

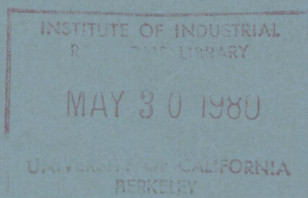
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**INSTITUTING COLLECTIVE BARGAINING AT  
CALIFORNIA'S UNIVERSITIES AND COLLEGES:  
THE OUTLINES OF HEERA**

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# Instituting Collective Bargaining at California's Universities and Colleges: The Outlines of HEERA

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In 1978 the California Legislature enacted the Higher Education Employer-Employee Relations Act<sup>1</sup> (HEERA), the latest step in the incremental development of the collective bargaining option for California public employees. HEERA, which became effective July 1, 1979, empowers California's university and college employees to select a collective bargaining representative and engage in collective bargaining—powers previously granted to all other California state employees.<sup>2</sup>

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1. CAL. GOV'T CODE §§ 3560-3599 (West Supp. 1979).

2. The California Legislature has at different times enacted four public employment collective bargaining statutes. The three of major importance to this Article are the Educational Employment Relations Act, CAL. GOV'T CODE §§ 3540-3549.3 (West Supp. 1979) (effective Jan. 1, 1976), covering public school and community college employees; the State Employer-Employee Relations Act, *id.* §§ 3512-3524 (effective July 1, 1978), covering state employees other than those employed by the university and college systems; and the Higher Education Employer-Employee Relations Act, *id.* §§ 3560-3599 (effective July 1, 1979), covering all employees of the University of California, the California State University and Colleges, and Hastings College of the Law. The three statutes will be referred to in this Article as EERA, SEERA, and HEERA, respectively. Inadvertently, the Legislature failed to name officially what is commonly known as EERA. EERA is also known by its popular name, the Rodda Act, after its principal sponsor and draftsman, California State Senator Albert S. Rodda. For a history of events leading to enactment of EERA, see Rodda, *Foreword—Public Employment Relations Symposium: Collective Bargaining in the California Schools*, 18 SANTA CLARA L. REV. 845 (1978).

The fourth public employee collective bargaining statute is the Meyers-Milias-Brown Act, CAL. GOV'T CODE §§ 3500-3510 (West 1966 & Supp. 1979). This Act regulates local public employee organizations, confers certain collective bargaining rights, and allows local governments and agencies to enact collective bargaining rules and regulations. For a discus-

This Article, written without benefit of interpretation of HEERA by its administering agency or the courts, is a preliminary analysis of HEERA's outlines. The Article examines the extent to which HEERA's development was influenced by earlier California public sector collective bargaining legislation,<sup>3</sup> which itself was greatly influenced by the private sector's 1935 National Labor Relations Act<sup>4</sup> (NLRA). The Article should provide some useful guidance in understanding how basic labor-management relations law concepts might be applied to California's vast system of higher education.<sup>5</sup>

HEERA regulates relationships between employers in California's higher education system and organizations representing or seeking to represent employees of the system. Only upon close examination of HEERA are material departures from the NLRA discernible. With the notable exceptions of HEERA's fact finding provision, which is an aspect of impasse resolution,<sup>6</sup> and its public notice provision,<sup>7</sup> which has no NLRA counterpart, a fair summary of HEERA's purposes and provisions would not differ significantly from a summary of those of the NLRA. HEERA provisions, as implemented by Public Employment Relations Board<sup>8</sup> (PERB) regulations, authorize higher education employees to select or reject a collective bargaining representative;<sup>9</sup> define certain employer and union conduct as unfair practices;<sup>10</sup> establish general criteria for resolving voting and other representation election controversies;<sup>11</sup> and empower the PERB, HEERA's counterpart to the National Labor Relations Board<sup>12</sup> (NLRB), to decide unfair practice or representation disputes that arise under HEERA.<sup>13</sup> The Article dis-

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sion of the Act see Grodin, *Public Employee Bargaining in California: The Meyers-Milias-Brown Act in the Courts*, 23 HASTINGS L.J. 719 (1972).

3. See note 2 & accompanying text *supra*.

4. 29 U.S.C. §§ 151-169 (1976).

5. California's system of higher education includes the University of California, the California State University and Colleges, California Community Colleges, and Hastings College of the Law. See CAL. EDUC. CODE §§ 66010, 89001, 92000-92144, 92200-92214 (West 1978). Community Colleges are under EERA coverage. See note 2 *supra*.

6. CAL. GOV'T CODE §§ 3591-3594 (West Supp. 1979). See notes 220-23 & accompanying text *infra*.

7. CAL. GOV'T CODE § 3595 (West Supp. 1979). See notes 199-214 & accompanying text *infra*.

8. 8 CAL. ADMIN. CODE §§ 50,000-51,530 (1979).

9. CAL. GOV'T CODE § 3565 (West Supp. 1979).

10. *Id.* §§ 3571 (unlawful employer practices), 3571.1 (unlawful employee organization practices). See notes 148-98 & accompanying text *infra*.

11. CAL. GOV'T CODE §§ 3573-3578 (West Supp. 1979).

12. 29 U.S.C. § 153(a) (1976).

13. CAL. GOV'T CODE § 3563.2. See notes 24-33 & accompanying text *infra*.

cusses the main divisions of HEERA as outlined by the Act's topical headings: administration; representation issues, focusing on unit determination questions; unfair practices issues; public notice requirements; and grievance and bargaining impasse resolution procedures.

### Administration

HEERA, like other labor-management relations legislation, is written with an elasticity of language that reflects a wise and practical spirit of legislative compromise. Faced with conflicting requests for particulars by management and labor groups, legislatures frequently draw up labor-management relations legislation that is sufficiently general to delay the resolution of controversies over meaning until they are addressed on a case by case basis by the appropriate administering agency or the courts.<sup>14</sup> Perhaps more so than in other administratively regulated areas of the law, the meaning of labor-management relations statutes is derived from decisions of administrative agencies that have initial jurisdiction to interpret the statute. A labor relations statute such as HEERA, written with a calculated absence of specificity, thus scarcely can be comprehended by simply reading its provisions. HEERA's administering agency, the PERB, accordingly will have a powerful role to play in determining HEERA's meaning through adjudicatory decisions and administrative regulations.

### The Origins of the PERB

Section 3563 of the California Government Code provides that HEERA "shall be administered by the Public Employment Relations Board."<sup>15</sup> The PERB was created in 1976 by the Educational Employment Relations Act<sup>16</sup> (EERA), which authorizes collective bargaining

14. The National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976), is replete with examples. Rather than list mandatory subjects of bargaining, § 8(d) of the NLRA, 29 U.S.C. § 158(d) (1976), provides that in appropriate circumstances an employer is obligated to bargain over "wages, hours, and other terms and conditions of employment." The National Labor Relations Board decides on a case by case basis, subject to judicial review, what constitutes "terms and conditions of employment" within the meaning of the NLRA. Unit determination standards under the NLRA are even more vague. See § 9(b) of the NLRA, 29 U.S.C. § 159(a) (1976); see notes 55, 57-60 & accompanying text *infra*.

15. CAL. GOV'T CODE § 3563 (West Supp. 1979).

16. *Id.* § 3541(a). Section 3541(a) created the Educational Employment Relations Board and fixed the number of Board members, the duration of their terms, and the manner of their appointments. The Board originally was named the Educational Employment Relations Board and its jurisdiction was limited to public primary and secondary schools and community colleges. SEERA § 3513(g), CAL. GOV'T CODE § 3513(g) (West Supp. 1979), changed the name of the Board to the Public Employment Relations Board. Sections

for public school and community college employees.<sup>17</sup> In 1977, the State Employer-Employee Relations Act<sup>18</sup> (SEERA) extended the PERB's jurisdiction to state employees, with the exception of employees of the state's universities and colleges. In 1978, the PERB's jurisdiction was extended further by HEERA,<sup>19</sup> to include employees of the state university and college systems.

The PERB has three members who are appointed by the Governor, subject to confirmation by the California Senate.<sup>20</sup> As provided originally in EERA, and as retained in both SEERA and HEERA, the PERB is authorized to appoint a general counsel,<sup>21</sup> an executive director,<sup>22</sup> and supporting staff. The PERB currently is staffed by ninety-five employees operating out of three regional offices and a headquar-

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3540.1(a) and 3541(a) of the EERA, CAL. GOV'T CODE §§ 3540.1(a), 3541(a) (West Supp. 1979), also were amended to read Public Employment Relations Board rather than Educational Employment Relations Board. 1977 Cal. Stat., ch. 1159, §§ 6, 7, at 3749.

17. CAL. GOV'T CODE § 3543 (West Supp. 1979).

18. *Id.* §§ 3514.5, 3515.

