying off employees, and transferring operations to a non-University entity; and that the "entire decision-making process was tainted with an unsavory and inappropriate focus on relieving the Division of E&I from the burden of complying with the UC-AFT MOU."

Although the ALJ found that Newman's desire to separate from the University was motivated by anti-union animus, she found that Basri was solely responsible for the decision to close YMP, and she found insufficient evidence that Newman had influenced Basri's decision such that her anti-union animus could be attributed to Basri. The ALJ also rejected UC-AFT's contention that Harrington's communications with UC-AFT included inadequate or shifting justifications as evidence of the University's unlawful motive or purpose, because they referenced only the "closure" of YMP, but not Basri's plans to "transfer" the Program to a non-University entity created specifically for that purpose. Relying on *Santa Ana Unified School District* (2012) PERB Decision No. 2235, the ALJ reasoned that the University was not required to give any explanation for its decision, let alone an "adequate" one, and that, there can be no "shifting" justification where none was previously provided.

Although the ALJ found each of the nexus factors argued by UC-AFT insufficient when viewed separately, she reasoned that a finding of unlawful motive was supported by the record as a whole. According to the ALJ, "Newman was consumed with the idea that compliance with the MOU would bankrupt the program she fought so hard to restore to fiscal health," while "Basri seemed [ ] intent upon appeasing [Newman] and avoiding the inevitable struggle that would ensue from compliance with not only the terms of the MOU but other workplace rules and regulations." Because these concerns arose "as a direct result of the concerted

activity of several YMP Instructors and their UC-AFT representative(s)," the ALJ found sufficient evidence of nexus to support a prima facie case of discrimination or reprisal.

Turning to the University's affirmative defense, the ALJ found that, while Basri's decision was motivated, in part, by unlawful anti-union animus, the University would have closed YMP and laid off Instructors, regardless of any protected activity. Although Basri admitted that Newman's desire to "extricate" YMP from the University's bargaining obligations UC-AFT was a positive factor in his decision, the ALJ also credited Basri's testimony that it was not the primary reason for his decision. Rather, Basri seized the opportunity to close YMP to focus on E&I's strategic priorities, which did not include YMP. Because, according to the ALJ, these were legitimate business justifications, she dismissed all discrimination and reprisal allegations in the complaint.

UC-AFT'S EXCEPTIONS

UC-AFT excepts to three aspects of the proposed decision. First, UC-AFT excepts to the ALJ's findings and conclusions that the University's unilateral decision to close YMP and affiliate with YMCO to provide services similar to those of YMP Instructors was a lawful exercise of its right to change the scope and direction of the enterprise or, in public sector parlance, to cease providing a particular service. UC-AFT offers several grounds in support of this exception. It disagrees with the ALJ's finding that the University actually ceased providing the youth music instruction service previously associated with YMP, and contends that the Transition and Affiliation Agreements demonstrate that, essentially the same program serving the same students with same instruments and equipment was continued, albeit by non-University employees. UC-AFT argues that the ALJ failed to correctly apply or consider controlling authority holding that subcontracting decisions are negotiable when essentially the same work is

performed under similar conditions by non-unit employees and/or when the decision is amenable to collective bargaining because it is based on personnel issues, such as labor costs. Because it regards the University's decision as negotiable, UC-AFT argues that the ALJ improperly ignored or misapplied *Lucia Mar Unified School District* (2001) PERB Decision No. 1440 (*Lucia Mar*) and similar precedent requiring notice and meaningful opportunity to bargain over subcontracting decisions in which "the employer simply replaces its employees with those of a contractor to perform the same services under similar circumstances." (*Id*. at p. 39.) According to UC-AFT, the University not only failed to give adequate notice; it actively concealed its subcontracting decision from UC-AFT until after it had already been implemented.

Second, UC-AFT excepts to the ALJ's failure to address the complaint's allegation that the University refused to bargain over the effects of its decision to subcontract YMP to YMCO. Like the decision itself, UC-AFT contends that the effects of this decision were amenable to the bargaining process and that the University's failure to engage in effects bargaining with UC-AFT was unlawful because the University gave no notice of the decision, faced no immutable deadline for implementation, and failed to negotiate in good faith both before and after implementation over any unresolved issues. (*Compton Community College District* (1989) PERB Decision No. 720, pp. 6-7.)

Third, UC-AFT excepts to the ALJ's findings and conclusions that the University neither interfered with protected rights, nor retaliated or discriminated against employees on the basis of union or other protected activity. UC-AFT argues the ALJ failed to apply the proper test for interference under the Board's *Carlsbad* line of cases and instead relied on *Darlington*, a private-sector case not briefed by the parties and never adopted by PERB, to dismiss the complaint's interference allegation. According to UC-AFT, the ALJ's reliance on *Darlington*, and her

conclusion that some employer conduct, such as partial business closure or elimination of services, are categorically immune from interference liability is contrary to PERB's *Carlsbad* line of cases, which focuses on whether employer conduct has interfered with, restrained or coerced employees in the exercise of protected rights, or would reasonably tend to do so, regardless of whether the decision is negotiable or a managerial prerogative. While an employer may assert operational necessity to justify its conduct, UC-AFT contends that the ALJ erred by failing to consider even the prima facie case of interference under *Carlsbad* in this case.

With respect to the complaint's discrimination allegations, UC-AFT argues that instead of following *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*) and other controlling authority, the ALJ instead created a hybrid discrimination standard, which combined elements of PERB's *Novato* test with *Darlington*. According to UC-AFT, the ALJ's newly-fashioned test improperly focused solely on whether the University's conduct affected employees in other departments with no apparent connection to the facts of this case, rather than on whether, by subcontracting YMP to a non-University entity and laying off YMP Instructors, the University "[i]mpose[d] or threaten[ed] to impose reprisals" on YMP employees or "discriminate[d] or threaten[ed] to discriminate against" YMP employees, "because of their exercise of rights guaranteed by [HEERA]." (HEERA, § 3571, subd. (a).)

DISCUSSION

We first address UC-AFT's exceptions concerning the unilateral change allegations and then consider its exceptions regarding the discrimination and interference allegations.

A. Failure/Refusal to Bargain Subcontracting Decision and/or its Effects

HEERA makes it unlawful for a higher education employer to "[r]efuse or fail to engage in meeting and conferring with an exclusive representative" regarding matters within

the scope of representation. (HERRA § 3571, subd. (c); *Regents of the University of California* (2012) PERB Decision No. 2300-H, pp. 19-20.) To prevail on a unilateral change allegation, the charging party must prove that: (1) the employer took action to change policy or made a firm decision to do so; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12 (*Pasadena Area CCD*); *City of Sacramento* (2013) PERB Decision No. 2351-M, p. 13; *County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 13.) Absent a valid defense, an employer's unilateral change affecting negotiable matters is a per se refusal to meet and confer (*City of Escondido* (2013) PERB Decision No. 2311-M, p. 8; *Lucia Mar*, *supra*, PERB Decision No. 1440, p. 26), and violates the representational rights of employees and their representative. (*Oakland Unified School District* (1983) PERB Decision No. 367, p. 22 (*Oakland*); *Regents of the University of California* (1991) PERB Decision No. 891-H, p. 10.)

Here, there is no question that by closing YMP, laying off employees and transferring the Program to an outside entity, the University changed policy. (*Pasadena Area CCD*, *supra*, PERB Decision No. 2444, p. 12.) Nor is there any doubt that this change had a generalized effect and continuing impact on terms and conditions of employment, inasmuch as "a bargaining unit is adversely affected when a work transfer results in layoffs or the failure to rehire bargaining-unit workers who would otherwise have been rehired." (*Building Material &*

Construction Teamsters' Union v. Farrell (1986) 41 Cal.3d 651, 659 (*Farrell*).)[13] Thus, as to the complaint's unilateral change allegation, only two issues were in dispute before the ALJ: Whether the University's decision to subcontract the Program was negotiable or involved negotiable effects, and whether the University provided UC-AFT with reasonable notice and meaningful opportunity for bargaining over that decision or its effects.

Our review of the record and applicable law leads us to conclude that the University's decision was negotiable under either of two lines of PERB and federal cases. First, it was substantially motivated by labor costs and personnel problems which were peculiarly suitable for resolution through collective bargaining. Second, its practical effect was to replace University employees with those of another employer to perform essentially the same services under similar circumstances. Unlike the ALJ, we conclude that the University was not authorized to act unilaterally to close YMP and transfer operations to YCMO.

We also find that the University failed to provide UC-AFT adequate notice of its decision to outsource the Program. As discussed below, the record reveals that by no later than March 6, 2013, Basri, the University's principal decisionmaker, acted in consultation with YMP's director and its advisory board to transfer the Program to an outside entity. At that

[13] Where California's public-sector labor relations statutes are similar or contain analogous provisions, agency and court interpretations under one statute are instructive under others. (*Redwoods Community College Dist. v. PERB* (1984) 159 Cal.App.3d 617, 623-624.) UC-AFT's supporting brief relies on *Farrell* and similar California Supreme Court cases interpreting the scope of representation under the MMBA. Although we agree that HEERA and the MMBA are sufficiently similar in language and purpose that these subcontracting cases decided under the MMBA provide persuasive authority for the present case, we find it unnecessary to apply the Supreme Court's test for negotiability or to determine whether it would produce a different result than PERB's *Anaheim* test as it has been applied in the HEERA context. (*Anaheim Union High School District* (1981) PERB Decision No. 177 (*Anaheim*), pp. 4-5; *Trustees of the California State University* (2006) PERB Decision No. 1839-H, adopting proposed decision at pp. 11-12.)

time, the University had not advised UC-AFT of YMP's impending closure nor that it planned to continue the Program under the auspices of a non-University entity.

1. Negotiability of the Decision to Subcontract YMP

HEERA defines the scope of representation at the University of California to include "wages, hours of employment, and other terms and conditions of employment." (HEERA, § 3562, subd. (q)(1).) Specifically excluded from the scope of representation is "[c]onsideration of the merits, necessity, or organization of any service, activity, or program established by law or resolution of the regents or the directors, *except for* the terms and conditions of employment of employees who may be affected thereby." (*Ibid*., emphasis added.) Thus, a decision to eliminate services and/or lay off employees is, by itself, not within the scope of representation. (*International Assn. of Fire Fighters, Local 188, AFL-CIO v. PERB* (2011) 51 Ca1.4th 259 [layoffs]; *City of Richmond* (2004) PERB Decision No. 1720-M [reduction in services].) The California Supreme Court has held that such matters as "the amount of work that can be accomplished or the nature and extent of the services that can be provided" affect "fundamental management decisions" that are beyond the scope of representation, because requiring bargaining over such decisions "would place an intolerable burden upon fair and efficient administration of state and local government." (*Farrell, supra*, 41 Ca1.3d at p. 660.)

Like the other PERB-administered statutes, HEERA neither expressly enumerates nor excludes subcontracting decisions from the scope of representation. While such decisions involve managerial decisions regarding the merits, necessity or organization of services, activities or programs, they also unquestionably affect wages, hours and working conditions, including whether employees who have previously performed such work will be employed at

all.[14] (*Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223, p. 12.) Where a management decision affects the merits, necessity or organization of any service or activity provided by law, it may nonetheless be negotiable, if intertwined with a negotiable decision. (*Pasadena Area CCD, supra*, PERB Decision No. 2444, p. 15.) Put another way, a decision affecting negotiable matters does not become non-negotiable simply because other, non-negotiable matters are also implicated by the decision. (*Anaheim Union High School District* (2016) PERB Decision No. 2504, pp. 11-12; *City of Sacramento, supra*, PERB Decision No. 2351-M, pp. 18-20.) The California Supreme Court has explained that to hold otherwise would defeat the overriding purpose of our statutes, which is to promote harmonious and cooperative labor relations by resolving disputes over wages, hours and other terms and conditions of employment through bilateral negotiations between public employers and employee organizations. (*Voters for Responsible Retirement v. Board of Supervisors* (1994) 8 Cal.4th 765, 782-783; see also *Trustees of the California State University* (2014) PERB Decision No. 2384-H, p. 32 (*Trustees of the CSU*); *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 612 (*City of Vallejo*); *Rialto Police Benefit Assn. v. City of Rialto* (2007) 155 Cal.App.4th 1295, 1300-1301.)

In *Anaheim, supra*, PERB Decision No. 177, the Board determined that a subject which was not specifically enumerated by statute as within the scope of representation is nonetheless negotiable if: (1) it is logically and reasonably related to wages, hours, or an enumerated term and condition of employment; (2) the subject is of such concern to both management and

[14] We use the general term subcontracting throughout this decision to refer to a transfer of unit work to employees of another employer, rather than transferring unit work to non-unit employees of the same employer. Compare *Whisman Elementary School District* (1991) PERB Decision No. 868, p. 12 with *City of Sacramento, supra*, PERB Decision No. 2351-M, pp. 14-17.

employees that conflict is likely to occur and the mediatory influence of collective negotiation is an appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the district's mission. The California Supreme Court approved this test in *San Mateo City School Dist. v. PERB* (1983) 33 Cal.3d 850, and it was subsequently applied in the Board's decision in *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375 (*Healdsburg*).

Using this test, the Board has found subcontracting decisions to be negotiable, if the management decision does not change the scope or direction of the enterprise. (*Arcohe Union School District* (1983) PERB Decision No. 360 (*Arcohe*), pp. 6-7; *Healdsburg*, *supra*, PERB Decision No. 375, pp. 85-87; see also *Oakland*, *supra*, PERB Decision No. 367, pp. 23-27)

Employers have unfettered decision-making rights over entrepreneurial and policy matters because unions lack the ability to resolve these issues through collective bargaining. However, while a subcontracting decision may involve a managerial decision "at the core of entrepreneurial control" and "be based on factors not amenable to negotiation" (*Ventura County Community College District* (2003) PERB Decision No. 1547, p. 19 (*Ventura*); citing *Fibreboard*, *supra,* 379 U.S. 203),[15] decisions involving personnel matters, such as absenteeism, workplace efficiency and employee turnover, are suitable for collective bargaining. (*Lucia Mar*, *supra*, PERB Decision No. 1440, proposed decision, p. 43.) Decisions to outsource which are based on labor costs, viz., "overall enterprise costs," are

[15] When interpreting the California labor relations statutes, PERB may take guidance, as appropriate, from administrative and judicial authorities interpreting analogous provisions of federal labor law. (*City of Vallejo*, *supra*, 12 Cal.3d at pp. 616-617.)

"peculiarly suitable for resolution through the collective bargaining framework," because the union has control over some enterprise costs (labor costs) and may make concessions through negotiations that "substantially mitigate the concerns underlying the employer's decision, thereby convincing the employer to rescind its decision." (*Ventura*, *supra*, PERB Decision No. 1547, p. 19, citing *Otis Elevator Co.* (1984) 269 NLRB 891, 901 and *First National Maintenance Corp. v. NLRB* (1981) 452 U.S. 666, 680 (*First National*); see also *Oakland*, *supra*, PERB Decision No. 367, p. 25; *Farrell*, *supra*, 41Cal.3d at p. 659.) The employee organization "need not demonstrate that it is able to solve every problem raised by the employer before it has the opportunity to negotiate." (*Lucia Mar*, *supra*, PERB Decision No. 1440, proposed decision, p. 43.)

In addition to the *Anaheim* test for negotiability, where an employer contemporaneously decides to terminate bargaining unit work and replace employees with those of an independent contractor to do the same work under similar conditions, such decisions do not involve a change in the scope and direction of the enterprise or a core entrepreneurial decision beyond the scope of the collective bargaining obligation. (*Fibreboard*, *supra*, 379 U.S. at p. 215; cf. *First National*, *supra*, 452 U.S. at pp. 686–687.) When this kind of subcontracting is involved, there is thus no need to inquire into labor costs or to apply *Anaheim* or any other tests for negotiability, as the U.S. Supreme Court, the NLRB, and PERB have all concluded that, as a matter of law, such decisions are negotiable. (*Lucia Mar*, *supra*, PERB Decision No. 1440, proposed decision, pp. 37-40 [discussing federal cases]; *Oakland Unified School District* (2005) PERB Decision No. 1770, pp. 9-10; *Redwoods Community College District* (1997) PERB Decision No. 1242, p. 3.)

We agree with UC-AFT that the University's decision to transfer YMP's operations to a non-University entity was negotiable under either line of cases. First, there is ample evidence that the decision to transfer YMP to YMCO was motivated in large part by personnel issues, including labor costs, which were eminently amenable to resolution through collective bargaining. Although Basri testified that YMP was not part of the strategic goals of existing University departments or programs, he also acknowledged that his decision was influenced by concerns that YMP consumed revenue from E&I needed to cover salaries and other human resources expenditures, and that the Program was undergoing a period of growth and expansion, portending additional expenses in the future.

Although the University argued that Newman's concerns did not influence Basri's decision to close the program, Basri admitted that "the fact that she was willing and interested in potentially [the University] dropping the program was, you know, a positive factor in [his] consideration" of the issue. Indeed, given Newman's success and importance to the survival of the Program as its director and chief fundraiser, it is not surprising that Basri's decision to close YMP was influenced, at least in part, by Newman's concerns, which Basri characterized as some "financial" and some "personnel-related," while others "had to do with space and the interaction of the program with the Music department." Particularly well-documented were Newman's complaints about the costs associated with the UC-AFT-negotiated wages and benefits for YMP Instructors, and her view that private instruction to minors, per hour "is not a unionized activity in any [ ] program, nationally," and that this "mistake" needs to be "fixed."

By January 2013, Newman had announced her refusal to conduct excellence reviews for YMP Instructors "until we have determined the right path for YMP's future relationship with the university." Her stated concern was "how to pay YMP's bills this year" and she

identified several factors as seriously threatening YMP's financial stability. Foremost among these were "[t]he financial implications connected with continuing the status quo" of "fringe benefits for teachers," which, according to Newman, would cost the program $70,000 which was not budgeted for the fiscal year. Additionally, according to Newman, "New potential donors are hesitant to become involved with union disputes."

The record also supports UC-AFT's contention that the University's decision to close YMP coincided with, and was influenced by, its decision to continue providing the same musical instruction services with many of the same employees but under the auspices of a non-University entity. *San Diego Adult Educators*, *supra*, 223 Cal.App.3d 1124, review den. Dec. 13, 1990 is instructive.

In *San Diego Adult Educators*, *supra*, 223 Cal.App.3d 1124, the Court of Appeal reviewed a PERB decision (*San Diego Community College District* (1988) PERB Decision No. 662), wherein the Board had determined that a community college district had violated its duty to bargain by outsourcing teaching assignments for various language courses. Two groups of instructors were involved. Tenured instructors, who were paid on a monthly basis, taught so-called major language courses, including French, Spanish and German, while non-tenured instructors, paid on an hourly basis, taught so-called minor language courses, including Farsi, Swedish and Tagalog.

The college district decided to discontinue offering major language classes because the fees paid by students for these courses were insufficient to cover the costs of the instructors' salaries. At the time, the college district had no plans to resume offering these classes nor to continue them under the control of any other entity. After members of the public pressured the

college district to reinstate the major language classes, it contracted with a separate, non-profit foundation to provide the major language classes.

Meanwhile, the college district continued offering minor language courses, because the fees paid by students in those subjects covered the costs of the hourly wages paid to non-tenured instructors. However, after announcing that the major language courses would resume under the auspices of the non-profit foundation, members of the public again exerted pressure on the college district, this time to transfer the minor language classes to the foundation as well. In response, the college district contracted with the foundation to teach minor language courses and laid off the non-tenured instructors who had previously taught these courses.

On these facts, PERB concluded that the college district had violated its duty to bargain by unilaterally subcontracting the work of both groups of instructors. On review of the Board's decision, the Court of Appeal agreed that the second contract for minor language courses constituted unlawful subcontracting, but disagreed with PERB that the college district had committed an unfair practice by contracting for major language course. The distinguishing feature was that *at the time* the college district discontinued offering major language courses, it had no plans to continue or resume offering such courses, either itself or under the auspices of a separate entity. The fact that it later did so was, according to the appellate court, a separate decision, which had no effect on its earlier decision to discontinue offering major language courses and reduce staffing accordingly. By contrast, the Court held that the decision to discontinue minor language courses and layoff non-tenured instructors was negotiable because it was part of the simultaneous decision to subcontract, or at least influenced by the subcontracting decision.

Similarly, in the present case, YMCO "restored" the Program's operations in Fall 2013, pursuant to the Transition and Affiliation agreements with the University. Although YMCO's offices are located off campus, it uses University space for its performances. Its director is the same, its board president is the same, its marketing identity is largely the same, including its use of University trademarks and scripts, its musical instruments are the same, several of its teachers are the same, and, as Newman herself observed to Fong, the students served by the Program are also the same. Indeed, in Basri's estimation, it was "a feather in [the University's] cap" to be able to transfer *and continue* the Program, but without the financial, personnel and other problems associated with direct University control.

On cross-examination, Newman rejected the words "transfer" and "transition" to describe YMP's relationship to YMCO, because, in her view, these terms implied continuity between separate and unrelated programs. However, YMCO incorporated YMP's mission statement and described itself in a financial report to the University as a "permanent continuation" of YMP. Basri similarly explained that to grant endowed funds to YMCO, the organization must be "doing something similar enough to what the money had been granted to the Regents for that we [would be] comfortable with []."

It is true, as the ALJ found, that the University and YMCO did not finalize and execute the Transition and Affiliation Agreements until months after Basri had announced the closure of YMP and layoff of YMP Instructors. However, focusing solely on the date these agreements were signed, as opposed to the fact that they were already under negotiation *even before* YMP's closure was announced, elevates form over substance. In his March 5, 2013 correspondence with Newman, Basri answered Newman's inquiry about "a timeline for YMP's exit" from the University by indicating that he had been "waiting for the [YMP] Board's opinion on whether

that was the direction we are all agreed upon." Upon receiving word from Newman that the YMP Board agreed with Basri's proposal, Basri responded on March 6, 2013, that he would now "work with the Chancellor to figure out the next steps" and "start the serious work on all the legal, HR, and financial issues" associated with YMP's "exit."

Thus, by the University's own account, negotiations for "the transfer of assets, ongoing support and a formal Affiliation Agreement" were already underway in May 2013. Even without a formal Affiliation Agreement, as early as April 24, 2013, the University had already provided YMCO with a conditional grant in the amount of $10,000. Thus, the record demonstrates that the execution and implementation of the Affiliation and Transition Agreements on October 24, 2013 reflected the culmination, rather than the genesis, of the University's months-long plan to close YMP and transfer operations to a non-University entity.

Additionally, while Basri sought to distinguish between, on the one hand, transferring the Program wholesale from the University to YMCO and, on the other, closing YMP but transferring merely some of its former assets, the Transition Agreement itself acknowledges that, "The University now desires to transfer operation of *the Program* to YMCO." (Emphasis added.) Far from being a mere legal formality, this formulation is entirely consistent with Basri's testimony and other evidence in the record. Under the Transition and Affiliation Agreements, the University and YMCO also share a public marketing identity. While YMP may have been "at the bottom" of the list of priorities and strategic goals of E&I and other University programs, it was, nonetheless, an immensely popular and successful community outreach program, and, in Basri's view, it would be "a feather in our cap" for the University to be seen as contributing to its continuation "on its own." Unlike the ALJ, we do not regard *Oakland*, *supra*, PERB Decision No. 367 and similar cases as distinguishable because the

University will not continue to pay YMCO for music instruction services on an on-going basis. By its own admission, the University promised to provide YMCO not only with start-up and bridge financing, but also "annual grants from existing endowments to support ongoing operations, as well as providing access to Hertz Hall for concerts and recitals."

Nor are we persuaded that YMP was so unusual among University programs or foreign to the University's mission that the decision to continue it as an annual grant-funded program must be regarded as a fundamental managerial decision outside the scope of representation. The University's mission is "to serve society as a center of higher learning, providing long-term societal benefits through transmitting advanced knowledge, discovering new knowledge, and functioning as an active working repository of organized knowledge." The University fulfills that mission through a variety of programs, including undergraduate education, graduate and professional education, research and "other kinds of public service, which are shaped and bounded by the central pervasive mission of discovering and advancing knowledge." For nearly half a century, the University considered the educational and public service components of its mission broad enough to encompass the Program, and consistent with this view, it provided instruction to young musicians staffed by University-paid Instructors and directed by University managers, housed in a University department on the University's campus and using University-owned equipment.

Contrary to the University's argument to the ALJ, the fact that the University serves as a funding conduit to YMCO and does not hire employees, set salaries or directly supervise the provision of services does not bring this case within the ambit of *Stanislaus County Department of Education*, *supra*, PERB Decision No. 556. Grant funding is not unique to YCMO. Much of the University's scientific research laboratory work is funded by federal grants secured by

principal investigators, who, in turn, pay the salaries and benefits of University employees. (*Unit Determination for Professional Non-Academic Senate Instructional and Research Employees of the University of California* (1982) PERB Decision No. 270-H, pp. 13-17.)

If YMCO's reliance on grant funding does not distinguish it from other University programs, neither does its mission. While "not exactly like YMP," Basri testified that other so-called "gateway" programs established "under the general umbrella of the Centers for Educational Partnerships [ ] operate in a number of schools around the Bay Area and even a bit in Southern California." According to Basri, the purpose of such programs is two-fold: "to inculcate a college-going culture in the schools that they operate in, and then the more specific goal is to try to get talented students from those schools into the UC system and UC Berkeley in particular." While it is not within PERB's authority to say what programs the University will offer or to suggest that it is *required* to serve the student population targeted by YMP, the fact that it chose to operate YMP for more than four decades undermines any notion that the Program was so outside the University's educational and public service missions that its transfer to a non-University entity is only a managerial prerogative, and not subject to negotiation. Because the University's decision to close YMP and transfer its operations to a non-University entity was based, in large part, on personnel matters, including labor costs, which were subject to resolution through collective bargaining, and because its practical effect was to continue essentially the same service under different organizational auspices, we conclude that the decision was subject to negotiation.

2. Whether the University Provided Adequate Notice of Its Subcontracting Decision

HEERA imposes a mutual obligation "to meet at reasonable times and to confer in good faith" and "to endeavor to reach agreement on matters within the scope of representation."

(HEERA, § 3562, subd. (m).) The meet-and-confer process must include "adequate time for the resolution of impasses." (*Ibid*.) Like the other PERB-administered statutes, the statutory scheme under HEERA presumes that notice of changes to negotiable matters will be provided "in a meaningful manner at a meaningful time." (*City of Sacramento, supra*, PERB Decision No. 2351-M, pp. 29-30.) What constitutes meaningful notice will necessarily vary, depending on the circumstances of each case, but, at minimum, an employer must give notice sufficiently in advance of reaching a firm decision to allow the representative an opportunity to consult its members and decide whether to request information, demand bargaining, acquiesce to the change, or take other action. (*Ibid*.)

By any measure, the University failed to provide UC-AFT with meaningful notice of the decision to transfer YMP's operations to a non-University entity. The record demonstrates that, as early as November 2012, and in response to Newman's insistence that YMP "extricate itself" from the UC-AFT MOU, Basri had asked the campus general counsel to research two options, "each of which would get YMP completely out from under all the personnel issues without damaging the program." At hearing, Basri identified these "two grand options" as relocating YMP from E&I to either Cal Performances or the UCB Extension Program. By early 2013, however, when neither of these options proved feasible, Basri decided that the best course was to transfer YMP's operations outside the University entirely, which he then discussed with Newman and proposed to the YMP Board. Upon receiving word of the YMP Board's agreement with Basri's plans in March 2013, Basri set about "the serious work on all the legal, HR, and financial issues" necessary for YMP's separation from the University.

Although Basri had made his decision as early as March 2013, on April 19, 2013, Harrington advised UC-AFT that the University was "seriously considering whether it should

continue with the YMP program." Harrington followed up her initial telephone conversation with a written proposal to provide notice of layoffs and /or pay in lieu of notice to YMP instructors, depending upon their years of service. On May 13, 2013, Harrington informed UC-AFT that the University had "decided to close [YMP], effective June 1, 2013." Harrington made no mention, in any of these communications, of the University's plans to subcontract or "transfer" YMP's operations to a "successor" organization.

Moreover, by the University's own account, "[i]n April 2013," members of the YMP Advisory Board had formed YMCO

> "to continue [YMP's] mission of recruiting economically disadvantaged junior high and high school students to participate in a rigorous program providing academic tutoring and musical instruction with an end goal of gaining admission to accredited colleges and universities offering full or partial financial aid. The intent is to have YMCO establish and maintain a close relationship with the University and negotiations between the parties are underway for the transfer of assets, ongoing support and a formal Affiliation Agreement."

The timing of these events is significant. Correspondence between Basri, Halimah and Newman confirms that, "E&I was aware of the *imminent* closure of YMP in April [2013]," several weeks before the decision was disclosed to UC-AFT. (Emphasis added.) It also reveals that, while not disclosed to UC-AFT any time before May 24, 2013, the "transfer" of YMP's "administration and management" was not a separate or subsequent development, but integral to Basri's decision. Despite Basri's "increasingly firm conviction" that YMP and the University must find "a new arrangement" and that separation from the University was the "only one that seems to make a lot of sense to me," he consciously postponed starting "the serious work on all the legal, HR and financial issues" until he had agreement from the YMP Board to take over and continue the Program as a non-University entity.