19. *Id.* §§ 3563, 3565. Unlike SEERA, which did not make clear whether the Governor was required to make new appointments to the PERB, HEERA clearly provided that no new appointments to the Board were required by the enactment of HEERA. Section 3562(b) of HEERA provides that "'Board' means the Public Employment Relations Board established pursuant to subdivision (g) of Section 3513 [of SEERA]." CAL. GOV'T CODE § 3562(b) (West Supp. 1979).

20. See note 16 *supra*. In so structuring the PERB, the legislature might have adopted one of a wide variety of other board models. These models included: New York's Public Employment Relations Board, consisting of one full-time chairperson and two part time members, N.Y. CIV. SERV. LAW § 205(1), (2) (McKinney 1973); New Jersey's tripartite Public Employment Relations Commission composed of union, management, and neutral members, N.J. STAT. ANN. § 34:13A-5.2 (West Supp. 1979-1980) (only chairperson full-time member); a five member full-time board similar to the National Labor Relations Board, 29 U.S.C. § 153(a) (1976), and California's Agricultural Labor Relations Board, CAL. LAB. CODE § 1141 (West Supp. 1979); and a board similar to the County of Los Angeles' Employee Relations Commission, COUNTY OF LOS ANGELES ORDINANCE NO. 93619, and the City of Los Angeles' Employee Relations Board, LOS ANGELES, CAL., CITY ADMIN. CODE § 4.810 (1974), each of whose part time members is appointed from a list of nominees jointly selected by representatives of management and labor.

21. CAL. GOV'T CODE § 3541(e) (West Supp. 1979).

22. *Id.* As amended, California Government Code § 3541(e) provides that the executive director shall be appointed by and serve at the pleasure of the Board's chairperson. CAL. GOV'T CODE § 3541(e) (West Supp. 1979). Formerly, the Board itself, then the EERB, appointed the executive director. See note 16 *supra*. A grandfather clause prevents the amended section from becoming operative during the incumbency of the executive director serving the EERB at the time the amendment became effective on January 1, 1978. CAL. GOV'T CODE § 3541(f) (West Supp. 1979). Section 3541(f) provides: "The executive director and general counsel serving the board on December 31, 1977, shall become employees of the Public Employment Relations Board and shall continue to serve at the discretion of the board." The general counsel of the PERB (formerly EERB) always has been appointed by the Board rather than by the chairperson of the Board.



ters office in Sacramento.<sup>23</sup>

### The Powers and Duties of the PERB

The PERB's "rights, powers, duties and responsibilities" are spelled out in the thirteen subsections of HEERA section 3563.<sup>24</sup> The PERB's powers and duties under HEERA are nearly identical to those enumerated in EERA<sup>25</sup> and SEERA.<sup>26</sup> They may be divided into three

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23. [1978] PERB ANN. REP. app. Regional Office Jurisdictions. The PERB's current proposed budget is \$5,084,171. [1979-1980] GOVERNOR'S BUDGET 1070. The PERB has jurisdiction over 450,000 school and community college employees, 150,000 state civil service employees, and 130,000 higher education employees—a total of 730,000 employees. Nationally, California's PERB ranks second in size only to New York's PERB, when measured by the number of public employees over whom each PERB exercises jurisdiction.

If California's PERB eventually acquires jurisdiction over local government employees in California's cities and counties, the number of employees under PERB's jurisdiction, based on state employment data, will increase to an estimated 1,420,000. See STATE OF CAL. EMPLOYMENT DATA & RESEARCH DIVISION, CAL. LABOR MARKET BULL. 3 (May 1979). A bill providing for this coverage, S.B. 858, was introduced during the 1979 session of the California Legislature. It passed the Senate by a vote of 21-9, but died in the Public Employees and Retirement Committee of the Assembly by a vote of 4-4, with one abstention. For a history of that bill, see *Recent Developments in California Public Jurisdictions*, 41 CAL. PUB. EMPLOYEE RELATIONS 26 (1979).

24. CAL. GOV'T CODE § 3563 (West Supp. 1979).

25. *Id.* § 3541.3. The powers and duties of the PERB are discussed in various places in the text of this Article. See notes 27-33 & accompanying text *infra*. PERB's powers are nearly identical under both HEERA and EERA. The few dissimilarities bear noting. Under EERA, the PERB is given discretionary power to study, collect, and make available on request data on employer-employee relations. CAL. GOV'T CODE § 3541.3(f) (West Supp. 1979). The description of the PERB's powers and duties under HEERA contains no such provision. *Id.* § 3563. Also, in describing PERB's powers and duties, HEERA § 3563 does not contain the requirement found in EERA § 3541.3(f) that the PERB file an annual "report to the Legislature by February 15th of each year on its activities during the immediately preceding calendar year." CAL. GOV'T CODE § 3541.3(f) (West Supp. 1979). SEERA, in contrast to both HEERA and EERA, contains no distinct description of PERB's powers and duties. However, § 3513(g) of SEERA, in addition to defining "Board" as the "Public Employment Relations Board," provides: "The powers and duties of the board described in Section 3541.3 [of EERA] shall also apply, as appropriate, to this chapter." CAL. GOV'T CODE § 3513(g) (West Supp. 1979).

It is not clear from the scant legislative history on any of the three statutes why the Legislature chose to omit the collection of data on employer-employee relations and the submission of an annual report to the Legislature from the PERB's powers and duties in the administration of HEERA. It is less clear why the Legislature would encourage the PERB to engage in data collection activity even under EERA and SEERA, given the existence of other agencies in the state government that traditionally have collected and maintained economic data of all kinds. The PERB's annual reports make no mention of activity in the area of discretionary data collection. It thus appears that the PERB has so far exercised its discretion not to engage in that activity.

26. CAL. GOV'T CODE § 3513(g) (West Supp. 1979). See note 25 *supra*.

general categories: (1) adjudicatory; (2) administrative and related to adjudication; and (3) administrative but unrelated to adjudication.

The PERB's adjudicatory authority empowers it to resolve disputes over unfair practices, representation units, and representation elections arising under the Act. Based on existing administrative rules implementing EERA, SEERA, and HEERA, the PERB first exercises this authority by actively encouraging and seeking voluntary resolution of such disputes.<sup>27</sup> Should the parties fail to agree, the PERB assigns a Board agent to take evidence at a hearing and render a recommended decision,<sup>28</sup> which the parties to the case may accept or appeal to the PERB.<sup>29</sup> Given the underlying purposes of the statute, it seems evident that the PERB's most important function in implementing HEERA, as has been the case in the administration of EERA and SEERA, will be the resolution of unfair practice and representation disputes.<sup>30</sup>

Subsections (f) and (g) of HEERA section 3563 give the PERB broad administrative powers to establish the procedures required to implement HEERA. Subsection (f) provides PERB with general rulemaking authority in areas within its jurisdiction.<sup>31</sup> Subsection (g), written with a narrower focus toward adjudication, authorizes hearings, the taking of oaths of witnesses, and the issuance of subpoenas,<sup>32</sup> presumably—although not expressly stated in section 3563—in connection with any matter within the PERB's jurisdiction. Together, these subsections directly support other HEERA sections authorizing the PERB's adjudicatory role.<sup>33</sup> The remainder of the Article focuses on this adjudicatory role, emphasizing the impact of existing employer-employee regulatory statutes on the implementation of HEERA.

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27. 8 CAL. ADMIN. CODE §§ 32,600, 33,000 (1978), 51,000 (1979).

28. *Id.* §§ 32,168, 32,170 (1979), 32,215 (1978). 8 CAL. ADMIN. CODE § 32,670 (1979), dealing with unfair practice disputes, provides for an informal settlement conference designed to narrow issues and explore the possibility of voluntary settlement of the entire case. 8 CAL. ADMIN. CODE § 32,680 (1979), also dealing with unfair practice disputes, provides for a hearing in the absence of a settlement.

29. 8 CAL. ADMIN. CODE § 32,300 (1978).

30. PERB's adjudicatory powers closely parallel those of the National Labor Relations Board. Compare CAL. GOV'T CODE § 3563(a)-(c), (i), (k) (West Supp. 1979) (representation and unfair practice authority) with NLRA § 9, 29 U.S.C. § 159 (1976) (representation and election matters) and NLRA § 10, 29 U.S.C. § 160 (1976) (unfair labor practice authority).

31. CAL. GOV'T CODE § 3563(f) (West Supp. 1979).

32. *Id.* § 3563(g).

33. Other administrative functions of the PERB, not related to the PERB's adjudicatory functions, are discussed at notes 233-35 & accompanying text *infra*, which address HEERA's impasse and grievance resolution sections.

## Representation Questions

Representation questions are those bearing on recognition procedures, campaign and voting procedures for representation elections, and unit determination. The importance of representation issues and their prompt resolution is highlighted by HEERA's provision that no collective bargaining may take place until all disputed representation questions arising under the Act are resolved, either by agreement of all parties to the dispute or by a final and unappealed PERB decision.<sup>34</sup>

Recognition and certification by PERB are the two general means by which a union may become the exclusive bargaining representative of a unit of employees under HEERA, EERA, and SEERA.<sup>35</sup> A union is recognized when an employer grants the union's request to be the exclusive bargaining representative for a designated unit of employees.<sup>36</sup> Recognition requests must be granted, subject to exceptions involving lack of majority support or a competing claim of representation.<sup>37</sup> Certification is achieved when a union petitions the

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34. The Act contains no express statement that collective bargaining may not take place until representation disputes are resolved. This requirement, however, is implicit in HEERA § 3573, which provides that any employees represented by an exclusive representative must be "employees of an appropriate unit." CAL. GOV'T CODE § 3573 (West Supp. 1979). It follows that the appropriate unit issue must be resolved before a representation election may be held. Counterpart provisions appear in EERA § 3544(a), CAL. GOV'T CODE § 3544(a) (West Supp. 1979); in SEERA § 3520.5(a), CAL. GOV'T CODE § 3520.5(a) (West Supp. 1979); and in NLRA § 9(a), 29 U.S.C. § 159(a) (1976).

35. Under the NLRA, a union may obtain a bargaining order from the NLRB without an election having been held if an employer's serious unfair practices are found to have made it not possible for a fair representation election to be conducted and the union demonstrates majority support through authorization cards. See *NLRB v. Gissel Packing Co.*, 395 U.S. 375, 595-600 (1969). PERB so far has issued no *Gissel*-type bargaining orders. The kinds of unfair practices that could lead to *Gissel*-type orders are unlikely to arise under EERA and SEERA and should not be anticipated under HEERA. See note 158 *infra*.

36. See HEERA §§ 3573-3575, 3577, CAL. GOV'T CODE §§ 3573-3575, 3577 (West Supp. 1979). EERA procedures for recognition basically are similar to HEERA procedures. See CAL. GOV'T CODE §§ 3544, 3544.1, 3544.3, 3544.5, 3544.7 (West Supp. 1979). SEERA recognition procedures are left to the rulemaking discretion of the PERB. See CAL. GOV'T CODE § 3520.5 (West Supp. 1979). It is unclear why recognition procedures are specified in EERA and HEERA and left to PERB's discretion in SEERA.

37. CAL. GOV'T CODE § 3574 (West Supp. 1979). See notes 43-44 & accompanying text *infra*. HEERA § 3574(b) provides that a competing claim for representation bars an employer from recognizing either of the competing unions, thus forcing a representation election. CAL. GOV'T CODE § 3574(b) (West Supp. 1979). Section 3574(b) has no express NLRA counterpart; the section is, however, a statement of NLRB decisional law as expressed in *In re Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060 (1945). *Midwest Piping* held that an employer could not rely on signed membership cards as a basis for granting recognition to one union where another union also claimed majority status. The *Midwest Piping* rationale is that authorization cards are an unreliable indication of a union's majority status when two or more unions compete for representation, because the extent of dual



PERB to organize a representation election which, if won by a union, will result in the union's certification by the agency as the exclusive representative of a unit of employees.<sup>38</sup> An employer's denial of a union's request for recognition can trigger the union's petition for certification.<sup>39</sup> Both recognition and certification procedures are carefully balanced to protect the rights of employees who do not wish to be represented by any union or who desire to be represented by a union other than the union originally seeking recognition or certification.<sup>40</sup>

Recognition, however, avoids both a representation election and the possibility of a protracted preliminary hearing to resolve a disputed unit question; it is also the quickest means by which a union might become a bargaining representative under HEERA. In contrast, the

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membership is "an important unknown factor." *Id.* at 1070 n.13. The *Midwest Piping* doctrine is open to criticism because of the inflexible manner in which it is applied. The NLRB makes no attempt to distinguish multi-union dual-card cases from multi-union cases with no dual-card issue, yet it does view the dual-card problem as the factor that distinguishes the single-union case from the multi-union recognition case. Nevertheless, in single-union voluntary recognition cases cards are considered reliable indicators of a union's majority status. It is difficult to distinguish such cases from the multi-union cases with no dual-card issue. Furthermore, the NLRB itself relies on authorization cards to justify an involuntary bargaining order when serious unfair practices which would influence election results are found to have been committed by an employer and the union demonstrates its majority status with authorization cards. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Under HEERA § 3574(b), the PERB must apply the *Midwest Piping* doctrine inflexibly in all multi-union recognition cases, those with and those without a dual-card problem. For criticism of the *Midwest Piping* doctrine, see Getman, *The Midwest Piping Doctrine: An Example of the Need for Reappraisal of Labor Board Dogma*, 31 U. CHI. L. REV. 292 (1964). See also *American Bread Co. v. NLRB*, 411 F.2d 147, 155-56 (6th Cir. 1969) (refusing to enforce an NLRB decision applying the *Midwest Piping* doctrine); *NLRB v. Air Master Corp.*, 339 F.2d 553, 557 (3d Cir. 1964) (same).

38. CAL. GOV'T CODE §§ 3575, 3577 (West Supp. 1979).

39. HEERA § 3575 sets out the certification procedures to be used by a union following an employer's refusal to recognize the union as well as certification procedures to be used by unions originally filing for certification without having first sought recognition. CAL. GOV'T CODE § 3575 (West Supp. 1979). The option of initially seeking either recognition or certification is not provided under EERA. See Alleyne, *A Comment on the New Proof-of-Majority Requirements of the Educational Employment Relations Act*, 36 CAL. PUB. EMPLOYEE RELATIONS 16 (1978). HEERA § 3577 sets out PERB's responsibilities after receipt of a union petition. CAL. GOV'T CODE § 3577 (West Supp. 1979).

40. For example, HEERA § 3577 expressly provides that a representation ballot shall contain the choice of "no representation." CAL. GOV'T CODE § 3577 (West Supp. 1979). This portion of HEERA was derived from EERA § 3544.7, CAL. GOV'T CODE § 3544.7 (West Supp. 1979). SEERA § 3520.5(b) makes election procedures subject to PERB's rulemaking discretion. CAL. GOV'T CODE § 3520.5(b) (West Supp. 1979). The PERB has published rules governing SEERA representation elections, see 8 CAL. ADMIN. CODE §§ 41,200-41,270 (1978), but these rules do not specifically require the ballot to contain a "no representation" choice. Intervention rights protect the interests of employees who seek representation by a union other than the union seeking recognition or certification. See, e.g., CAL. GOV'T CODE § 3574(b) (West Supp. 1979).

road to certification may be slow and tumultuous if complex representation disputes precede the election.<sup>41</sup> Because an employer's obligation to bargain begins with the employer's recognition of a union or the union's certification as the exclusive representative, the statutory procedures for achieving recognition and certification warrant special attention.

### Recognition Procedures

If a union seeks to become recognized, it must file a recognition request with the employer and simultaneously file proof of the union's majority support with the PERB or a third party mutually agreed upon by the employer and the union seeking recognition.<sup>42</sup> These proce-

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41. In the absence of recognition or a consent-election agreement resolving unit or other disputed representation questions, a hearing is held before a PERB hearing officer who writes a recommended decision, any part of which may be appealed to the PERB. *See* 8 CAL. ADMIN. CODE §§ 33,270 (1978), 33,330 (1979) (EERA), 41,071, 41,140 (1978) (SEERA), 51,140, 51,225 (1979) (HEERA), 32,168, 32,170 (1979), 32,215, 32,300 (1978) (general).

On the basis of the PERB's performance under EERA and SEERA, it can take from one to two years for the PERB to decide representation cases that are not settled by recognition or other agreements. For example, SEERA became effective on July 1, 1978. Requests for recognition were filed during August and September of 1978. Unit requests under SEERA differed and could not be harmonized. One phase of the hearings to resolve the differing unit contentions, concerning the scope of the unit, began on December 19, 1978, and ended on May 16, 1979. The other phase, concerning who might be excluded from the unit as a supervisory, managerial, or confidential employee, began on January 13, 1979. The 20,000-page record made in the case was submitted directly to the PERB members without an intervening hearing officer's decision, an unusual step for a quasi-judicial administrative agency. While bypassing a hearing officer's recommended decision appears to be a time-saving measure, the time used by PERB members to cope with issues that might not have been appealed from a hearing officer's decision could very well make the decision to bypass the hearing officer's decision a time-losing decision. The prevailing practice of parties to unit disputes is to appeal the decision on the scope of the unit and not to appeal hearing officer decisions on all supervisory, managerial, and confidential employee issues.