UC-AFT asserts, and there is no evidence to the contrary, that it first learned of plans to *transfer* YMP to a non-University entity as a result of the May 24, 2013 announcement posted on the University's website. By the time UC-AFT learned of the decision to transfer the Program to YMCO (as opposed to simply closing it), the transfer was already well underway. In fact, months before the Transition and Affiliation Agreements were finalized, Basri approved "bridge financing to YMCO" in the amount of $10,000 and the University announced "annual grants from existing endowments to support ongoing operations, as well as providing access to [University facilities] for concerts and recitals."

Although the University argued in its post-hearing brief that UC-AFT had waived any right to meet and confer by failing to request negotiations, it is well-settled that a union cannot waive bargaining over a negotiable matter when it had no actual or constructive notice of the issue, until after the employer had already reached a firm decision. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 33-35, and cases cited therein.) Even if an employer does not implement the change in policy until later, or perhaps not at all, its act of reaching a firm decision to do so without first providing meaningful notice and opportunity for bargaining violates the bilateral scheme of collective bargaining contemplated by our statutes. (*Id*. at pp. 35-36; HEERA, §§ 3560, subd. (a), 3561, subd. (a), 3562, subd. (m).) The fact that employees were not laid off until May 23, 2013, or that the Program did not fully resume operations under the auspices of YMCO until the following October does nothing to alter the analysis. The University only hinted of YMP's *possible closure* on April 19, 2013, but did not inform UC-AFT of its firm decision until one month later, and even then, made no mention of a successor organization to whom YMP's operations would be transferred. Where, as here, the

bargaining representative has no actual or constructive notice of plans to alter negotiable matters, there is no meaningful notice, and thus no issue of waiver of the right to bargain.

3. Failure to Bargain over Effects of the Decision to Close/Transfer YMP

UC-AFT also excepts to the ALJ's failure to address the complaint's allegation that the University failed to bargain over the negotiable effects of subcontracting YMP to a non-University entity. UC-AFT contends that, even if the University's subcontracting decision was not itself negotiable, the University nonetheless had an obligation to provide notice and opportunity to bargain over negotiable effects before implementation. We agree.

Allegations included in a complaint are not only ones that the charging party wishes to pursue, but also ones that the agency has determined *should* be pursued. (*County of Fresno* (2014) PERB Decision No. 2352-M, p. 4; see also *City of Inglewood* (2015) PERB Decision No. 2424-M, p. 12.) Where identical or overlapping facts support more than one theory of liability, each of which is set forth in the complaint, consideration of one theory will generally not replace or subsume consideration of the others. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 20 (*Fresno Co. IHSS*) ; *City of San Jose* (2013) PERB Decision No. 2341-M, pp. 49-50; *Regents of the University of California* (1985) PERB Decision No. 520-H, pp. 10-11.) Because the purpose of a formal hearing is to "[i]nquire fully into all issues and obtain a complete record upon which [a] decision can be rendered" (PERB Reg. 32170, subd. (a)),[16] once the ALJ concluded that the University's subcontracting decision was not itself negotiable, she still had an obligation to consider the effects bargaining allegation or explain why it need not be addressed. (*Fresno Co.*

[16] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

IHSS, *supra*, PERB Decision No. 2418-M, p. 20; *County of Fresno*, *supra*, PERB Decision No. 2352-M, p. 4.)

Although we agree with UC-AFT that the ALJ should have either addressed the effects bargaining allegation or explained her decision not to, unlike the ALJ, we have concluded that the University failed to provide adequate notice of and opportunity to bargain over its decision to subcontract YMP. It necessarily also failed to provide adequate notice and opportunity for decisional bargaining. It is therefore unnecessary to consider the University's contention that UC-AFT waived its right to effects bargaining by failing to identify negotiable matters or to request effects bargaining. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 30-31; *County of Santa Clara*, *supra*, PERB Decision No. 2321-M, pp. 23-24.) Thus, even if the decision to lay off employees was non-negotiable, we conclude that the University nonetheless violated its duty to bargain by failing to provide UC-AFT notice and opportunity to bargain over the negotiable effects of that decision.

B. Alleged Violations of Employee Rights

1. The Complaint Allegations and the Issues Raised by UC-AFT's Exceptions

The amended complaint alleges that by announcing and then implementing its decision to close YMP and transfer operations to a non-University entity, the University interfered with protected rights, retaliated against employees for pursuing a grievance, and/or unlawfully sought to extricate itself from its bargaining obligations to UC-AFT and to rid itself of union-represented employees. UC-AFT argues that the ALJ misapplied or ignored PERB's *Carlsbad* analysis and instead relied on inapposite federal authority to dismiss the complaint's interference allegation. With respect to the complaint's reprisal and discrimination allegations, UC-AFT argues that the record contains both direct and circumstantial evidence of the University's

unlawful motive, intent or purpose, that the ALJ erroneously applied the *Novato*/*Wright Line* analysis to find that the University had proven its affirmative defense, and that, under either the *Campbell* or *Novato* analysis, the ALJ should have found a violation.

Because the complaint's allegations and the issues raised in UC-AFT's exceptions involve several related but distinct theories of liability, we take this opportunity to clarify our decisional law regarding interference and discrimination, and the relationship of the different tests for employer interference, reprisal or discrimination under *Carlsbad*, *supra*, PERB Decision No. 89, *Campbell*, *supra*, 131 Cal.App.3d 416 and *Novato*, *supra*, PERB Decision No. 210 to one another. Because a central contention of UC-AFT is that the ALJ either improperly relied on or misapplied federal authority to dismiss the complaint's interference and discrimination allegations, we also review the sometimes complex relationship of HEERA and other PERB-administered statutes to federal statutory language and decisional law.

a. The Statutory Language

HEERA section 3565 guarantees higher education employees the rights to "form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." In language virtually identical to that of the other PERB-administered statutes, HEERA section 3571, subdivision (a), makes it unlawful for a higher education employer to "[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by [HEERA]." Additionally, HEERA section 3571, subdivision (b), makes it unlawful for a higher education employer to deny organizational rights guaranteed by HEERA.

b. *Carlsbad* and its Relationship to Federal Statutory and Decisional Law

When drafting HEERA and the other PERB-administered statutes, the California Legislature took much of its inspiration from the NLRA. (*Voters for Responsible Retirement v. Board of Supervisors*, *supra*, 8 Cal.4th at pp. 782-783; *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 12.) PERB and California courts have therefore often looked to private-sector precedent under the NLRA and/or California's Agricultural Labor Relations Act (ALRA)[17] as persuasive authority for interpreting parallel provisions in the PERB-administered statutes or doctrines borrowed from private-sector decisional law and codified in our statutes. (*Trustees of the California State University* (2017) PERB Decision No. 2522-H, pp. 15-17; *Modesto City Schools* (1983) PERB Decision No. 291, pp. 60-61 (*Modesto*); *State of California* (2007) PERB Order No. Ad-367-S, p. 14; *McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 311 (*McPherson*); *City of Vallejo*, *supra*, 12 Cal.3d at p. 611.) However, while federal authorities "undoubtedly provide a useful starting point," they "do not necessarily establish the limits of California public employees' representational rights" (*Social Workers' Union, Local 535 v. Alameda County Welfare Dept.* (1974) 11 Cal.3d 382, 391), and PERB is not constrained by private-sector precedent where our statutes differ from federal law or serve a dissimilar purpose. (*Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 15 (*Capistrano*); *Carlsbad*, *supra*, PERB Decision No. 89, p. 6; *Walnut Valley Unified School District* (2016) PERB Decision No. 2495, pp. 14-20.) In each instance, the touchstone for whether private-sector decisional law or other foreign authority is applicable to California public-sector labor relations is whether its underlying reasoning is consistent with the language, policies and purposes of the PERB-administered statutes. (*Capistrano*, *supra*,

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

PERB Decision No. 2440, p. 35; *County of Riverside* (2012) PERB Decision No. 2233-M, pp. 7-8; *State of California (California Department of Corrections)* (1980) PERB Decision No. 127-S, pp. 7-8.)

Historically, the Board has assigned particular significance to the fact that, unlike the NLRA, which includes separate provisions prohibiting employer interference and discrimination on the basis of protected rights, the PERB-administered statutes include all forms of employer violations of employee rights in a single section of the statute. (HEERA, § 3571, subd. (a); *San Dieguito Union High School District* (1977) EERB[18] Decision No. 22 (*San Dieguito*), pp. 14-17 overruled in part on other grounds by *Carlsbad, supra*, PERB Decision No. 89 [interpreting identical language of Educational Employment Relations Act (EERA)[19]]; see also *Davis Unified School District, et al.* (1980) PERB Decision No. 116, p. 3, fn. 2.) Reasoning that the words "*because of* their exercise of rights" applied to *all* instances of employer conduct proscribed by the Legislature, the *San Dieguito* Board concluded that, unlike federal authorities interpreting the NLRA's prohibitions against employer interference, restraint or coercion,[20] EERA required some showing of unlawful motive, intent or purpose for

[18] Until January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.

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

[20] Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees" in the exercise of rights guaranteed by section 7 of the NLRA, including the rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right to refrain from any or all of such activities. (29 U.S.C., §§ 158, subd. (a); 157.) Despite differences in statutory language, PERB and California courts have held that the scope of employee rights guaranteed by the PERB-administered statutes is generally parallel to those guaranteed by NLRA section 7. (*Modesto, supra*, PERB Decision

any and all of the employer violations of employee rights listed in EERA section 3543.5, subdivision (a). (*Ibid*., Emphasis added.)

In *Carlsbad*, *supra*, PERB Decision No. 89, a Board majority overruled *San Dieguito* in part, and held that EERA's protection of employee rights is not "invariably dependent upon an affirmative finding of intentional infringement." (*Id*. at pp. 5, 7-8.) *Carlsbad* involved a school district's "idiosyncratic reassignment[ ]" of four known union activists from their teaching positions at the district's only high school to a junior high school, where conditions were less favorable for organizing on behalf of the employees' chosen employee organization. The issue in *Carlsbad* was whether the employer interfered with or restrained the exercise of protected rights by transferring union activists "because of" their protected activity. With respect to two of the employees, the Board adopted the hearing officer's findings and conclusions that their transfers were not based on educational considerations but on their protected activity, and that the transfers thereby interfered with or restrained employees in the exercise of their protected rights to self-organization. (*Id*. at pp. 11-13.)

Carlsbad thus treated interference allegations similar to alleged violations of NLRA section 8(a)(1) in that unlawful motive, intent or purpose was no longer an element of the prima facie case, and, as discussed below, PERB and California courts have frequently looked to private-sector authority for guidance when considering interference allegations arising under HEERA and other PERB-administered statutes. (*Trustees of CSU*, *supra*, PERB Decision No. 2384-H, p. 28, fn. 23; *Los Angeles Community College District* (2014) PERB Decision No. 2404, pp. 6-9 (*Los Angeles CCD*); *McPherson*, *supra*, 189 Cal.App.3d at p. 311.)

No. 291, pp. 60-61; *McPherson*, *supra*, 189 Cal.App.3d at p. 311; cf. *Redwoods Community College Dist. v. PERB*, *supra*, 159 Cal.App.3d at p. 622; *Walnut Valley Unified School District*, *supra*, PERB Decision No. 2495, pp. 14-20.)

The *Carlsbad* Board held that, by combining all employer violations of employee rights in a single section of the statute, the Legislature intended for PERB to devise a single, comprehensive test applicable for all employer conduct prohibited by that part of the statute. (*Id.* at pp. 9-11.) That test, as announced in *Carlsbad*, was as follows:

> 1. A single test shall [apply to all alleged employer violations of employee rights.]
>
> 2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights . . . a prima facie case shall be deemed to exist;
>
> 3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
>
> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available; [and,]
>
> 5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

(*Carlsbad*, *supra*, PERB Decision No. 89, pp. 10-11.)

The *Carlsbad* Board thus expressly rejected the NLRA's bifurcation of interference and discrimination allegations in favor of a single, comprehensive test covering all employer violations of employee rights, regardless of whether the conduct at issue is characterized as reprisal, discrimination, interference, restraint, coercion, or a threat to engage in such

conduct.[21] Although PERB has since adopted and refined other tests for employer violations of employee rights, including those for *Campbell* and *Novato* discrimination, it has never overruled *San Dieguito*'s holding, as modified and affirmed by *Carlsbad*, that a single, comprehensive test applies for all employer violations of employee rights. To the contrary, because the employee rights and employer unfair practice provisions of HEERA and other PERB-administered statutes are virtually identical to those in EERA, PERB has repeatedly extended the *Carlsbad* test to the other PERB-administered statutes. (*State of California (California Department of Corrections), supra*, PERB Decision No. 127-S, pp. 7-8; *California State University, Sacramento* (1982) PERB Decision No. 211-H, pp. 12-13; *Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M (*Stanislaus*), pp. 22-23; *County of Merced* (2014) PERB Decision No. 2361-M, pp. 6-7, 9-11.) Even where PERB has adopted additional tests for some forms of employer conduct, it has often characterized these additions to PERB case law as variations, clarifications or elaborations of the *Carlsbad* standard. (See, e.g., *California State University, Sacramento*, *supra*, PERB Decision No. 211-H, p. 32 [*Novato* clarifies "but for" prong of *Carlsbad* test]; see also *State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S (*DPA*), p. 14, fn. 12; and *Stanislaus*, *supra*, PERB Decision No. 2231-M, p. 22-23.)

c. The Prima Facie Case of Interference under *Carlsbad*

Under *Carlsbad*, an interference violation will be found where the employer's conduct interferes or tends to interfere with the exercise of protected rights and the employer is unable to

[21] As explained below, part of the Board's concern in *Carlsbad* was to avoid "attribution to the word 'discrimination' a definition unique to section 8(a)(3) of the NLRA" but contrary to the language and statutory scheme of EERA. (*Carlsbad*, *supra*, PERB Decision No. 89, pp. 9-10.)

justify its actions by proving operational necessity. (*Carlsbad, supra*, PERB Decision No. 89, pp. 10-11.) Thus, employer conduct may violate employee rights without regard to the employer's subjective intent, motive or purpose. (*Id.*, pp. 7-8.) The adverse action is harm to protected rights that results or is reasonably likely to result from the employer's conduct. (*Los Angeles CCD, supra*, PERB Decision No. 2404, p. 9; *Santa Monica Community College District* (1979) PERB Decision No. 103, pp. 19-20 (*Santa Monica CCD*), affirmed by (1980) 2 Cal.App.3d 684.) A finding of interference, coercion or restraint also requires no evidence that any employee subjectively felt threatened or intimidated or was actually discouraged from participating in protected activity. (*Hartnell Community College District* (2015) PERB Decision No. 2452, p. 24; *Sacramento City Unified School District* (1982) PERB Decision No. 214, pp. 14-16.) Rather, the inquiry is an objective one which asks whether, under the circumstances, employees would reasonably be deterred from engaging in protected activity. (*Santa Monica CCD, supra*, PERB Decision No. 103, pp. 19-20.)

Because the focus in an interference case is on the harm to statutory rights, unlike in the *Novato* test, there is also no need to show that employees suffered any demonstrable or objectively adverse effect on their employment conditions. (*Clovis Unified School District* (1984) PERB Decision No. 389, pp. 14-15.) An express or implied threat of reprisal or discrimination, or to interfere with, restrain, or coerce employees because of protected rights violates the statute as much as an actual reprisal or act of discrimination, interference, restraint or coercion. (HEERA, § 3571, subd. (a); *Trustees of CSU, supra*, PERB Decision No. 2384-H, p. 38; *Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M, pp. 20-21; *John Swett Unified School District* (1981) PERB Decision No. 188, pp. 5-8, adopting proposed decision at pp. 27-28.) Where employer conduct has the natural

and probable consequence of discouraging protected activity, the "chilling effect" itself is sufficient harm for a prima facie case. (*Carlsbad*, *supra,* PERB Decision No. 89, p. 13; *San Diego Unified School District* (1980) PERB Decision No. 137, p. 18 (*San Diego USD*); *El Dorado Union High School District* (1986) PERB Decision No. 564, adopting proposed decision, p. 30.)

d. *Carlsbad* Balancing: "Comparatively Slight Harm" versus "Inherently Destructive"

While a prima facie case of interference under *Carlsbad* is essentially the same as under private-sector precedent interpreting NLRA section 8(a)(1), *Carlsbad's* balancing analysis of the employer's affirmative defense diverges significantly from private-sector interference cases. The "inherently destructive"/"comparatively slight harm" framework used for evaluating employer defenses under *Carlsbad* has no analog in private-sector interference jurisprudence. Rather, *Carlsbad* borrowed this framework, more or less verbatim, from *NLRB v. Great Dane Trailers, Inc.* (1967) 388 U.S. 26 (*Great Dane*) and similar cases interpreting the *anti-discrimination* language of NLRA section 8(a)(3), which expressly requires proof of unlawful motive, intent or purpose to find a violation.[22] (*DPA*, *supra*, PERB Decision No. 2106a-S, p. 11; *Pittsburg Unified School District* (1978) PERB Decision No. 47, p. 20, fn. 16 (*Pittsburg*) [recognizing *Great Dane* as source of the "natural and probable consequence" language used for determining whether employer conduct is "inherently

[22] NLRA section 8(a)(3), in relevant part, makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." (29 U.S.C., § 158, subd. (a)(3).) Judicial and administrative authorities uniformly interpret section 8(a)(3) as requiring some proof of unlawful motive, intent or purpose. (*American Ship Bldg. Co. v. NLRB* (1965) 380 U.S. 300, 311 (*American Ship Building*); *Radio Officers' Union of Commercial Telegraphers Union, AFL v. NLRB* (1954) 347 U.S. 17, 42-44 (*Radio Officers*)).

destructive" of protected rights].) Whether an employer's conduct is inherently destructive or comparatively slight in its effect on protected rights thus determines the level of scrutiny used to evaluate the employer's affirmative defense (*State of California* (*Department of Corrections & Rehabilitation*) (2012) PERB Decision No. 2282-S, pp. 16-17; *County of San Bernardino* (*Office of the Public Defender*) (2015) PERB Decision No. 2423-M, pp. 37-38 (*San Bernardino*)), and may even determine the outcome of the case. When an employer policy expressly and categorically bans "union" activity in the workplace, requiring it to show not just operational justification, but operational *necessity*, i.e., that *no alternative* was available is appropriate. (*Long Beach Unified School District* (1980) PERB Decision No. 130, p. 23; *Lafayette Park Hotel* (1998) 326 NLRB 824, 825; *Martin Luther Mem'I Home, Inc.* (2004) 343 NLRB 646, 647 [employer rule explicitly restricting protected activity per se unlawful].)

Despite the significance of this step in the analysis, the Board has never identified or explained what distinguishes comparatively slight harm from inherently destructive conduct. The *Carlsbad* test carried over language from *San Dieguito* and prior Board decisions indicating that employer conduct would be deemed "inherently destructive" of protected rights, if its "natural and probable consequence" would be to discourage the exercise of such rights. (*San Dieguito*, *supra*, EERB Decision No. 22, pp. 14, 16-17, overruled in part by *Carlsbad*, *supra*, PERB Decision No. 89.) It is clear that this formulation came from *Great Dane* and similar private-sector authority.[23] (*Pittsburg*, *supra*, PERB Decision No. 47, p. 20, fn. 16.) The *Carlsbad* majority also, at least implicitly, found the employer's involuntary transfer of

[23] Although *Great Dane* is not cited by the *Carlsbad* majority, the case was briefed extensively before the hearing officer and was clearly part of the Board's deliberations, as indicated in Member Raymond Gonzales' concurring opinion. (*Id*. at p. 21, fn. 2; see also proposed decision, pp. 13-14, 16, 21.)

union organizers to cause comparatively slight harm, rather than inherently destructive, as evidenced by the fact that the majority balanced the harm to the right to self-organization against the "educational objectives" asserted as the employer's justification for its conduct, rather than asking whether the transfers were caused by circumstances beyond the employer's control and whether any alternative was available. (*Id*. at pp. 12-13.) Otherwise, however, *Carlsbad* offered little guidance for distinguishing inherently destructive conduct from comparatively slight harm and in early decisions following *Carlsbad*, the Board acknowledged that it had yet to provide a definition of the term "inherently destructive" or to advance any principles of general application for identifying such conduct. (*Coast Community College District* (1982) PERB Decision No. 251, p. 23, fn. 6 (*Coast CCD*); *Office of the Los Angeles County Superintendent of Schools* (1982) PERB Decision No. 263, pp. 8-9.)[24]

In one early decision applying *Carlsbad*, PERB held that requiring employees to give up organizational activities as a condition for receiving a pay increase was "inherently destructive" of employee rights, because it would tend to discourage both present and future protected activity. (*Santa Monica CCD*, *supra*, PERB Decision No. 103, pp. 19-20, citing *Great Dane*, *supra*, 388 U.S. 26.) However, the case offered no further analysis of the issue.

PERB and federal cases have also held that employer conduct directed against a union officer, steward or other employee representative, *in his or her capacity as an employee*

[24] In cases where the charging party failed to state a prima facie case, or where the employer asserted no justification for its actions, it was unnecessary to determine whether the conduct at issue had caused comparatively slight harm or was inherently destructive, and the Board understandably declined to consider the issue. (See, e.g., *San Diego USD*, *supra*, PERB Decision No. 137, p. 18; *Office of Kern County Superintendent of Schools* (1985) PERB Decision No. 533, adopting proposed decision at pp. 51-53; *City & County of San Francisco* (2004) PERB Decision No. 1664-M; *Hilmar Unified School District* (2004) PERB Decision No. 1725, p. 16.)

representative, may also be found inherently destructive of employee and organizational rights. (*State of California (Department of Corrections & Rehabilitation), supra*, PERB Decision No. 2282-S, pp. 16-17; *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, pp. 22-23; *Allis-Chalmers Corp*. (1977) 231 NLRB 1207, 1213; *Consumers Power Co*. (1979) 245 NLRB 183; *Cirker's Moving & Storage Co., Inc & Murray* (1994) 313 NLRB 1318.) Such conduct is inherently destructive because the "natural and foreseeable consequence" of permitting an employer to discriminate against employee representatives is its inevitable chilling effect upon the rights of all employees. (*Santa Clara Valley Water District*, *supra*, PERB Decision No. 2349-M, pp. 22-23, 26; see also *Santa Paula School District* (1985) PERB Decision No. 505, adopting proposed decision at pp. 52-54; *Northeast Constructors, Div. of Cives Corp.* (1972) 198 NLRB 846, 851; *Hyster Co.* (1972) 195 NLRB 84, 90; *Dravo Corp*. (1977) 228 NLRB 872, 874; *Pittsburgh Press Co*. (1978) 234 NLRB 408; *Caterpillar Inc*. (1996) 322 NLRB 674, 675.)[25]

In several cases, PERB has similarly found employer speech inherently destructive when it contains express or implied threats, when it is likely to discourage employees from seeking union assistance, from using the collectively-bargained grievance procedure, or from engaging in other protected conduct, or when it conveys the message that collective bargaining is futile.

[25] In *Coast CCD*, *supra*, PERB Decision No. 251, the Board distinguished between the *Carlsbad* interference and *Novato* discrimination standards, but also explained that, employer conduct directed against union officials or organizers may be appropriately analyzed under either or both standards, as such conduct not only constitutes discrimination, but also "clearly interferes with the right of employees to form and participate in employee organizations." (*Id*. at p. 20; see also *Placer Hills Union School District* (1982) PERB Decision No. 262, pp. 22-23.) Accordingly, under PERB precedent, and unlike private-sector precedent, such conduct may be deemed "inherently destructive" for either a discrimination or interference allegation. (See *State of California (Department of Corrections & Rehabilitation), supra*, PERB Decision No. 2282-S, pp. 16-17.)

(*Compton Unified School District* (2003) PERB Decision No. 1518, pp. 23-23; *Woodland Joint Unified School District* (2004) PERB Decision No. 1722, adopting proposed decision at p. 32;[26] *City & County of San Francisco* (2017) PERB Decision No. 2536-M, p. 28. In *Compton*, PERB held that warning employees against attending a union meeting is inherently destructive of employee rights (*Compton*, *supra*, PERB Decision No. 1518 at pp. 23-24), while in *City and County of San Francisco*, the Board found an employer's memo advising employees that "strikes or work stoppages of any kind are prohibited" and threatening dismissal of any employee engaged in such job action was inherently destructive of employees' and employee organizations' qualified right to strike. (*City and County of San Francisco*, *supra*, PERB Decision No. 2536-M, at p. 28.)

In other cases, PERB has held that, absent special circumstances, an employer's outright or facial ban on union or other protected activity in non-working areas and during non-working time is inherently destructive of employee rights. (*Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 51 (*Petaluma*); *State of California (Department of Forestry)/State of California, Governor's Office of Employee Relations* (1981) PERB Decision No. 174-S, p. 32.) PERB has also found an employer's prohibition against union officers representing bargaining-unit employees in investigative meetings inherently destructive of the representational rights of employees and employee organizations. (*San Bernardino*, *supra*, PERB Decision No. 2423-M, pp. 37-38.)

Although the "inherently destructive"/"slight harm" framework was borrowed from *Great Dane* and other private-sector cases, in the decades since deciding *Carlsbad*, PERB has

[26] As recognized in *Walnut Valley Unified School District*, *supra*, PERB Decision No. 2495, *Woodland Joint Unified School District*, *supra*, PERB Decision No. 1722 was superseded by statute on other grounds.

rarely turned to federal authority for identifying what constitutes inherently destructive conduct. One possible reason for this reluctance is the Board's recognition in *Carlsbad* that, under federal law, the inherently destructive doctrine applies only to discrimination allegations arising under NLRA section 8(a)(3), while the *Carlsbad* analysis encompasses other employer unfair practices, including some more analogous to interference cases under NLRA section 8(a)(1.) For that reason, we reserve consideration of the inherently destructive doctrine under federal law for our discussion of *Campbell* and *Novato* below.

2. Application of *Carlsbad* to UC-AFT's Interference Allegation

As an initial matter, we consider whether a *Carlsbad* interference analysis is applicable here. While PERB routinely finds that an unlawful unilateral change to negotiable matters also interferes with employee and organizational rights, here UC-AFT appears to argue that the University's conduct independently violates HEERA under a *Carlsbad* analysis, even though this interference allegation relies on the same nucleus of facts as the unilateral change allegations. The ALJ considered the issue, relying on the U.S. Supreme Court's interpretation of federal law under *Darlington* and, came to the opposite result. According to the ALJ, because the University's decision to close YMP and lay off employees affected only non-negotiable matters, it could not constitute an independent act of interference under *Carlsbad*, unless UC-AFT could show that this conduct somehow affected the rights of *other*, i.e., remaining employees. UC-AFT contends, that, contrary to the logic of *Darlington* relied on by the ALJ, the closure and transfer of YMP may interfere with protected rights, irrespective of whether employees in other University departments were aware of, or affected by, that decision. We agree.

Although an employer may terminate programs or services for financial or operational reasons aimed at the fulfilment of its mission, such decisions are not immune from scrutiny

where they are alleged to violate protected rights. (HEERA, § 3563, subd. (h).) In discussing the balancing aspect of the *Carlsbad* test, the Board noted that "the Legislature does not seem to have attached 'conditions' to the exercise of rights granted to [public] employees." (*Carlsbad, supra*, PERB Decision No. 89, p. 8.) It also noted that EERA's scope of protected rights could not be so broad as to prevent public employers from fulfilling their mission. (*Id.* at pp. 8-9.) Thus, while employees' rights to engage in protected activity are not absolute and must coexist with the employer's inherent managerial interests (*Regents of the University of California* (1984) PERB Decision No. 470-H, adopting proposed decision at pp. 49-50), neither are there any forms of employer conduct, including those involving fundamental policy decisions at the core of the employer's mission, which are categorically immune from interference liability under the statute. (*Carlsbad, supra*, PERB Decision No. 89, pp. 11-13; see also *Gonzales Union High School District* (1993) PERB Decision No. 1006, adopting proposed decision at pp. 15-17 (*Gonzales*) [closing program caused slight harm to protected rights but no violation when balanced against employer's interest in determining how to fulfil its mission].)

Carlsbad is instructive here. Liability in *Carlsbad* was "predicated on the physical relocation of the charging parties from an area in which they were effectively organizing for [their union] to areas where their efforts were likely to be ineffective" (*Carlsbad, supra*, PERB Decision No. 89, p. 14), and was not based on any finding that the employees' transfer was objectively adverse to their working conditions. The *Carlsbad* Board concluded that, under the circumstances, the transfer of known union activists to a more remote worksite both interfered with the activists' right to engage in non-disruptive organizational activities at work, and "would have the natural and probable consequence of causing *other* employees reasonably to fear that

similar action would be taken against them," if they engaged in similar protected activity. (*Id*. at p. 13, emphasis added; cf. *Fresno County Office of Education* (2004) PERB Decision No. 1674, pp. 13-17 [similar facts analyzed as discrimination under *Novato*].)