As matters stand at this writing, the PERB itself will decide the portion of the unit case concerning the scope of the unit, but not the issue of who might be excluded as a supervisory, managerial, or confidential employee. A representation election will then be held. Some voters will probably be challenged on the ground that their supervisory, managerial, or confidential status makes them ineligible to vote. It will subsequently be determined whether the challenged ballots are determinative of the outcome of the election. If the challenged ballots are determinative of the outcome, all of the issues raised by those ballots will have to be resolved by the PERB before election results may be certified by the PERB. This could extend the time of certification of election results until July of 1980 and possibly into early 1981. Telephone Interview with Charles M. Cole, Executive Director, PERB (Sept. 19, 1979).

42. CAL. GOV'T CODE §§ 3573, 3575 (West Supp. 1979). EERA § 3544, originally requiring that proof of a union's majority support be submitted to the employer, has been amended to require submission of such proof to the PERB instead. CAL. GOV'T CODE

dures precipitate important questions concerning the extent of an employer's discretion to deny a request for recognition and trigger an election or a unit hearing, or both, in lieu of recognition.

HEERA's section on recognition requires that an employer recognize a union on request unless at least one or more of six conditions is met.<sup>43</sup> Two of these conditions bear on the employer's state of mind at the time the recognition request is made: "The higher education employer shall grant a request for recognition . . . unless . . . [t]he employer reasonably doubts that the employee organization has majority support or reasonably doubts the appropriateness of the requested unit."<sup>44</sup> In adopting this language, the legislature appears to have departed sharply from EERA's recognition procedures, which permit an employer to deny a recognition request for any reason.<sup>45</sup> This departure from EERA procedures apparently has incorporated the earlier and no longer followed approach of the NLRB in *In re Joy Silk Mills, Inc.*,<sup>46</sup> which obligated an employer to recognize a union on request

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§ 3544 (West Supp. 1979). HEERA and EERA now differ in that HEERA § 3573, unlike EERA § 3544, provides a union with the possibility of submitting proof of majority support to a neutral third party rather than to the PERB. The requirement that the neutral third party be "mutually agreed upon" means, however, that the employer may veto that possibility. See generally Alleyne, *A Comment on the New Proof-of-Majority Requirements of the Educational Employment Relations Act*, 36 CAL. PUB. EMPLOYEE RELATIONS 16 (1978).

43. CAL. GOV'T CODE § 3574 (West Supp. 1979).

44. *Id.* § 3574(a). The other four conditions which exempt an employer from recognizing a union upon request occur where: (1) "Another employee organization . . . files with the employer a challenge to the appropriateness of the unit . . . within 15 workdays of the posting of notice of the written request," *id.* § 3574(b); (2) "[a]nother employee organization . . . submits a competing claim of representation within 15 workdays of the posting of notice of the written request," *id.*; (3) "[t]here is currently in effect a lawful written memorandum of understanding between the employer and another employee organization recognized or certified as the exclusive representative of any employees included in the unit described in the request for recognition," *id.* § 3574(c); or (4) "[w]ithin the previous 12 months either another employee organization has been lawfully recognized or certified as the exclusive representative of any employees included in the unit described in the request for recognition, or a majority of votes cast in a representation election . . . were cast for 'no representation,'" *id.* § 3574(d).

45. CAL. GOV'T CODE § 3544.1(a) (West Supp. 1979). Section 3544.1(a) provides that the public school employer need not grant recognition if the employer desires a representation election or doubts the appropriateness of the unit. Under HEERA § 3574 an employer may not trigger an election in lieu of recognition simply by requesting a representation election. CAL. GOV'T CODE § 3574 (West Supp. 1979). HEERA § 3574 also differs from comparable EERA § 3544.1(a) in that the former requires "reasonab[le] doubt," rather than merely "doubt," concerning the appropriateness of a union's requested unit. The difference appears to be more form than substance, as measured by the quantum of proof required to establish one standard rather than the other.

46. 85 N.L.R.B. 1263, 1264 (1949), *aff'd*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951).

unless the employer had a good faith doubt that the union had majority support.<sup>47</sup> Reasons for the departure are not made clear by anything found in HEERA itself. Nonetheless, the legislature, in making these changes, has made it much more difficult for a HEERA employer to deny a single union's request for recognition than it is for a public school employer to deny such a request under EERA. In virtually all other respects, however, the recognition provisions in EERA and HEERA are similar.

In summary, under HEERA, an employer's denial of recognition can trigger one of two responses by a union seeking recognition: a "petition for certification," which ordinarily would lead to a representation election;<sup>48</sup> or an unfair practice charge under section 3571<sup>49</sup> alleging an unlawful refusal to recognize the union seeking recognition, which could lead to a *Joy Silk Mills* type of bargaining order.<sup>50</sup> Either the petition for certification or the unfair practice charge would be filed with the PERB.

### Certification Procedures

Confronted with a HEERA employer who is unwilling for valid reasons to recognize the union upon request, a union seeking to become the exclusive representative of employees must attempt to do so under HEERA's certification procedures.<sup>51</sup> On receiving a petition for certification, the PERB must determine whether the petition meets the statutory requisites for an election, resolve any pre-election disputes raised by the petition, and, if in order, conduct an election to determine

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47. Modifying its *Joy Silk Mills* decision, the NLRB in *Aaron Brothers Co.*, 158 N.L.R.B. 1077 (1966), held that "[a]bsent a showing of bad faith, an employer will not be held to have violated his bargaining obligation under the law simply because he refuses to rely upon cards, rather than an election, as the method for determining the union's majority." *Id.* at 1078. The effect of *Aaron Brothers* was to relieve the employer of the burden of proof. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 592-94 (1969). In *Gissel Packing*, the United States Supreme Court noted: "[T]he Board announced at oral argument that it had virtually abandoned the *Joy Silk* doctrine altogether. Under the Board's current practice, an employer's good faith doubt is largely irrelevant, and the key to the issuance of a bargaining order is the commission of serious unfair labor practices that interfere with the election processes and tend to preclude the holding of a fair election. Thus, an employer can insist that a union go to an election, regardless of his subjective motivation, so long as he is not guilty of misconduct . . . ." *Id.* at 594.

48. See note 41 *supra*.

49. CAL. GOV'T CODE § 3571 (West Supp. 1979).

50. Allegations of unlawful refusal to recognize could provide the basis for a *Joy Silk Mills* type of bargaining order; however, the *Joy Silk Mills* rationale apparently has been virtually abandoned elsewhere. See notes 46-47 & accompanying text *supra*.

51. CAL. GOV'T CODE § 3575 (West Supp. 1979).

whether employees in the "appropriate unit" desire to be represented by a union or desire "no representation."<sup>52</sup> Experience under EERA portends that among the various types of pre-election disputes that must be resolved before an election is held under HEERA, unit controversies will far exceed all others in number and importance.<sup>53</sup>

### Unit Determination

A representation unit is a grouping of job classifications. The function of a unit determination proceeding is to determine which grouping of job classifications is "appropriate" under the applicable statutory unit criteria for collective bargaining. The importance of unit determination cannot be overemphasized. The selection of an "appropriate" unit not only determines which classes of employees are eligible to vote in the election, but also predetermines the constituency the union will exclusively represent should the union win the election. The outcome of the representation election may hinge on the outcome of the unit determination, just as the outcome of a political election might hinge on the results of a gerrymander. Consequently, unit determination arguments made by parties to the determination proceeding, although at times couched in the dry terms of applicable statutory criteria, often have as their real objective approval of a unit configuration most likely to produce a representation election victory.

Unit determination controversies, including those under HEERA, may be classified as (1) disputes over the geographical boundaries of a unit; (2) disputes over the classes of employees to be included in a unit; and (3) disputes concerning the particular employees to be included in the generic class or classes of employees making up a unit. Thus, under HEERA, the question of whether a unit should be statewide or be limited to a single campus would represent a boundary dispute. The question of whether faculty and librarians should be in the same unit would represent a class inclusion dispute. On a determination that a unit consisting of faculty, but excluding librarians, is an appropriate unit, the question of whether a department head should be excluded from the unit because he or she is a supervisor within the meaning of HEERA would represent an individual inclusion dispute.

Moreover, some unit disputes involve two or all three types of controversies. A unit controversy involving more than one classification might exist, for example, where Union *A* petitioned for a unit com-

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52. *Id.* § 3577(a).

53. *See generally* [1976] EERB ANN. REP.

prised of faculty from one campus, while Union *B* filed a competing petition for a statewide unit of librarians and faculty. All three types of unit issues would be involved if the university employer contended that the appropriate unit should be a statewide unit of faculty and librarians and that Union *A*'s proposed unit inappropriately included the head of the English Department, an alleged supervisor within the meaning of HEERA's "supervisory employee" definition.<sup>54</sup> This classification of unit determination disputes is important in two respects. First, different unit criteria tend to be applied to units falling in the different classifications. Second, the speed with which the PERB can decide unit controversies will vary with the differing character of the unit controversy.