In *Darlington*, a parent company with multifaceted textile operations liquidated one of its subsidiaries in response to employees at that location voting to unionize. No operations at other locations were closed or otherwise affected. The NLRB held that a partial shutdown and resulting layoff due to protected activity is an unfair labor practice. The Fourth Circuit Court of Appeal reversed. The U.S. Supreme Court held that a plant closure and layoff unlawfully discriminates against employees because of union activity, in violation of NLRA section 8(a)(3), when the persons exercising control over the plant:

> (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities . . .

Darlington was thus concerned with discrimination against an employer's *remaining* employees following a partial closure and layoff, and not with whether the laid off employees themselves had been injured by the partial closing. The Supreme Court's exclusive focus on discrimination under NLRA section 8(a)(3), and on the employer's remaining employees, stemmed from its view that a private-sector employer must be free to go out of business, partially close operations and/or lay off employees, and that the NLRA could not be interpreted to infringe on this private property interest, absent some evidence of an unlawful motive or

purpose. Given this view, the Court effectively held there could be no interference violation resulting from a partial closure and layoff.

We agree with UC-AFT that the ALJ's reliance on *Darlington* was misplaced, as its reasoning is fundamentally at odds with the statutory scheme of the PERB-administered statutes, as interpreted by *Carlsbad*. Notwithstanding similarities with the NLRB's analysis for interference under NLRA section 8(a)(1), the *Carlsbad* Board expressly rejected the notion of an implied management rights clause in the statute which would immunize managerial decisions from interference liability, and we have found no subsequent decision in which PERB has endorsed the logic of *Darlington* or held that an employer's conduct is immune from interference liability, simply because it involves a managerial prerogative. To the contrary, PERB has continued to recognize an "inherent and substantial distinction" between the property interests of private-sector employers and the manner in which our statutes govern public-sector labor relations. (*County of Riverside*, *supra*, PERB Decision No. 2233-M, p. 7.)

For example, in *Gonzales*, *supra*, PERB Decision No. 1006, the Board adopted a proposed decision holding that, notwithstanding a public employer's managerial prerogative to alter or eliminate programs or services, closing a particular program may constitute at least slight harm to employee rights, and thus state a prima facie case of interference under *Carlsbad*. (*Id.* adopting proposed decision at pp. 15-17.) *Gonzales* teaches that where an employer asserts a statutory or managerial right to reduce or eliminate programs or services as a defense to an interference allegations, such assertions are properly analyzed under *Carlsbad*'s balancing test, rather than as negating a prima facie case.

By asking first whether an employer's conduct involves the exercise of a fundamental managerial prerogative (or, alternatively, a negotiable matter) to establish a prima facie case, the

Darlington analysis conflates an independent interference allegation with an employer's failure or refusal to bargain. Indeed, under *Darlington*, as applied by the ALJ, employer conduct could never constitute unlawful interference, regardless of its effect on protected rights, unless it first met the test for negotiability or had a demonstrable effect on negotiable matters. While we do not presume to disagree with the U.S. Supreme Court's interpretation of federal law, one problem in the *Darlington* analysis, and which appears in the proposed decision as well, is that, contrary to the structure and plain meaning of our statutes, the prohibition against employer interference becomes a mere appendage of another unfair practice provision rather than an independent violation. However, because any employer conduct, including non-negotiable managerial decisions, may constitute interference under *Carlsbad*, PERB is not limited to asking whether a mass layoff interfered with the rights of remaining employees, while ignoring its effect on the laid off employees themselves.

a. Application of *Carlsbad*: Prima Facie Case

Here, UC-AFT filed a grievance on or about October 27, 2011 and continued to pursue the matter over the next two years. During that time, the scope of the grievance expanded to encompass not only Brodo, but other YMP instructors whom UC-AFT alleged were improperly denied excellence reviews and/or terminated to avoid fulfilling the University's obligation to provide excellence reviews. Throughout this period, Squitieri made periodic requests for information in support of UC-AFT's grievance and, to Newman's displeasure, Squitieri and Brodo contacted other YMP Instructors to gain additional information and organize employee support for the grievance. In April and May, 2013, as the parties were discussing settlement of the grievance, the University's human resources officials informed UC-AFT that the University was "seriously considering" whether to close the YMP program, and, shortly thereafter,

informed UC-AFT and affected employees of the decision to close the Program and layoff all Instructors. The decision to transfer operations was separately revealed to the public on the University's website the day after employees learned of their impending layoffs.[27]

Like the transfer of employees in *Carlsbad*, whether the University's decision to close and subcontract YMP was negotiable or a fundamental managerial prerogative has no bearing on whether it interfered with protected rights. Rather, for analyzing an interference allegation under *Carlsbad*, we ask whether, under the circumstances, the University's conduct had an actual or reasonably likely adverse effect on the exercise of protected rights, including those of the laid off YMP instructors or other University employees. Because a layoff removes employees from the workplace, and may terminate the employment relationship altogether, we conclude that the University's layoff of YMP Instructors involved in protected activity would reasonably tend to discourage the laid off employees from engaging in present or future protected activity, regardless of whether it would likely discourage protected activity by other employees.

Alternatively, UC-AFT contends that the University failed to disclose to UC-AFT its true planned course of action and that its contemporaneous communications with UC-AFT and employees regarding the closure and subcontracting of YMP were "circular" and "surely inadequate" under *Stanislaus*, *supra*, PERB Decision No. 2231-M and similar cases.[28] We agree that employer communications to employees and their representative which misrepresent

[27] On October 9, 2013, almost two years after the grievance was filed, and after YMP's closure, the University and UC-AFT reached a settlement of the Churning Grievance. Brodo was among the employees provided back pay for lost wages as part of the settlement and release, though she was not hired to teach at YMCO, which began operations at about the time the grievance settled.

[28] UC-AFT makes these contentions to show inadequate notice in support of its unilateral change allegation, and as evidence of unlawful motive in support of its discrimination and reprisal theories. Because these arguments involve the same provision of the statute, we consider them part of the complaint's interference allegation as well.

or omit material information about pending employment decisions may state an interference violation, separate from an alleged bargaining violation, because they would reasonably tend to discourage the representative from requesting negotiations, filing a grievance, or taking other action necessary to represent the employees' or the organization's interests. While this theory of liability overlaps factually with the inadequate notice element of UC-AFT's unilateral subcontracting theories, it is not purely derivative of the unilateral change allegations. Employer conduct allegedly constituting a unilateral change may also state a prima facie case of reprisal or interference with protected rights, where it was allegedly undertaken for a discriminatory purpose or would reasonably tend to discourage protected activity. (*Stanislaus*, *supra*, PERB Decision No. 2231-M, pp. 17-23.) In such instances, establishing a bargaining violation is not necessary for proving up an independent interference or discrimination allegation. (*Ibid*.; see also *Regents of the University of California* (1997) PERB Decision No. 1188-H, p. 26 (*Regents of the UC*); and *State of California (Department of Corrections & Rehabilitation)*, *supra*, PERB Decision No. 2282-S, p. 15.)

Here, the record demonstrates that at least eight Instructors were eligible for excellence reviews. Although Newman refused to conduct any reviews or make any continuing appointments "until we have determined the right path for YMP's future relationship with the University," Basri testified that, if YMP had remained part of the University, "it would have had to comply with all of our rules and regulations and procedures," that "there were things that needed to happen that were about to happen," and that, if Newman "refused to implement those things, I would have to fire her at some point." This problem never came to a head, however, because, after consulting with Newman and the YMP Board, Basri chose instead to close YMP and subcontract its operations. Basri's testimony thus demonstrates that, but for the University's

closure of the Program, YMP Instructors would have exercised their collectively-bargained rights to receive excellence reviews and been eligible for consideration for a continuing appointments. Regardless of his intent, Basri's decision was objectively adverse to employment conditions, and to employee rights to self-organization and participation in organizational activities. The record thus supports a prima facie case of employer interference with protected rights, and we next turn to the *Carlsbad* balancing analysis to determine the severity of harm to employee rights.

b. Application of *Carlsbad*: Inherently Destructive or Comparatively Slight Harm

Although the University has not responded to UC-AFT's exceptions, in its brief before the ALJ, it argued that its decisions to close YMP and transfer operations to a non-University entity were motivated by financial and programmatic reasons. The ALJ also credited Basri's testimony that the University's affiliation with YMCO was a legitimate and reasonable solution to the problem of what to do with a popular program that no longer fit into the University's strategic goals. Because the University has asserted operational necessity as a defense, under *Carlsbad*, we must first determine whether its conduct was inherently destructive or comparatively slight in effect, before balancing such harm against this asserted justification. (*Carlsbad*, *supra*, PERB Decision No. 89, pp. 11-12; *San Bernardino*, *supra*, PERB Decision No. 2423-M, pp. 36-37; cf. *San Diego USD*, *supra*, PERB Decision No. 137, p. 18; *Office of Kern County Superintendent of Schools*, *supra*, PERB Decision No. 533, adopting proposed decision at pp. 51-53.)

As discussed above, PERB's cases offer little guidance on this step of the analysis, though, as UC-AFT notes, PERB has repeatedly held that a unilateral change to terms and conditions of employment is a per se violation of the duty to bargain and "inherently destructive

of employee rights." (See, e.g., *City of Livermore* (2014) PERB Decision No. 2396-M, adopting proposed decision at pp. 16-17; *County of Riverside* (2013) PERB Decision No. 2307-M, pp. 17-18; *Healdsburg Union Elementary School District* (1994) PERB Decision No. 1033, pp. 15-16; see also *County of Santa Clara*, *supra*, PERB Decision No. 2321-M, pp. 22-23.) The University argues that, by proving its unilateral subcontracting allegation, it has already established the existence of inherently destructive conduct for its separate interference and discrimination allegations, since "[t]he elimination of bargaining-unit work in order to contract it out to a private entity employing non-bargaining-unit employees is arguably the most 'inherently destructive' course of action an employer could take with respect to collective bargaining rights."

We have located no case in which the Board has considered whether the "inherently destructive" nature of a unilateral change determines that the same conduct in a separate interference or discrimination allegation is necessarily also "inherently destructive." While it would seem anomalous to find that an employer has engaged in inherently destructive conduct by virtue of its decision to unilaterally alter terms and conditions of employment, but that the same conduct may inflict only slight harm to employee rights when considered as an independent interference allegation, under the circumstances, we find it unnecessary to decide this issue, as California judicial authorities provide an alternative rationale for finding the University's conduct inherently destructive.

Like PERB, the California Court of Appeal has held that *Great Dane*'s "inherently destructive"/"comparatively slight" framework may be appropriate in interference cases, as when an employer applies workplace rules that, *regardless of motive*, have the effect of penalizing employees who are distinguishable only by their prior participation in protected activity. (*M.B. Zaninovich, Inc. v. Agricultural Labor Relations Bd.* 114 Cal.App.3d 665, 670, 675–676.)

Additionally, the California Supreme Court has held that wholesale replacement of unionized with non-union employees is inherently destructive under *Great Dane* and similar cases, because it "has a manifest and substantial adverse impact on organizational rights." (*Rivcom Corp. v. Agricultural Labor Relations Bd.* (1983) 34 Cal.3d 743, 758. (*Rivcom*)) In light of these authorities, we find the University's conduct inherently destructive of protected rights.

c. Application of *Carlsbad* Balancing Analysis

Where employer conduct is deemed "inherently destructive" of protected rights, it will be excused only when caused by circumstances beyond the employer's control and when no alternative course of action was available. (*San Bernardino, supra*, PERB Decision No. 2423-M, pp. 36-37; *Santa Monica CCD, supra*, PERB Decision No. 103, pp. 19-20, affirmed by (1980) 2 Cal.App.3d 684; *Carlsbad, supra*, PERB Decision No. 89, pp. 10-11.) Here, the University contends that it was justified in eliminating YMP because the Program did not fit into the strategic goals of other University departments or programs. Additionally, it contends that transferring YMP's operations to a non-University entity, which would retain significant affiliations with the University, was the most practical solution for disposing of endowed funds specifically earmarked for YMP. We are not persuaded.

Even accepting these contentions as true, they do not account for the alternatives that were available to the University, including providing UC-AFT with adequate notice of the decision to subcontract YMP, and, upon request, to bargain with UC-AFT over negotiable aspects of this decision. Nothing in HEERA requires the University to choose different priorities, to reallocate its resources in a different manner, or to come to a different decision than the one Basri reached to close YMP and continue operations under a different organization. HEERA section 3570 does, however, require the University or its representatives to "engage in

meeting and conferring with the employee organization selected as exclusive representative of an appropriate unit on all matters within the scope of representation." This obligation is not extinguished, even in emergency circumstances, and, in any event, the University has identified no immutable deadline or managerial interest that would have been negated had implementation been delayed. (*Compton Community College District*, *supra*, PERB Decision No. 720, pp. 6-7.) Nor, under the circumstances, is it necessary to speculate over whether any negotiated savings in labor costs would have been sufficient to alter Basri's thinking, since the bargaining obligation is not eliminated by the possibility or even likelihood that no agreement would be reached. (*Lucia Mar*, *supra*, PERB Decision No. 1440, proposed decision, at p. 43.)

Basri also acknowledged that the University "could have just closed [YMP]," which "was definitely one option," but that he chose instead to continue the Program under other auspices. He also testified that continuing YMP as a University program posed no risk to funding for other E&I programs. Rather, according to Basri, "[i]t would just cause us to not be able to do some other things we wanted to do, higher-priority things." Although the University has asserted and argued a business necessity defense in its answer to the complaint and in its brief before the ALJ, it has not satisfied its burden of proving either operational necessity or that no alternative was available to justify its inherently destructive conduct. We conclude that it violated HEERA section 3571, subdivision (a), by interfering with employee rights to join and participate in employee organizational activities.

3. UC-AFT's Discrimination and/or Reprisal Theories

a. Overview of *Campbell* and *Novato* Theories

The amended complaint alleges the University decided to close and subcontract YMP as a reprisal for the Churning Grievance, and/or because of the University's desire to rid itself

of unionized employees and to extricate itself from its collective bargaining obligations. Although the ALJ found that Basri's decision was tainted by anti-union animus, she also credited his testimony that YMP was a poor fit with the University's strategic goals and that the University would have made the same decision, regardless of protected activity.

UC-AFT excepts to several of the ALJ's findings and conclusions, though its main points of contention concern whether the University's conduct was inherently destructive of employee rights and whether the ALJ selected and properly applied the appropriate test for analyzing such conduct. UC-AFT argues that the ALJ erred: (1) by failing to analyze the complaint's discrimination allegations under *Campbell* and similar controlling authority; (2) by creating and applying a hybrid discrimination test using elements of PERB's *Novato* line of cases with *Darlington*, a federal private-sector case never adopted by PERB; and, (3) by misapplying the *Novato*/*Wright Line* burden shifting analysis to find that the University would have made the same decisions to close and subcontract YMP, even in the absence of protected activity. Before considering the substance of UC-AFT's exceptions, we review our precedents and controlling judicial authority concerning employer reprisals and discrimination, and attempt to explain the distinctive features and purposes of the different lines of authority on the subject.