### The Influence of NLRA Unit Criteria

NLRA unit determination standards are not readily apparent on reading the NLRA itself because Congress gave the NLRB virtually complete power to establish NLRA unit criteria and to determine how they should be applied.<sup>55</sup> Nonetheless, HEERA's unit determination criteria are simply NLRA criteria, as developed by the NLRB and the courts, tailored slightly to fit California's higher education system. The NLRA-based origins of HEERA's unit criteria provide a threshold basis for their interpretation, as California courts, by a combination of pronouncement and practice, have virtually commanded that federal labor law precedents be followed in the interpretation of state labor relations legislation that is patterned after federal legislation.<sup>56</sup> The

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54. See CAL. GOV'T CODE § 3580.3 (West Supp. 1979).

55. NLRA § 9(b) provides: "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . ." 29 U.S.C. § 159(b) (1976). See notes 57-58 & accompanying text *infra*.

56. In *Fire Fighters Union v. City of Vallejo*, 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974), the California Supreme Court held that it is appropriate to use National Labor Relations Act precedents as a guide in interpreting analogous or identical language in state labor legislation. *Id.* at 617, 526 P.2d at 977, 116 Cal. Rptr. at 513. In *Los Angeles Metropolitan Transit Auth. v. Brotherhood of R.R. Trainmen*, 54 Cal. 2d 684, 355 P.2d 905, 8 Cal. Rptr. 1 (1960), the California Supreme Court held: "When legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation. This rule is applicable to state statutes which are patterned after federal statutes." *Id.* at 688, 355 P.2d at 907, 8 Cal. Rptr. at 3.

Following the reasoning of *Vallejo* and *Los Angeles Metropolitan Transit Authority*, California appellate courts consistently have followed NLRB and federal court interpretations of the National Labor Relations Act in interpreting California collective bargaining



NLRA origins of HEERA's unit criteria thus are an essential key to their understanding.

The original NLRA did not establish workable unit criteria. Instead, the 1935 Act provided that the NLRB shall decide whether the appropriate unit shall be the "employer unit, craft unit, plant unit, or subdivision thereof."<sup>57</sup> This statutory enumeration embraced every possible unit configuration and gave the NLRB no more guidance than the Act would have provided in the absence of such language. Little more guidance was provided by the NLRA's command that the appropriate unit shall "assure to employees the fullest freedom in exercising the rights guaranteed by [the Act]."<sup>58</sup>

Working with *carte blanche* authority not only to determine units but also to establish the criteria to be employed in making the determination, the NLRB over the years has fashioned two principal unit criteria: (1) community of interest, including the subcriteria that make up the elements of community of interest; and (2) past bargaining history.<sup>59</sup> These criteria have found their way into HEERA as part of a detailed listing of criteria which must be considered in "each case where the appropriateness of a unit is an issue."<sup>60</sup>

In addition to the NLRA-based unit criteria, which the PERB has discretion to apply in virtually any reasonable fashion, HEERA's unit criteria contain specific and unqualified unit inclusions and exclusions<sup>61</sup> and specific but rebuttable presumptions in favor of certain unit

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statutes. *See, e.g.*, Santa Clara County Dist. Attorney Investigators Ass'n v. County of Santa Clara, 51 Cal. App. 3d 255, 124 Cal. Rptr. 115 (1975); Alameda County Assistant Pub. Defenders Ass'n v. County of Alameda, 33 Cal. App. 3d 825, 109 Cal. Rptr. 392 (1973).

57. 29 U.S.C. § 159(b) (1976).

58. *Id.*

59. *See generally* R. GORMAN, LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 68-72 (1976).

60. CAL. GOV'T CODE § 3579(a) (West Supp. 1979). HEERA also follows § 9(b) of the NLRA, 29 U.S.C. § 159(b) (1976), under which the NLRB's discretion to determine the scope of units is limited by a proviso added by the Taft-Hartley amendments of 1947. The proviso expressly removes the NLRB's authority to approve certain proposed units: (1) units that include both professional and nonprofessional employees (unless the professional employees consent to the inclusion of nonprofessionals); and (2) units that include both guards and employees who are not guards. *Id.*

61. CAL. GOV'T CODE § 3579(d) (West Supp. 1979). Section 3579(d) provides that skilled craft employees have the right to be included in separate craft units. This is an apparent legislative response to the PERB's decision in Sacramento City Unified School Dist., 1 P.E.R.C. 419 (1977), disallowing a separate craft unit. In that case, the PERB also denied a motion to reconsider its decision, even though no party to the case opposed the motion and a voluntary settlement of the craft-unit dispute appeared to be imminent. *See* Sacramento City Unified School Dist., 1 P.E.R.C. 475 (1977) (Motion for Reconsideration).

configurations.<sup>62</sup> The NLRA and HEERA are not parallel with respect to all specific unit inclusions and exclusions. One example of a specific HEERA limitation on the PERB's discretion, contrasting markedly with NLRB precedents, is HEERA's treatment of the well-litigated issue of whether law, medical, and other professional school faculty are entitled to separate units.

The NLRB, by applying community of interest criteria, has held that law school and medical school faculties may be appropriately organized as separate units.<sup>63</sup> HEERA's unit criteria, however, provide

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62. HEERA § 3579(b) creates a rebuttable presumption that professional and nonprofessional employees "shall not be included in the same representation unit." CAL. GOV'T CODE § 3579(b) (West Supp. 1979). The presumption in § 3579(b) is expressly made rebuttable on the basis of community of interest, history of representation, and other general unit criteria enumerated in HEERA § 3579(a). CAL. GOV'T CODE § 3579(a) (West Supp. 1979). It seems that satisfaction of the general unit criteria found in § 3579(a) might overcome the presumption and permit the approval of a mixed unit of professional and nonprofessional employees. HEERA's treatment of professional and nonprofessional employees thus appears to differ from NLRA treatment of the subject, since the NLRA presumption against a mixed professional and nonprofessional employee unit, absent consent of a majority of the professional employees, in effect, is irrebuttable. See note 60 *supra*. However, the differences between NLRA and HEERA treatment of professional employee units may be more apparent than real.

HEERA § 3562(o) defines "professional employee" in part as "[a]ny employee engaged in work . . . predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work[,] . . . involving the consistent exercise of discretion and judgment in its performance[,] . . . and . . . requiring knowledge of an advanced type . . . customarily acquired by a prolonged course of specialized intellectual instruction . . . [and any] employee who . . . has completed courses of specialized intellectual instruction and study . . . and . . . is performing related work under the supervision of a professional person to qualify himself to become a professional employee . . . ." CAL. GOV'T CODE § 3562(o) (West Supp. 1979). Given this definition of "professional employee," it is difficult to perceive how the presumption against a mixed professional-nonprofessional employee unit might be rebutted. Few, if any, professional employees under the jurisdiction of HEERA will be found to have a community of interest with nonprofessional employees that is sufficient to rebut the presumption against the mixed unit. Nor is it likely that consideration of general unit criteria other than community of interest—such as unit fragmentation, employer efficiency, and effect on the meet and confer bargaining process—will very often serve to overcome the presumption against a mixed unit of professional and nonprofessional employees. Indeed, consideration of the criterion of the unit composition's effect on the meet-and-confer process very likely will support the presumption against the mixed unit. A unit made up of professional and nonprofessional employees working under widely differing employment conditions, and hence having widely divergent bargaining interests, would adversely affect the bargaining process.

63. See *University of Vermont & State Agricultural College*, 223 N.L.R.B. 423 (1976); *University of Miami*, 213 N.L.R.B. 634 (1974); *University of San Francisco*, 207 N.L.R.B. 12 (1973); *Catholic Univ.*, 201 N.L.R.B. 929 (1973). In these cases, the NLRB's community of interest findings calling for separate law or medical school units included findings of separate buildings, unequal salaries, differing promotion and tenure periods, operational autonomy, and an intellectual alignment with practitioners. Public sector decisions involving

in part that "the only appropriate representation units including members of the academic senate of the University of California shall be either a single statewide unit consisting of all eligible members of the senate, or divisional units consisting of all eligible members of a division of the senate."<sup>64</sup> Thus, even though separate units of law and medical school faculties at the University of California undoubtedly would be deemed appropriate under the community of interest criteria of both the NLRB and HEERA,<sup>65</sup> HEERA section 3579(e) clearly makes inappropriate any University of California academic unit with a boundary encompassing less than one campus.<sup>66</sup>

For other than University of California academic senate members, however, the initial question of whether a HEERA unit may be statewide, campus-wide, or a campus subdivision, is as open as it would be under the decisional law of the NLRB. Because no specific HEERA unit criterion will govern this initial issue, the question should be resolved on the basis of the general unit criteria found in HEERA section 3579.<sup>67</sup> NLRB decisions may be instructive in this initial unit determination, but they should be viewed with caution because of the inconsistent manner in which the NLRB has applied its criteria to unit boundary disputes at private universities and colleges.

In 1970, the NLRB decided *Cornell University*,<sup>68</sup> its seminal multi-

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public universities and colleges tend to follow the NLRB cases. See, e.g., *American Ass'n of Univ. Professors v. Board of Regents of the Univ. of Neb.*, 198 Neb. 243, 253 N.W.2d 1 (1977). In *New York Univ.*, 205 N.L.R.B. 4 (1973), and *Syracuse Univ.*, 204 N.L.R.B. 641 (1973), the NLRB permitted law faculties to decide whether or not they wanted separate representation units. See generally Moore, *The Determination of Bargaining Units for College Faculties*, 37 U. PITT. L. REV. 43, 60-62 (1975); Pollitt & Thompson, *Collective Bargaining on the Campus: A Survey Five Years After Cornell*, 1 INDUS. REL. L.J. 191, 212-14 (1976).

64. CAL. GOV'T CODE § 3579(e) (West Supp. 1979).

65. *Id.* § 3579(a)(1).

66. See *id.* § 3579(e).

67. CAL. GOV'T CODE § 3579(a)(d) (West Supp. 1979). For academic senate members of the University of California, but for no other HEERA employees, Government Code § 3579(e) provides that "the only appropriate representation units including members of the academic senate . . . shall be either a single state-wide unit consisting of all eligible members of the senate or divisional units consisting of all eligible members of a division of the senate." *Id.* § 3579(e). A "division" of the senate is a campus component of the state-wide senate. Since both the campus and state-wide units are defined as "appropriate," *id.*, a petition for a campus unit of academic employees could not be challenged successfully on the grounds that a campus unit is not appropriate within the meaning of Government Code § 3579(a). Further, § 3579(e) permits a petition for a University of California state-wide academic unit when 35% of eligible members of the senate are represented by one or more unions. Then, the issue of representation in a system-wide unit would be determined by state-wide senate members in a PERB-conducted election.

68. 183 N.L.R.B. 329 (1970).

facility university and college unit case, in which it held the general unit criteria used in industrial unit disputes applicable in determining the appropriate unit in university and college disputes. These criteria included "prior bargaining history, centralization of management particularly in regard to labor relations, extent of employee interchange, degree of interdependence or autonomy of the plants, differences or similarities in skills and functions of employees, and geographical location of the facilities in relation to each other."<sup>69</sup> The NLRB concluded a statewide unit was appropriate.<sup>70</sup>

With the exception of the geographic criterion, all of these criteria are employed by the NLRB in class-inclusion as well as unit boundary disputes.<sup>71</sup> In unit boundary and class-inclusion unit decisions, however, the NLRB tends to apply the unit criteria without stating which of the numerous criteria are being given more weight than others, and why. Instead, it merely recites all of the applicable criteria, notes the relevant facts, and states a conclusion. This is particularly the case in regard to the various community of interest subcriteria.<sup>72</sup>

This lack of a priority ranking of criteria and subcriteria may be partially responsible for the inconsistency in the NLRB's approach to these cases. For example, in 1973 the NLRB decided another case involving Cornell University,<sup>73</sup> but concluded there that "something less than the statewide unit . . . may be appropriate."<sup>74</sup> The NLRB based its decision on the "considerable geographic diversity among Cornell's various facilities and considerable distance between many of them . . . [and the] minimal degree of interchange of employees."<sup>75</sup> Consequently, the Board found that a unit comprised of dining services employees on one campus was appropriate.<sup>76</sup> The NLRB, although noting Cornell's centralized employment and labor relations policies, uniform wage rates, and other uniform benefits, did not consider these factors controlling.<sup>77</sup> In *Tulane University*,<sup>78</sup> however, the NLRB

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69. *Id.* at 336.

70. *Id.*

71. Compare *NLRB v. Retail Clerks Local 588*, 587 F.2d 984, 987-88 (9th Cir. 1978) and *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1038 (9th Cir. 1978) (class-inclusion unit dispute) with *Local 627, Int'l Union of Operating Eng'rs v. NLRB*, 595 F.2d 844, 848, 849 n.12 (D.C. Cir. 1979) and *Electrical Workers v. NLRB*, 101 L.R.R.M. 2864, 2868 (D.C. Cir. 1979) (unit boundary dispute).

72. See notes 102-04 & accompanying text *infra*.

73. *Cornell Univ.*, 202 N.L.R.B. 290 (1973).

74. *Id.* at 291.

75. *Id.*

76. *Id.* at 292.

77. *Id.* at 291.

found a unit of nonacademic employees from one university appropriate, relying on centralized personnel policies, identical job titles throughout the University, and uniform wages and fringe benefits<sup>79</sup>—the same factors considered not controlling in the 1973 *Cornell University* case.<sup>80</sup> Further, the facts in *Tulane University* showed geographic diversity and a lack of interchange or transfer of employees between Tulane's facilities—controlling factors in the 1973 *Cornell University* case<sup>80</sup>—yet the Board did not find a single-campus unit appropriate.

Although the NLRB's near ten-year history of unit determination in private college and university cases may prove useful in determining how individual HEERA unit criteria might be interpreted, the inconsistency of the NLRB's approach in these cases decreases the usefulness of NLRB decisions in HEERA unit determination controversies. Moreover, the specificity with which HEERA's unit criteria are written does not solve the problem. Although HEERA requires the PERB to consider all of HEERA's unit criteria in "each case where the appropriateness of a unit in an issue,"<sup>81</sup> the act does not suggest which of its unit criteria should be given more weight than others. This shortcoming compounds the difficulty of finding a principled basis on which to decide unit disputes.

The need for weighting various unit criteria would not exist if each of the unit criteria rationally could be given equal weight in all cases. To adopt this approach, however, would sometimes place different unit criteria in conflict with each other. For example, in a single unit determination proceeding, community of interest evidence, viewed alone, might favor multiple units; evidence on unit size, as related to efficiency of operations, might favor fewer units than the number suggested by the community of interest criterion; and bargaining history evidence, alone, might dictate still another result. Hence, a principled application of unit criteria requires that some criteria be given priority. Similar problems may arise with community of interest subcriteria, as illustrated by the apparently different priorities of subcriteria applied in the NLRB's *Tulane University* and 1973 *Cornell University* decisions.<sup>82</sup>

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78. 195 N.L.R.B. 329 (1972).

79. *Id.* at 330.

80. See notes 73-77 & accompanying text *supra*.

81. CAL. GOV'T CODE § 3579(a) (West Supp. 1979).

82. See notes 68-80 & accompanying text *supra*.

### Suggested Priority Ranking of HEERA Unit Criteria

The NLRA's preamble speaks of employee concerns such as "inequality of bargaining power between employees . . . and employers" and the need to provide "protection . . . of the right of employees to organize and bargain collectively."<sup>83</sup> HEERA's preamble provides that HEERA's purpose is to "assure . . . an atmosphere which permits the fullest participation by employees in the determination of conditions of employment which affect them"<sup>84</sup> and that this purpose is to be achieved by "providing a uniform basis for recognizing the right of the employees . . . to full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of representation . . . ."<sup>85</sup>

Despite these similar purposes, in the enumeration of unit criteria and statutory objectives, HEERA and the NLRA appear to differ. NLRA unit criteria are phrased almost exclusively in terms of employee rights. The NLRB is commanded to make unit determinations that "assure to employees the fullest freedom in exercising the rights guaranteed by [the NLRA]."<sup>86</sup> HEERA's unit criteria, in contrast, ex-

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83. 29 U.S.C. § 151 (1976).

84. CAL. GOV'T CODE § 3560(e) (West Supp. 1979). Similar language appears in EERA, *id.* § 3540, and SEERA, *id.* § 3525. EERA's statement of purpose contains the additional statement that "[n]othing contained herein shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements." *Id.* § 3540. Likewise, SEERA's "purpose and intent" provision states: "Nothing contained herein shall be deemed to supersede the provisions of existing state law which establish and regulate a merit or civil service system or which provide for other methods of administering employer-employee relations." *Id.* § 3525. In the absence of determinative case law, it is too early to say how California courts will harmonize these provisos, which limit the bargaining process, with the stated objectives of EERA and SEERA and the bargaining process generally. In other states, the trend of the decisions is in favor of sustaining the position which supports the viability of the collective bargaining statute. At this juncture in the development of California's three major public employment collective bargaining statutes, it is sufficient to note that HEERA's statement of purpose contains no proviso requiring that HEERA be harmonized with another statute. *See* CAL. GOV'T CODE § 3561 (West Supp. 1979). In this respect, the difference separating HEERA from SEERA and EERA undoubtedly has its basis in the constitutional autonomy of the University of California. CAL. CONST. art. IX, § 9. A HEERA proviso, however, does protect the functions of the University of California's and the California State University and Colleges' Academic Senates and other "shared governance mechanisms or practices." CAL. GOV'T CODE § 3561(b) (West Supp. 1979).