Unlike interference allegations, in discrimination or retaliation cases, evidence of unlawful motive, intent or purpose is the specific nexus required to establish a prima facie case. (*Carlsbad*, *supra*, PERB Decision No. 89, pp. 11-12; *Novato*, *supra*, PERB Decision No. 210, p. 6.) Nexus may be established by direct evidence, as when the employer's words or conduct demonstrate that it acted on the basis of union activity or other protected conduct. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221, pp. 19-20; *Contra Costa Community College District* (2006) PERB Decision No. 1852, adopting proposed

decision at pp. 10, 14-16; *Regents of the UC, supra,* PERB Decision No. 1188-H, p. 29.) When the natural and probable consequence of an employer's conduct is to discourage (or encourage) protected activity, the Board may fairly presume that this was the intended result. (*Santa Clara Valley Water District, supra*, PERB Decision No. 2349-M, p. 23, fn. 8; *Campbell, supra,* 131 Cal.App.3d at pp. 422-424; *Great Dane, supra,* 388 U.S. at p. 32.) Unlawful motive, intent or purpose may also be established by circumstantial evidence or by a combination of direct and circumstantial evidence and inferred from the record as a whole. (*Carlsbad, supra,* PERB Decision No. 89, p.11; *Novato, supra,* PERB Decision No. 210, p. 6; *Wright Line, supra,* 662 F.2d at pp. 902–903.)

PERB has generally analyzed allegations of employer reprisal and discrimination under two lines of cases, which can be distinguished primarily by the manner in which they permit the charging party to prove nexus. One line of authority stems from *Campbell* and other California appellate authority interpreting the anti-discrimination language of the MMBA in light of the U.S. Supreme Court's decision in *Great Dane* and other private-sector cases. The gist of these cases is that employer conduct that is directly and unambiguously discriminatory on the basis of union or other protected activity supplies its own evidence of unlawful motive, intent or purpose for establishing a prima facie case of reprisal or discrimination. (*Campbell, supra,* 131 Cal.App.3d at pp. 423-424, citing *Great Dane, supra,* 388 U.S. at p. 32; HEERA, § 3571, subd. (a).)[29] Additionally, if the employer's discriminatory conduct is deemed inherently

[29] See also *NLRB v. Erie Resistor Corp.* (1963) 373 U.S. 221, 228 (*Erie Resistor*); *Radio Officers, supra,*) 347 U.S. at p. 45; and *M. B. Zaninovich, Inc. v. Agricultural Labor Relations Bd., supra,* 114 Cal.App.3d at pp. 675–676 [applying the *Great Dane* framework to California agricultural labor relations]. Although decided shortly after *Campbell,* see also *Metropolitan Edison Co. v. NLRB* (1983) 460 U.S. 693, which summarizes the *Great Dane*

destructive of protected rights, no further proof of antiunion motivation is needed, and the Board can find an unfair labor practice, even if the employer produces evidence that its conduct was motivated by business considerations. Alternatively, if the adverse effect of discriminatory conduct on protected rights is "comparatively slight," meaning something less than inherently destructive, and the employer comes forward with evidence that it acted for a legitimate and substantial purpose, the charging party must produce evidence of unlawful motive to sustain the charge. (*Campbell*, *supra*, 131 Cal.App.3d at pp. 423–424.)

In *Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C (*LA Superior Court*), which appeared after the present case had been briefed, we explained that a prima facie case of discrimination or reprisal is established under the *Great Dane*/*Campbell* test by the presence of "discrimination in its simplest form," which we characterized as "employer conduct that is facially or inherently discriminatory, such that the employer's unlawful motive can be inferred without specific evidence." (*Id*. at p. 14.)[30]

In *LA Superior Court*, *supra*, PERB Decision No. 2566-C, we also noted that, in most cases, inherently discriminatory conduct will be apparent on its face, as when the employer has

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framework for "inherently destructive" employer conduct at pages 701–702, and *Rivcom*, *supra*, 34 Cal.3d at pp. 757–758.

[30] Although some authorities appear to have used the terms "inherently discriminatory" and "inherently destructive" interchangeably, inherently destructive conduct is a subset of inherently discriminatory conduct, as the latter triggers the *Great Dane* analysis, but may ultimately be found to have caused only comparatively slight harm to employee rights. (Barbara J. Fick, *Inherently Discriminatory Conduct Revisited: Do We Know It When We See It?* (1991) 8 Hofstra Lab. L.J. 275, 335, fn. 5.) Thus, under *Great Dane* and other federal authorities, facially or inherently discriminatory conduct, such as employment decisions based on union or other protected activity, operates as a necessary but not sufficient precondition for finding that an employer has engaged in conduct that is also inherently *destructive* of protected rights. (*Great Dane*, *supra*, 388 U.S. at pp. 33–34; see also *Local 357, Intern. Broth of Teamsters v. NLRB* (1961) 365 U.S. 667, 676.

offered, provided or maintained differential pay, benefits, hours, or working conditions, or based other employment decisions on union or other protected activity. (*Id*. at pp. 14-15; see also *Great Dane, supra*, 388 U.S. at p. 32; *Campbell, supra*, 131 Cal.App.3d at p. 424; *Erie Resistor, supra*, 373 U.S. at pp. 230-231; *Metropolitan Edison Co. v. NLRB, supra*, 460 U.S. at pp. 703-705; *Huck Mfg. Co. v. NLRB* (5th Cir. 1982) 693 F.2d 1176, 1183-1184.)

In addition to *Campbell*, the other major line of PERB authority for analyzing employer reprisal and discrimination allegations stems from *Novato, supra*, PERB Decision No. 210 and similar cases. (See also *Martori Brothers Distributors v. Agricultural Labor Relations Bd., supra*, 29 Ca1.3d at pp. 729-730; *Wright Line, A Div of Wright Line Inc.* (1980) 251 NLRB 1083.)

According to *Novato*, "[b]ecause retaliatory conduct is inherently volitional in nature," where it is alleged that the employer has acted in reprisal against employees for participation in protected activity, evidence of unlawful motive is the specific nexus required to establish a prima facie case. (*Novato, supra*, PERB Decision No. 210, p. 6.)

Under *LA Superior Court, supra*, PERB Decision No. 2566-C, the presence of facially or inherently discriminatory conduct, or "discrimination in its simplest form," triggers the *Campbell/Great Dane* test, as opposed to the *Novato/Wright Line* analysis of nexus factors or other circumstantial evidence to divine the employer's true motive. (*Id*. at pp. 14-15; *Campbell, supra*, 131 Cal.App.3d at p. 423, citing *Great Dane, supra*, 388 U.S. at p. 32; see also *Int'l Paper Co.*(1995) 319 NLRB 1253, 1269, e*nforcement denied*, (D.C. Cir. 1997) 115 F.3d 1045; *National Fabricators, Inc. v. NLRB* (5th Cir. 1990) 903 F.2d 396, 399, citing *NLRB v. Haberman Constr. Co.* (5th Cir.1981), 641 F.2d 351, 359 (en banc).) Whereas *Campbell* relies on an evidentiary presumption arising from the employer's conduct itself ("discrimination in its

simplest form"), under *Novato*, proof of the employer's unlawful motive, intent or purpose must be established through circumstantial evidence, or a combination of direct and circumstantial evidence, to demonstrate that an employer's proffered justification for its action was not its true motive or purpose. (*Novato, supra*, PERB Decision No. 210, p. 6; *Carlsbad, supra*, PERB Decision No. 89, p. 11; *Coast CCD, supra*, PERB Decision No. 251, p. 23.) As the Board explained in *Novato* and subsequent cases, circumstantial evidence, such as the nexus factors borrowed from *Wright Line* and other private-sector authority, is only necessary where *there is no direct proof motive*. (*Novato, supra*, PERB Decision No. 210, p. 7; *Contra Costa Community College District* (2003) PERB Decision No. 1520, p. 7.)

However, in those relatively rare cases involving direct evidence of unlawful motive, it is unnecessary to resort to *Novato*'s analysis of nexus factors to evaluate circumstantial evidence of unlawful motive. (*Regents of the University of California (Davis)* (2004) PERB Decision No. 1590-H, p. 7-8; *Regents of the UC, supra*, PERB Decision No. 1188-H, p. 29; see also *Berkeley Unified School District* (2003) PERB Decision No. 1538, p. 4, citing, *San Marcos Unified School District* (2003) PERB Decision No. 1508, p. 45, fn. 26.)[31] While reliance on circumstantial evidence of motive has undoubtedly become the primary avenue for proving discrimination or retaliation allegations, *Novato* itself indicates that circumstantial evidence is only necessary if there is no *direct* evidence of unlawful motive, as there was in *Campbell*.

The "inherently destructive"/"comparatively slight harm" framework announced in the third and fourth guidelines of *Carlsbad* are typically understood as applying to interference and

[31] Where there is direct evidence of an employer's unlawful motive, it is not clear that the other elements of the *Novato* test, i.e., "protected activity," "employer knowledge" or "adverse action" are even applicable, as those issues are either handled differently under the *Campbell/Great Dane* standard, or are not part of the prima facie discrimination analysis at all. (*Coast CCD, supra*, PERB Decision No. 251, p. 23.)

other strict liability allegations concerned with the consequences of the employer's conduct, rather than its subjective state of mind. However, the same distinction and order of analysis are also implicit in the "but for" class of cases recognized under the fifth guideline of the *Carlsbad* test. That is, where it is alleged that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent, proof of the employer's subjective state of mind may be supplied either by its own conduct or, in the absence of such a finding, through circumstantial evidence or a combination of direct and circumstantial evidence established by way of *Novato*'s nexus factors.[32]

In sum, *Novato*'s reliance on circumstantial evidence to prove unlawful intent, purpose or motive is only required if a case does not fall within one of the other two categories of cases described by the *Carlsbad* test. Where it is alleged that the employer's conduct would reasonably tend to interfere with protected rights, and liability is determined largely on the consequence of the employer's conduct, regardless of its actual subjective state of mind, there is no need to prove intent, motive or purpose. (*Cabrillo Community College District* (2015) PERB Decision No. 2453, p. 13; *Regents of the University of California* (2006) PERB Decision No. 1804-H, adopting warning letter at p. 5; *Clovis Unified School District, supra*, PERB Decision No. 389, pp. 13-14.) Alternatively, where the employer's conduct is facially or

[32] In deciding *Novato*, PERB did not purport to overrule or limit *Carlsbad* in any way. To the contrary, the *Novato* Board expressly endorsed the holding of *Carlsbad* that unlawful motive need not be affirmatively proved in all cases alleging a violation of employee rights (*Novato, supra*, PERB Decision No. 210 pp. 4-5), and subsequent Board decisions demonstrate that *Novato* was intended as an extension or clarification, rather than a repudiation of, the "but for" test contained in the fifth guideline of the *Carlsbad* test. (*Marin Community College District* (1980) PERB Decision No. 145, pp. 10-11; *California State University, Sacramento, supra*, PERB Decision No. 211-H, 32; *Rio Hondo Community College District* (1982) PERB Decision No. 226, p. 3; *Office of the Los Angeles County Superintendent of Schools, supra*, PERB Decision No. 263, p. 4; *Lemoore Union High School District* (1982) PERB Decision No. 271, adopting in relevant part proposed decision at p. 35.)

inherently discriminatory, unlawful motive may be presumed, such that the employer may be required to disprove it.

Some of the disagreement among the parties and the ALJ over whether the facts of this case call for a *Novato* or *Campbell* analysis is resolved by the *Novato* decision itself. The question presented is whether, by closing YMP, laying off its Instructors and then subcontracting essentially the same operations to a non-University entity created specifically for that purpose, the University engaged in the kind of directly and unambiguously discriminatory conduct to trigger the *Campbell/Great Dane* analysis.

The *Campbell* court borrowed the "inherently destructive"/"comparatively slight" framework verbatim from *Great Dane*. (*Campbell*, *supra*, 131 Cal.App.3d at pp. 423–424, citing *Great Dane*, *supra*, 388 U.S. at pp. 32-34; see also *(DPA)*, *supra*, PERB Decision No. 2106a-S, p. 11.) Thus, *Great Dane* provides the most direct authority for PERB's interpretation and application of *Campbell* and, inasmuch as *Campbell* is controlling authority for PERB, its explicit reliance on *Great Dane* makes that case, and arguably similar pre-*Campbell* private-sector cases, controlling precedent for PERB as well. (*Campbell*, *supra*, 131 Cal.App.3d at pp. 423–424, citing *Great Dane*, *supra*, 388 U.S. at pp. 32-34; see also *Erie Resistor*, *supra*, 373 U.S. 221.)

Unfortunately, for reasons peculiar to both *Campbell* and *Great Dane*, neither case offers much guidance for determining whether employer conduct is "inherently destructive" or "comparatively slight" in its effect on protected rights.[33] While not required to do so, we may

[33] While often cited by PERB and California courts as the leading authorities on the inherently destructive doctrine, in fact, neither *Campbell* nor *Great Dane* provided any detailed analysis or application of this doctrine. In both *Campbell* and *Great Dane*, the employer engaged in facially discriminatory conduct, *i.e.*, "discrimination in its simplest form," but then

therefore also look to post-*Campbell* private-sector cases which are consistent with *Campbell*'s reasoning or elaborate on the doctrine adopted by *Campbell*, while bearing in mind any significant differences between the California and federal statutes. (*State of California* (1983) PERB Decision No. 348-S, pp. 4-8; *Capistrano, supra*, PERB Decision No. 2440, pp. 15, 35; *Carlsbad, supra*, PERB Decision No. 89, pp. 8-9.)

b. *Campbell* Analysis: The Prima Facie Case

We now turn to *Campbell*'s application to the facts of this case. Following *LA Superior Court*, supra, PERB Decision No. 2566-C, we must determine whether there is evidence of employer conduct which "directly and unambiguously penalizes or deters protected activity" or what the *Campbell* and *Great Dane* courts referred to as "discrimination in its simplest form." The presence of facially or inherently discriminatory employer conduct triggers the *Campbell/Great Dane* analysis, as opposed to the *Novato/Wright Line* analysis of circumstantial evidence of motive. (*Campbell, supra*, 131 Cal.App.3d at p. 423, citing *Great Dane, supra*, 388 U.S. at p. 32; see also *Int'l Paper Co., supra*, 319 NLRB 1253, 1269, e*nforcement denied*, (D.C. Cir. 1997) 115 F.3d 1045; *National Fabricators, Inc. v. NLRB, supra*, 903 F.2d at p. 399, citing *NLRB v. Haberman Constr. Co., supra*, 641 F.2d at p. 359 (*en banc*).) Under *Great Dane* and similar cases, facially or inherently discriminatory conduct, such as employment decisions based on union or other protected activity, may also warrant a finding of "inherently destructive" conduct if the conduct "carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent.'" (*Great*

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failed to come forward with any justification for its conduct. (*Campbell, supra*, 131 Cal.App.3d at p. 423, citing *Great Dane, supra*, 388 U.S. at p. 32.) It was thus unnecessary for either the *Campbell* or *Great Dane* court to determine whether the employer's conduct was "inherently destructive" or caused only "comparatively slight" harm to protected rights. (*Campbell, supra*, 131 Cal.App.3d at p. 424, citing *Great Dane, supra*, 388 U.S. at p. 34.)