85. CAL. GOV'T CODE § 3560(e) (West Supp. 1979).

86. 29 U.S.C. § 159(b) (1976).



pressly require that the PERB consider employer interests.<sup>87</sup> Employee interests are not mentioned, although they are strongly implied in the general community of interest and bargaining history criteria.

The priority of statutory objectives also must be implied, as HEERA does not expressly state all of its necessary objectives. In this regard, the primacy of stable bargaining relationships as an objective of unit determination is implicit not only in HEERA's preamble,<sup>88</sup> but also in California's common law policy against public employee strikes<sup>89</sup> and in HEERA's attempt to substitute impasse resolution procedures for the right to strike.<sup>90</sup> Consequently, bargaining history and community of interest criteria should be regarded as critical criteria, because both criteria have a substantial bearing on the statutory objective of a stable bargaining relationship. This does not mean that such HEERA unit criteria as the ability of the "employer representatives to deal effectively with employee organizations,"<sup>91</sup> the "numerical size of the unit,"<sup>92</sup> the "effect of the proposed unit on efficient operations of the employer,"<sup>93</sup> or the "number of employees and classifications in a proposed unit"<sup>94</sup> are unimportant and should not be taken into account in unit disputes. It does mean that the impact of these criteria on the goal of a stable bargaining relationship generally will be less than that of the community of interest and bargaining history criteria. Additionally, some of the former criteria are mere redundant statements of other more important criteria<sup>95</sup> and others are of little use for other reasons.<sup>96</sup>

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87. CAL. GOV'T CODE § 3579(a) (West Supp. 1979).

88. *Id.* § 3560(a). "The people of the State of California have a fundamental interest in the development of harmonious and cooperative labor relations between public institutions of higher education and their employees." *Id.*

89. Public employee strikes in California have been held to be illegal even in the absence of a statute making them illegal. *See Pasadena Unified School Dist. v. Pasadena Fed. of Teachers*, 72 Cal. App. 3d 100, 105-07, 140 Cal. Rptr. 41, 44-45 (1977); *Los Angeles Unified School Dist. v. United Teachers*, 24 Cal. App. 3d 142, 145-46, 100 Cal. Rptr. 806, 808 (1972). *But see San Diego Teachers Ass'n v. Superior Court*, 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979), discussed in note 216 *infra*.

90. *See* CAL. GOV'T CODE §§ 3590-3594 (West Supp. 1979).

91. *Id.* § 3579(a)(2).

92. *Id.*

93. *Id.* § 3579(a)(3).

94. *Id.* § 3579(a)(4).

95. The following sections of HEERA unit criteria are redundancies: "The effect of the proposed unit on efficient operations of the employer," *id.* § 3579(a)(3); "[a] number of employees and classifications in a proposed unit, and its effect on the operations of the employer," *id.* § 3579(a)(4); "[t]he impact on the meet and confer relationship created by fragmentation of employee groups or any proliferation of units among the employees of the employer," *id.* § 3579(a)(5).

The requirement in HEERA § 3579(a)(5), CAL. GOV'T CODE § 3579(a)(5) (West Supp.

Consequently, the following ranking of unit criteria considers only bargaining history, community of interest, efficient operations, and the extent to which employees belong to the same organization.

### *Bargaining History*

Bargaining history, because it indicates the type of bargaining relationship that in fact exists, is the best evidence of whether a particular unit determination will promote a stable bargaining relationship. For instance, evidence may show that employees have organized, chosen a bargaining representative, and bargained successfully through that representative. Conversely, bargaining history might suggest that the ultimate objectives of the collective bargaining statute have not been fulfilled for reasons attributable in whole or in part to an existing unit configuration. Thus, bargaining history, if it exists under a collective bargaining statute, should predominate over other unit criteria.

The importance of bargaining history as a unit criterion requires one qualification. Only bargaining history that existed under a collective bargaining statute authorizing genuine collective bargaining by exclusive representatives for identifiable units should be given serious consideration. More specifically, this means that the "history of employee representation with the employer," as described in HEERA section 3579(a)(1),<sup>97</sup> should apply only to "history" under HEERA. Differences between the administration of employer-employee relations under a collective bargaining statute and relations existing independently of such a statute are so great that, for unit determination pur-

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1979), that the PERB consider the effect that the proposed unit will have on the meet and confer relationship does not materially differ from the community of interest, history of employee representation, and other criteria found in HEERA § 3579(a)(1)-(4), CAL. GOV'T CODE § 3579(a)(1)-(4) (West Supp. 1979). Implicitly, the latter criteria have as their objective an effective bargaining relationship. This is consistent with the purpose and intent of HEERA as expressed in its preamble. See notes 84-85 & accompanying text *supra*.

96. First, the "numerical size of the unit" is too obscure to be useful. This criterion might mean the number of employees in the unit, in which case it is superfluous. If numerical size does not mean the number of employees in the unit, its meaning is unclear, as the size of the unit can be measured only by the number of employees in the unit or the number of job classifications in the unit. A unit may have a small number of job classifications and a large number of employees, or a large number of job classifications and a relatively small number of employees.

Second, the "number of employees . . . in a proposed unit" may not be applied rationally if other unit criteria are given effect. If a proposed unit consists of a single job classification with large numbers of employees, each one performing similar kinds of work under similar working conditions, community of interest criteria ought to dictate that the number of employees in the unit becomes irrelevant, particularly in determining whether the unit should be subdivided.

97. CAL. GOV'T CODE § 3579(a) (West Supp. 1979).

poses, pre-HEERA employer-employee relations history should be given minimal weight in unit determination proceedings.<sup>98</sup>

### *Community of Interest*

Community of interest criteria are evidence of the kind of bargaining relationship that might exist and thus operate as a predictive test. Accordingly, these criteria ought to be ranked behind bargaining history in a priority ranking of unit criteria. In the absence of bargaining history, however, community of interest stands as the most reliable indication of a unit's ability to further the objectives of HEERA.

There is a direct relationship between the extent of employment-related differences among various classes of employees in a single unit and the potential for inter-classification conflicts that might impede bargaining—as the number of classes with varying characteristics grows, so does the potential for detrimental inter-classification con-

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98. PERB's treatment of this issue under EERA has been inconsistent. In its first unit decision, *Sweetwater Union High School Dist.*, 1 P.E.R.C. 10 (1976), the PERB determined that "[b]ecause of the unspecified and possibly unilateral nature of the unit designation procedure which existed in this district under the Winton Act [CAL. EDUC. CODE §§ 13080-13088 (West Supp. 1968-1969) (repealed July 1, 1976)], in determining appropriate negotiating units in this case we give little weight to 'established practices' as they relate to the composition of the unit represented under the authority of [the EERA]." 1 P.E.R.C. at 11. Subsequent PERB unit decisions generally have followed the *Sweetwater* holding. See, e.g., *Los Angeles Unified School Dist.*, 1 P.E.R.C. 18 (1976). But in a sharp and unexplained departure from *Sweetwater*, the PERB in *San Mateo Union High School Dist.*, 2 P.E.R.C. ¶ 2074 (1978), relied on ten years of history predating EERA, among other factors, in denying a request for a separate craft unit. It is submitted that the PERB's reliance on pre-EERA history in *San Mateo* was erroneous. Neither collective bargaining, exclusive representation, nor unit criteria existed under the Winton Act. CAL. EDUC. CODE §§ 13080-13088 (West Supp. 1968-1969) (repealed July 1, 1976). Thus, under the Winton Act, a school district was not obligated to attempt to negotiate or reach an agreement in good faith with any union and was free to recognize any number of employee organizations for meet and confer purposes.

Further, the existence of a "voluntary" school district-union relationship under the Winton Act usually was not consensual—it existed in most instances because the union had little choice other than to accede to the desires of the school district. Under EERA, in contrast, when efforts at voluntary agreement in unit disputes fail, the controversy becomes a disputed case for resolution by the PERB; the possibility of an adverse PERB unit decision gives EERA unit agreements a consensual characteristic generally not achievable under the Winton Act.

Employers and employees covered by HEERA previously were covered by the Brown Act, which specifically no longer applies to them. CAL. GOV'T CODE § 3526(b) (West Supp. 1979). The Brown Act resembles the Winton Act, in that no collective bargaining is authorized and no units are defined or authorized. Consequently, the same limitations exist in relying on bargaining history under the Brown Act as a basis for HEERA unit determination as exist in relying on bargaining history under the Winton Act for EERA unit determination.

flicts.<sup>99</sup> If inter-classification conflicts would impede bargaining based on a proposed multi-classification unit, it then must be determined what subdivisions within the proposed multi-classification unit would meet the community of interest standard.