Dane, supra, 388 U.S. at p. 33, citing *Erie Resistor, supra*, 373 U.S. at p. 231; see also *Local 357, Intern. Broth of Teamsters v. NLRB, supra*, 365 U.S. at p. 676.)

Conduct which "directly and unambiguously penalizes or deters protected activity" may appear in a *simultaneous* form, as where an employer is alleged to have offered, provided or maintained differential pay, benefits, hours, or working conditions between different groups of employees on the basis of union or other protected activity. (*LA Superior Court, supra*, PERB Decision No. 2566-C, pp. 14-15.) Facially discriminatory conduct may also be *sequential* or non-contemporaneous, as when an employer changes policy *in response to* protected activity. (*NLRB v. Jemco, Inc.* (6th Cir. 1972) 465 F.2d 1148, 1150, cert. denied, (1973) 409 U.S. 1109; *Allied Industrial Workers .v NLRB* (D.C. Cir. 1973) 476 F.2d 868, 871-872; *NLRB v. United Aircraft Corp*. (2d. Cir. 1973) 490 F.2d 1105, 1108; *Mullins Broadcasting Co*. (1972) 200 NLRB 119.) For sequential discrimination, the relevant baseline for comparison is not different treatment between groups of employees, but between the employer's policies *before* and *after* the exercise of protected rights. (*LA Superior Court, supra*, PERB Decision No. 2566-C, p. 15; *Kansas City Power & Light Co. v. NLRB* (8th Cir. 1981) 641 F.2d 553, 557.)

While "discrimination in its simplest form" will typically be apparent on its face, as when the employer openly acknowledges that it has distinguished between employees on the basis of union or protected activity, the NLRB and some federal courts have also recognized that employer conduct may be inherently discriminatory based on its adverse impact. In such cases, the employer's policy is facially neutral but its application has a predictable and actual disproportionate effect on the exercise of protected rights. (*In Re W.D.D.W. Commercial Sys. & Investments, Inc.* (2001) 335 NLRB 260, 261, 262-263 (*W.D.D.W*); *Lone Star Indu.*(1986) 279 NLRB 550, 552; *Moore Bus. Forms, Inc*. (1976) 224 NLRB 393, enforced in relevant part by

(5th Cir. 1978) 574 F.2d 835; see also *Int'l Paper Co.*, *supra*, 319 NLRB 1253, 1275.) If such a policy is discriminatory in operation, the employer has the burden of justifying its adherence to the policy to forestall a finding that it was implemented and used "merely as a 'pretext' for discrimination." (*W.D.D.W.*, *supra*, 335 NLRB 260, 263, citing *Albemarle Paper Co. v. Moody* (1975) 422 U.S. 405, 425.) An employer's wholesale replacement of union with nonunion employees, even absent "direct or specific" evidence that the employer acted for an anti-union purpose, is also "inherently destructive," where it has "a manifest and substantial adverse impact on [employee] rights," and the employer offers no credible, non-discriminatory explanation for its conduct. (*Rivcom*, *supra*, 34 Cal.3d. at pp. 757-758.)

HEERA's prohibition against employer reprisal and discrimination based on protected activity covers a variety of fact patterns, and we agree with UC-AFT that the particular framework chosen by the ALJ was neither the one urged by the parties, nor necessarily the one best suited to analyzing the allegations in the complaint and the evidence presented at hearing. UC-AFT's theory of the case is not that the University treated two, otherwise similarly-situated groups of employees differently based on the protected activity of one group, nor that it eliminated YMP and laid off Instructors in an effort to discourage protected activity among University employees in other departments. Rather, the allegation is that the University laid off all YMP Instructors *in response to* the protected activity of some YMP employees and their representative in asserting their collectively-bargained rights and prosecuting the Churning Grievance. This allegation is more aptly characterized as one involving sequential discrimination or reprisal for protected activity, rather than simultaneous discrimination against YMP Instructors vis-à-vis other, University employees about whom no evidence was presented.

In certain respects, the present case thus resembles *Cupertino Union Elementary School District* (1986) PERB Decision No. 572 (*Cupertino*). There, an employer was alleged to have implemented a layoff targeting a particular department because of a high number of union activists in that department. (*Id.* at pp. 2, 6.) According to the charge, the department-wide layoff was "not based solely on organizational needs, but [was] being used to 'punish' or retaliate against a number of workers who have, over the years, challenged . . . the department's manager." (*Id.* at p. 4.) Because *Cupertino* involved circumstantial evidence, the Board analyzed the case under *Novato*. After reviewing the charge and supporting materials, including prior unfair practice charges, the Board found "sufficient circumstantial evidence from which an inference can be drawn that there may be a link between past aggressive union activity and the decision to lay off the maintenance group." (*Id.* at p. 5.) Accordingly, it reversed the dismissal and ordered that a complaint issue, alleging discrimination by the employer against employees because of protected activity and interference with organizational rights because of the disproportionate impact of the layoff on union officers and activists.

Like the allegations in *Cupertino,* UC-AFT argues that the University decided to close YMP and lay off employees in response to protected activity, which was unlawful regardless of how the University treated other employees who were not involved in protected activity. Reprisals for protected activity are also expressly prohibited by the statute, regardless of how the employer treats other employees. We therefore agree with UC-AFT that the ALJ erred by attempting to shoehorn this case into a theory of simultaneous discrimination between different groups of employees, or into the *Darlington* inquiry of whether a layoff of one group of employees affected other, remaining employees.

However, the present case also differs from *Cupertino* in certain, important respects. UC-AFT contends that, in addition to suspicious timing and other circumstantial evidence of unlawful motive, there is also direct evidence of nexus in the form of Newman's well-documented disdain for UC-AFT and YMP Instructors' protected activity. We agree.

Regardless of Basri's stated motives, it is clear that his decision-making process was tainted by Newman's hostility to the University's collective bargaining obligations in general and to UC-AFT in particular. Under the subordinate bias liability theory, unlawful motive of a supervisor, manager or other lower-level official may be imputed to the decision-maker responsible for authorizing an adverse action, when the lower-level official recommended taking adverse action, the recommendation was motivated by protected activity, and the recommendation was a motivating factor or proximate cause of the decision to take adverse action. (*Santa Clara Valley Water District*, *supra*, PERB Decision No. 2349-M, p. 33.) Even where the decision-maker's action was entirely free of animus, the employer will nonetheless be held liable, if the decision was influenced by the unlawful animus of the lower-level official. (*Ibid*.) Thus, to the extent Newman's demonstrably anti-union views were a contributing factor in the University's decision to close and subcontract YMP, there is direct evidence of nexus or inherently discriminatory conduct within the ambit of *Campbell* and *Great Dane*.

The record demonstrates that, by late 2012, and in response to UC-AFT's Churning Grievance, Newman had made clear her disdain for the University's collective bargaining relationship with UC-AFT, and her desire to "extricate" YMP from the legal obligations that relationship entailed. Fundamentally, she considered the unionization of YMP's Instructors a "mistake," though, at the hearing, she opined that she might find another union, one devoted to representing musicians, more acceptable. Either view is inconsistent with employee choice

and collective bargaining (*Hartnell Community College District, supra*, PERB Decision No. 2452, pp. 56-57), and thus Newman's animus is established.

During the same time frame, she sought to "build a case" that, because no other similar programs around the country were unionized, neither should YMP be required to adhere to collectively-bargained employment conditions. Although not presented as a formal recommendation, she nonetheless made this desire clear to her superiors, and Basri eventually responded, after determining that he could not simply shift the problem to another University department. Although Basri repeatedly denied that Newman's anti-union hostility influenced his decision to close YMP, he was certainly aware of it, and effectively acquiesced to it at the time he came to the decision to close YMP. When Halimeh advised Newman in late 2012 that at least eight Instructors were eligible for excellence reviews under the MOU, Newman refused to conduct any reviews or make continuing appointments "until we have determined the right path for YMP's future relationship with the university." Remarkably, Newman faced no corrective action for openly defying Halimeh's directive and, under the circumstances, the logical inference is that Newman's superiors considered it more important to appease her than to comply with the MOU and the statutory rights of employees and UC-AFT.

Basri explained that, if YMP had remained part of the University, "it would have had to comply with all of our rules and regulations and procedures," that "there were things that needed to happen that were about to happen," and that, if Newman "refused to implement those things, I would have to fire her *at some point*." (Emphasis added.) Instead, Basri's "solution" was to avoid the inevitable struggle that would ensue if he and Halimeh were to insist on YMP's compliance with the MOU. By acquiescing to Newman's oft-repeated desire to "fix" the "mistake" of unionization and propose that YMP "extricate" itself from its collective

bargaining obligations, we find the University engaged in the kind of directly and unambiguously discriminatory conduct necessary to trigger the *Campbell/Great Dane* analysis. The University's decision was a direct response to concerted activity by YMP Instructors and UC-AFT, and, in this respect, had a predictable and actual disproportionate effect on the exercise of protected rights. (*Int'l Paper Co.*, *supra*, 319 NLRB at p. 1275; *Lone Star Indus.*, *supra*, 279 NLRB at p. 552; *Moore Bus. Forms*, *supra*, 224 NLRB 393, enforced in relevant part by (5th Cir. 1978) 574 F.2d 835.)

Unlike the employers in *Campbell* and *Great Dane*, the University has asserted an affirmative defense for its conduct. It argues that its decision to close and subcontract YMP "was privileged and exercised because of operational need, legitimate business purpose, and/or business necessity." Before considering the merits of this argument, under the *Campbell/Great Dane* test, we must first determine whether the University's conduct was inherently destructive or caused only comparatively slight harm to protected rights.

c. Identifying Inherently Destructive Conduct under *Campbell* and Federal Cases

As noted above, conduct which "directly and unambiguously penalizes or deters protected activity" is "inherently discriminatory" but not necessarily "inherently destructive," as it may have caused only comparatively slight harm to protected rights. To find employer conduct inherently destructive, the NLRB and the federal courts also consider the temporal impact or likely duration of its effect on protected activity. (*Int'l Paper Co.*, *supra*, 319 NLRB at p. 1274 [comparing permanent subcontracting with permanent replacement of strikers].) According to federal authorities, inherently destructive conduct typically "creat[es] visible and continuing obstacles to the future exercise of employee rights" or has "far reaching effects which could hinder future bargaining." (*Esmark, Inc. v. NLRB* (7th Cir. 1989) 887 F.2d 739, 748 (*Esmark*), citing *Portland Willamette Co. v. NLRB* (9th Cir. 1976) 534 F.2d 1331, 1334; see also

Boilermakers Local 88 v. *NLRB* (D.C. Cir. 1988) 858 F.2d 756, 763. By contrast, when an employer's conduct is temporary and does not attempt to prevent employees from future collective bargaining, it is typically not unlawful, without separate proof of unlawful motive, intent or purpose. (See *Esmark*, *supra*, 887 F.2d at p. 748; *NLRB v. Brown* (1965) 380 U.S. 278, 284; *American Ship Building*, *supra*, 380 U.S. 300.) In *Santa Monica CCD*, *supra*, PERB Decision No. 103, PERB similarly relied on *Great Dane* to conclude that conditioning a pay increase on surrendering protected rights is inherently destructive conduct, because it tends to discourage present and future protected activity. (*Id*. at pp. 19-20, citing *Great Dane*.)

The NLRB has explained that, in evaluating the temporal impact on protected rights, both "the severity of the harm suffered by the employees for exercising their rights" and "the severity of the impact on the statutory right being exercised" should be considered. (*Int'l Paper Co.*, *supra*, 319 NLRB at p. 1269.) Under *International Paper Company* and subsequent cases applying that standard, "[t]he more severe the consequences reasonably perceived by employees to flow from their exercise of [protected] rights, the more likely [ ] that the future exercise of those rights will be chilled." (*Roosevelt Mem'l Med. Ctr*. (2006) 348 NLRB 1016, 1018-1019.) Conversely, "minimal consequences that reasonably and naturally flow from [the employer's conduct] are less likely to have a chilling effect" on protected activity. (*Ibid.*) In evaluating the severity of harm to statutory rights, U.S. Supreme Court cases have considered employer conduct affecting the right to bargain collectively (*American Ship Building*, *supra*, 380 U.S. at p. 308), the right to strike (*Id*. at pp. 309-311; *Erie Resistor*, *supra*, 373 U.S. at pp. 230-231), and the right to hold union office. (*Metropolitan Edison Co.*, *supra*, 460 U.S. at p. 704; *Radio Officers*, *supra*, 347 U.S. at p. 45 [discharge and suspension for violating employer's rules prohibiting soliciting for union membership found inherently destructive]; see also *American Ship Building*,

supra, 380 U.S. at p. 309 [stating in dictum that "permanently discharg[ing] unionized staff and replac[ing] them with employees known to be possessed of a violent antiunion animus" is inherently destructive].)[34]

Federal authorities have also found employer conduct which exhibits hostility to the process of collective bargaining itself and/or discourages collective bargaining by making it appear futile in the eyes of employees to be inherently destructive. In doing so, federal authorities have distinguished between the effects of an employer's conduct on the *substance*, versus the *process*, of collective bargaining. Some federal courts have concluded that the label "inherently destructive" may *only* be applied to conduct which "exhibits hostility to the *process* of collective bargaining itself," while "actions which merely further an employer's *substantive* bargaining position in a particular contract negotiation are not 'inherently destructive' as long as the employer respects the employees right to engage in concerted activity." (*Esmark*, *supra*, 887 F.2d at p. 748, citing *American Ship Building*, *supra*, 380 U.S. at pp. 308–309 and *Boilermakers Local 88* v. *NLRB*, *supra*, 858 F.2d at p. 763; cf. *Int'l Paper Co.*, *supra*, 319 NLRB at p. 1269.) Conduct may also be inherently destructive, if it makes the process of collective bargaining appear futile to employees. (*Int'l Paper Co.*, *supra*, 319 NLRB at pp. 1269–1270.)

d. Application: The University's Conduct was Inherently Destructive

We now turn to *Campbell*'s application to the facts of this case. As suggested above, the University's decision to close and subcontract YMP may be fairly characterized as "inherently discriminatory" or what the *Campbell* and *Great Dane* courts referred to as "discrimination in its

[34] See also *Petaluma*, *supra*, PERB Decision No. 2485-M, p. 51, applying *Carlsbad*'s inherently destructive prong to prohibition on the rights to solicit and to distribute literature in non-work areas during non-work time.

simplest form." (*Campbell, supra*, 131 Cal.App.3d at p. 423, citing *Great Dane, supra*, 388 U.S. at p. 32.) While the layoff and subcontracting decisions do not facially distinguish between groups of employees on the basis of protected activity, as a response to the Churning Grievance, they "directly and unambiguously penalize[ ] or deter[ ] protected activity" by laying off employees and replacing them with a non-unionized workforce to perform what are, essentially, the same duties. (*Rivcom, supra*, 34 Cal.3d at pp. 757-758.) Moreover, laying off employees severs the employment relationship altogether and thus "creat[es] visible and continuing obstacles to the future exercise of employee rights," while wholesale replacement of unionized employees with a non-union workforce has "far reaching effects which could hinder future bargaining," because it negates employee choice and removes the very basis for collective bargaining. (*Esmark, supra*, 887 F.2d at p. 748.)

Because we find that Newman's animus can be imputed to Basri inasmuch as it prompted his proposal and eventual decision to layoff and subcontract YMP, the University's conduct also demonstrates hostility to the process of collective bargaining itself and makes it appear futile in the eyes of employees. Newman characterized the University's collective bargaining relationship with UC-AFT as a "mistake" that "needs to be fixed." Alternatively, she expressed the view that another union, one devoted specifically to representing musicians, as opposed to university faculty, might be a better fit for YMP Instructors than UC-AFT. We need not attempt to reconcile these seemingly contradictory positions. Either view exhibits hostility to the process of collective bargaining, in that it rejects the principle of employee choice on which collective bargaining depends. Employers and their agents do not "sit on both sides of the table in collective bargaining matters" and therefore have no cognizable interest in matters of employee choice. (*Trustees of CSU, supra*, PERB Decision No. 2384-H, p. 29.) By

statute and well-settled case law, higher education employers and their agents "shall not express a preference for one employee organization over another employee organization" and, because they have no cognizable interest in matters of employee choice, they have no "free speech" right to second-guess the employee's choice of a representative. (HEERA, § 3571.3; *Anaheim Union High School District* (2015) PERB Decision No. 2434, p. 16.)

Even if Basri did not expressly share Newman's views, the University's failure to require Newman to comply with its obligation under the MOU to conduct excellence reviews, even after the University acknowledged that several YMP Instructors were entitled to such reviews, suggests, at minimum, a disregard for the statutory duty to meet and confer. However, when coupled with Newman's desire, and Basri's decision, to "extricate" the University from its collective bargaining relationship with UC-AFT, the University's conduct goes beyond merely furthering its substantive bargaining position. It exhibits hostility to the process of collective bargaining by eliminating it. Under the circumstances, we find the University's conduct inherently destructive of protected rights.

e. <u>*Campbell/Great Dane* Balancing Analysis</u>

If the effect of the employer's conduct on protected rights is comparatively slight, the balancing analysis focuses on whether that conduct was "reasonably adapted" to achieve the legitimate business purposes asserted. (*NLRB v. Brown*, *supra*, 380 U.S. at p. 288.) In such cases, the question of the employer's motive is still very much at issue. In "comparatively slight" cases, if the employer comes forward with evidence that it acted for a legitimate and substantial purpose, the charging party must produce evidence of unlawful motive to sustain the charge. (*Campbell*, *supra*, 131 Cal.App.3d at pp. 423–424.)

However, because we find the University's conduct was inherently destructive of protected rights, no further proof of anti-union motive is necessary. Under *Carlsbad*, an employer's inherently destructive conduct "will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available." (*Carlsbad, supra*, PERB Decision No. 89 pp. 10-11.) Private-sector authorities decided both before and after *Campbell* articulate a slightly different standard, whereby the Board must balance the employer's asserted business interest against the severity of the harm to protected rights. (*Erie Resistor, supra*, 373 U.S. at pp. 236–237; *W.D.D.W., supra*, 335 NLRB at p. 263.) If the employer's asserted business justification outweighs the harm to protected rights, there is no liability. (*Laidlaw Corp*. (1968) 171 NLRB 1366, 1369, fn. 15; *NLRB v. Fleetwood Trailer Co.* (1967) 389 U.S. 375, 379.) However, if the asserted justification is insufficient to outweigh the harm to protected rights, the employer will be held liable for an unfair labor practice. (*Metropolitan Edison Co., supra*, 460 U.S. at p. 704; *Erie Resistor, supra*, 373 U.S. at pp. 629-630; *Radio Officers, supra*, 347 U.S. at pp. 45-46.) Under this balancing analysis, the Board may find an unfair labor practice, even if the employer produces evidence that it acted for a legitimate business purpose. (*Campbell, supra*, 131 Cal.App.3d at p. 423; *W.D.D.W., supra*, 335 NLRB at p. 263.)

The U.S. Supreme Court's *Erie Resistor* decision illustrates the significance of the balancing analysis. In *Erie Resistor*, the employer provided superseniority to replacement employees during a strike. Notwithstanding its adoption of the superseniority system, the employer took considerable effort to counteract the effects of the strike and to maintain production, a legitimate business interest recognized by the NLRB and the courts, without destroying the union. The employer initially tried to maintain production with its existing non-

unit employees before then hiring replacements. Even then, it did not offer superseniority to replacements until it became evident that the promise of permanent status was not sufficient to attract enough applicants to maintain production. After offering superseniority, the employer received enough applications to replace all of the striking employees but refrained from doing so in an effort not to destroy the union. (*Erie Resistor, supra*, 373 U.S. at pp. 645-647.)

Nevertheless, the NLRB explained that, because the employer's discrimination was so patent, and its consequences so inescapable and demonstrable, it was unnecessary to prove that the employer had subjectively intended such a result. (*Erie Resistor, supra*, 373 U.S. at pp. 629-630.) The detrimental effect of the seniority benefit on current and future protected activity was deemed too great, regardless of the employer's intent. The Third Circuit Court of Appeals denied enforcement of the NLRB's order, reasoning that a legitimate business purpose is always a defense to an unfair labor practice. However, the U.S. Supreme Court reversed, agreeing with the NLRB's reasoning that, notwithstanding other evidence that the employer had acted for a lawful business purpose, its inherently discriminatory and destructive conduct spoke for itself. *Erie Resistor* thus illustrates that, once employer conduct is found inherently destructive, the employer assumes responsibility for its natural and probable consequences, even if they were not actually intended.

In the present circumstances, we find it unnecessary to reconcile the divergent tests under *Carlsbad* and the private-sector authorities from which *Campbell* draws its inspiration. Both lines of cases derive from *Great Dane* and, under either analysis, the University has failed to justify its inherently destructive conduct. Newman's animus toward UC-AFT, which both prompted and infected Basri's decision, was not a circumstance beyond the University's control. Basri and Halimah advised Newman of her obligations under the MOU, but then

acquiesced when she openly defied their directive to conduct excellence reviews, as required by the MOU. Rather than supervise and, if necessary, discipline Newman, Basri chose instead to research and eventually formulate a plan that would appease Newman's oft-stated desire to "extricate" the Program from its collective bargaining obligations.

Basri also admitted that closing and transferring YMP was not the only option available and that, if it continued as a University program, it would, at most, "just cause us to not be able to do some other things we wanted to do, higher-priority things." Thus, as discussed above, reasonable alternatives were available, even if they were not Basri's first choice. Moreover, even under the apparently more lenient private-sector standard, the resulting harm outweighed the University's asserted business justification. The permanent separation of the employees from their employment through layoffs, and their wholesale replacement with other, non-unionized employees, coupled with the destruction of the collective bargaining relationship itself resulting from subcontracting YMP, outweighs any legitimate business purpose asserted by the University in this case. (See *Rivcom*, *supra*, 34 Cal.3d at pp. 757-758; *Esmark*, *supra*, 887 F.2d at p. 748.)

We do not hold that the University can never reduce or eliminate programs or services performed by University employees. We simply hold that it may not do so for an unlawful purpose, such as to undermine employee choice, repudiate collectively-bargained obligations, retaliate against employees for exercising statutory rights, or destroy the very basis for future negotiations through unilateral and/or discriminatorily subcontracting work. HEERA provides for meeting and conferring to resolve such disputes, and, having failed to avail itself of that option, the University cannot complain now that its actions were privileged or its motives pure.

REMEDY

HEERA gives the Board broad remedial powers, including the authority to issue cease and desist orders and to require such affirmative action as the Board deems necessary to effectuate the policies and purposes of the Act. (HEERA, § 3563.3; *Mt. San Antonio Community College Dist. v. PERB* (1989) 210 Cal.App.3d 178, 189.) PERB's customary remedy for an employer's unfair practices includes restoration of the prior status quo, including reinstatement of employees with back pay and benefits and interest thereon for employees who have suffered loss as a result of the unlawful conduct. (*City of San Diego* (2015) PERB Decision No. 2464-M, pp. 40-42; *State of California (Employment Development Department)* (1999) PERB Decision No. 1318-S, p. 12; *Corning Union High School District* (1984) PERB Decision No. 399, pp. 7-8; *Regents of the University of California* (1983) PERB Decision No. 356-H, pp. 19-22.) Where the unfair practices involve unilaterally transferring or subcontracting bargaining unit work to another entity, PERB will ordinarily also order the employer to rescind its transfer or subcontracting agreement and, upon request, to meet and confer in good faith to affirm the principle of bilateralism in negotiations and to vindicate the representative's authority in the eyes of employees. (*San Diego Adult Educators, supra*, 223 Cal.App.3d at p. 1137; *Desert Sands Unified School District* (2004) PERB Decision No. 1682a, p. 5; *Oakland, supra*, PERB Decision No. 367, pp. 39-40.)

In a long line of cases involving both unilateral changes and discriminatory conduct, PERB has also ordered make whole relief to compensate employees for the difference between what they actually earned and what they would have earned, but for the employer's illegal conduct. (*Santa Monica CCD, supra*, PERB Decision No. 103; *Santa Clara Unified School District* (1979) PERB Decision No. 104; *Los Gatos Joint Union High School District* (1980)

PERB Decision No. 120; *San Diego Community College District* (1983) PERB Decision No. 368.) A back pay award also provides a financial disincentive and deterrent against future unlawful conduct. (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13, and authorities cited therein.)

In addition to a cease and desist order and restoration of the status quo, other affirmative relief, including a posting requirement, is also appropriate in this case to ensure that employees affected by the Board's decision and order are informed of their rights and of the University's willingness to comply with the law. (*City of Sacramento, supra*, PERB Decision No. 2351-M, pp. 44-45; *Regents of the University of California* (1998) PERB Decision No. 1263-H, adopting proposed decision at p. 72.)

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, the Regents of the University of California (University) are found to have violated the Higher Educational Employment Relations Act (HEERA), Government Code section 3560, et seq., by deciding to subcontract bargaining-unit work performed by employees in the Young Musicians Program (YMP) at the University's Berkeley campus to a non-University organization and to lay off YMP employees without providing notice and opportunity to request decisional and/or effects bargaining to University Council-AFT (UC-AFT), and by subcontracting YMP's operations and laying off employees because of employees' and UC-AFT's exercise of protected rights. This conduct also interfered with the representational rights of employees and UC-AFT, as their exclusive representative.

Pursuant to Government Code section 3563, subdivisions (h) and (m), it hereby is ORDERED that the University, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally deciding to alter and/or altering policies within the scope of representation, including subcontracting work performed by YMP Instructors represented by UC-AFT and the negotiable effects thereof.

2. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise restraining or coercing employees because of the exercise of rights guaranteed by HEERA.

3. Interfering with employees' right to be represented by the employee organization recognized or certified as their exclusive representative.

4. Interfering with the right of UC-AFT, as the exclusive representative, to represent employees.

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

1. As soon as is practical, but not later than ten days after this decision and order becomes final, rescind and/or withdraw from the Transition and Affiliation Agreements providing for the Young Musicians Choral Orchestra (YMCO) to provide musical instruction services to students formerly provided by the Young Musicians Program.

2. Offer immediate reinstatement to all YMP Instructors laid off on or about April 24, 2013 to their former positions or, if those positions no longer exist, to equivalent or substantially similar positions without prejudice to their seniority or any other rights and/or privileges previously enjoyed.

3. Make whole for any financial losses suffered, including wages and benefits, all YMP Instructors who were laid off as a result of the University's decision to close YMP and transfer its administration and management to a non-University entity until such

persons are either reinstated or have refused an offer of reinstatement. These amounts shall be augmented by interest at a rate of 7 percent per annum.

4. Remit to UC-AFT the sum equivalent of any membership dues UC-AFT would have received if the University had not unlawfully laid-off YMP Instructors who were dues-paying members of UC-AFT, until each laid-off Instructor is either reinstated or has refused an offer of reinstatement in accordance with No. 2 above. These amounts shall be augmented by interest at a rate of 7 percent per annum.

5. Upon request, meet and confer with UC-AFT over matters affecting employee wages, hours and/or other terms and conditions of employment, including but not limited to, subcontracting decisions.

6. Within ten (10) workdays following the date this Decision is no longer subject to appeal, post at all work locations where notices to employees represented by UC-AFT customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. The Notice shall also posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with employees in CSEA's bargaining unit. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

7. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. The University shall provide reports, in writing, as directed

by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on UC-AFT.

Member Winslow joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-1047-H, , in which all parties had the right to participate, it has been found that the Regents of the University of California (Berkeley) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560 et seq.

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

A. CEASE AND DESIST FROM:

1. Unilaterally deciding to alter and/or altering policies within the scope of representation, including subcontracting work performed by YMP Instructors represented by UC-AFT and the negotiable effects thereof.

2. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise restraining or coercing employees because of the exercise of rights guaranteed by HEERA.

3. Interfering with employees' right to be represented by the employee organization recognized or certified as their exclusive representative.

4. Interfering with the right of UC-AFT, as the exclusive representative, to represent employees.

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

1. As soon as is practical, but not later than ten days after this decision and order becomes final, rescind and/or withdraw from the Transition and Affiliation Agreements providing for the Young Musicians Choral Orchestra (YMCO) to provide musical instruction services to students formerly provided by the Young Musicians Program.

2. Offer immediate reinstatement to all YMP Instructors laid off on or about April 24, 2013 to their former positions or, if those positions no longer exist, to equivalent or substantially similar positions without prejudice to their seniority or any other rights and/or privileges previously enjoyed.

Dated: _____ Regents of the University of California (Berkeley)

By: _____
Authorized Agent

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