HEERA section 3579(a)(1) provides that the PERB, in determining an appropriate unit, shall take into consideration several community of interest subcriteria:

The internal and occupational community of interest among the employees, including, but not limited to, the extent to which they perform functionally related services or work toward established common goals, the history of employee representation with the employer, the extent to which such employees belong to the same organization, the extent to which the employees have common skills, working conditions, job duties, or similar educational or training requirements, and the extent to which the employees have common supervision.<sup>100</sup>

HEERA section 3579(a)(1) is virtually a statutory restatement of NLRB decisional law on community of interest.<sup>101</sup> Hence, unit determinations under HEERA likely will suffer from many of the problems found in NLRB community of interest decisions.

Compounding the problem created by the NLRB's failure to give unit criteria a priority ranking is the absence of a priority ranking for community of interest subcriteria. As a result, the NLRB's unit determination decisions that are based on community of interest grounds tend to suffer from a lack of guiding rationale. Typically, they delineate community of interest subcriteria, outline the essential facts required for a decision, and then state a conclusion without attempting to suggest which of the subcriteria influenced the decision and why other subcriteria did not.

In *Kalamazoo Paper Box Corp.*,<sup>102</sup> one of the NLRB's leading decisions on unit determination, the NLRB identified ten community of interest subcriteria, all of which were treated as having nearly equal weight. All ten subcriteria, taken together, were found to favor rejection of a proposed separate unit for truck drivers, even though some of the subcriteria, as individually applied, would have supported a deci-

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99. The possibilities of inter-classification conflicts are functions of the number of classifications and the extent of inter-classification differences, with "the number" having a bearing on "extent" only in the sense that the larger the number of classifications, the greater the probability that employment-related differences will impede bargaining if all classifications are placed, for example, in a single unit.

100. CAL. GOV'T CODE § 3579(a) (West Supp. 1979).

101. See *Kalamazoo Paper Box Corp.*, 136 N.L.R.B. 134 (1962).

102. 136 N.L.R.B. 134 (1962).

sion that a separate unit of truck drivers was appropriate. By determining the "predominant community of interest,"<sup>103</sup> the NLRB's *Kalamazoo* decision may appear to have given some priority ranking to community of interest subcriteria. Close analysis of the decision reveals, however, that the NLRB merely ascertained which party had the larger number of community of interest subcriteria in its favor.<sup>104</sup> This is far from equivalent to assigning community of interest subcriteria relative weights for use in ranking them in order of their importance—the first step toward a principled application of community of interest subcriteria.

The legislature's adoption of NLRA community of interest subcriteria in California labor legislation<sup>105</sup> and the PERB's adoption of the NLRB's reasoning in disputes involving the application of interest subcriteria are outstanding examples of the NLRA's influence on the development of public sector labor-management relations law in California. Other HEERA unit criteria, such as efficient operations, do not derive so closely from the NLRA. Passage of time will prompt the PERB's consideration and application of criteria, which cannot be applied fully in the resolution of the PERB's threshold unit determination decisions.

### *Efficient Operations*

In establishing efficiency of employer operations as a unit criterion under HEERA, EERA, and SEERA,<sup>106</sup> the California legislature was

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103. *Id.* at 138.

104. In *Kalamazoo*, the NLRB identified several community of interest elements, all of which were found to favor a denial of the severance petition and all of which were treated as having equal importance. Some had a general application to all employees in the dispute and were not likely to be changed by a unit configuration change, *e.g.*, the degree of interchange with other employees and the character of the work, *id.* at 138. Others were such that a different unit configuration, and hence possible representation by a different labor organization, might have produced differing rather than similar employment results, *e.g.*, similarity of wages and fringe benefits, *id.* The PERB has followed the *Kalamazoo* case in disputes involving both classified and certified school personnel. *See, e.g.*, Sweetwater Union High School Dist., 1 P.E.R.C. 10 (1976).

105. CAL. GOV'T CODE §§ 3521(b)(1) (SEERA), 3545(a) (EERA), 3579(a)(1) (HEERA) (West Supp. 1979). The reasoning of the *Kalamazoo* decision, see notes 102-04 & accompanying text *supra*, may be anticipated in HEERA cases, given the similarity of the community of interest criterion in the three statutes to the community of interest criterion established in *Kalamazoo*. The apparent mechanical error made in the EERA community of interest criterion of including noncommunity of interest criteria under the heading "community of interest" was repeated in the SEERA, CAL. GOV'T CODE §§ 3521(b)(1) (West Supp. 1979), and the HEERA, *id.* § 3579(a)(1).

106. CAL. GOV'T CODE §§ 3521(b)(3) (SEERA), 3545(a)(EERA), 3579(a)(3)(4) (HEERA) (West Supp. 1979).

no doubt motivated by examples of inordinately fragmented units in other public sector jurisdictions.<sup>107</sup> The efficient operations criterion, by its terms and, unlike any other HEERA unit, is intended to benefit employers.

From an employer's perspective, inter-union rivalry, excessive bargaining, and excessive contract administration requirements are the major problems with overly fragmented units. In addition, whipsaw strikes have more potential for effectiveness as the number of units increases. Accordingly, it is fair to conclude that such unit configurations generally tend to disfavor employers and that the efficient operations criterion would favor a HEERA employer's request for a single comprehensive unit.

On the other hand, unions are not always favored by larger unit numbers. The number of units for which unions file petitions is governed primarily by the number of unions seeking to represent employees and the perceptions those unions have of where they might find voting support in a representation election. Furthermore, the political spectrum of unions representing public employees tends to be much wider than it is in private employment because proportionately more public sector unions have unit interests paralleling those of the employer whose employees they seek to represent. Consequently, to the extent that a union seeking a comprehensive unit would benefit from applying the efficient operations criterion in favor of an employer, it would be merely an incidental beneficiary of that decision.

Although HEERA specifically addresses the problem of excessive unit fragmentation, it does not address with similar specificity the polar extreme of a proposed single comprehensive unit. For example, a HEERA employer may propose a unit of all of its nonfaculty employees, with the exception of the express statutory exclusions of supervisors, management, and confidential employees. The appropriateness of such a unit depends on the number of diverse classifications and the degree of inter-classification diversity within the proposed unit.

Both extremes illustrate why, in resolving unit determination issues, community of interest criteria should be considered before the efficient operations criterion and before considering community of interest and efficient operations criteria in juxtaposition. Application of community of interest criteria alone may justify a finding in favor of a

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107. See Rock, *The Appropriate Unit Question in the Public Service: The Problem of Proliferation*, 67 MICH. L. REV. 1001 (1969). New York City at one time had 200 separate public employee units. *Id.* at 1003.



single unit or a small, but indisputably efficient, number of units. In that event the efficient operations criterion would not have to be considered.

### *Same-Employee-Organization Criterion*

The extent to which employees "belong to the same employee organization"<sup>108</sup> should be viewed as the least reliable of the HEERA unit criteria, measured by the standard of fostering HEERA's general objectives. HEERA's same-employee-organization criterion requires that the PERB consider a preponderance of employee membership in an employee organization seeking to represent that unit of employees as a factor in favor of a particular unit.<sup>109</sup> Membership in an employee organization that exists outside the collective bargaining context, however, may have little or nothing to do with the employee's desires within the collective bargaining context. Certain employee organizations now competing for representation rights under public employment collective bargaining statutes easily could have attracted members for many reasons having little to do with collective bargaining, such as the opportunity to qualify for group life insurance. Nonetheless, the existence of the same-employee-organization criterion in HEERA means that it must be considered when evidence in support of its application is presented. When considered, the criterion should be given less weight than other HEERA unit criteria that are more in keeping with HEERA's general statutory objective of creating a "basis for . . . freedom of association, self-organization, and designation of . . . organizations as . . . exclusive representative for the purpose of meeting and conferring."<sup>110</sup>

### **Individual-Inclusion Unit Disputes**

Three classes of employees are effectively excluded, either directly or indirectly, from HEERA's coverage: managerial, confidential, and supervisory employees.<sup>111</sup> Managerial and confidential employees are

108. CAL. GOV'T CODE § 3579(a)(1) (West Supp. 1979). See text accompanying note 100 *supra*.

109. For example, if Union *A* sought to represent unit *X*, consisting of all nonsupervisory employees, and Union *B* sought to represent unit *Y*, consisting of a small subdivision of unit *X*, the fact that most employees in the overall unit belonged to Union *A* would be a factor in favor of approving as an appropriate unit the overall unit sought by Union *A*. On the other hand, if most of the employees in proposed unit *Y* belonged to Union *B*, that would be a factor in favor of approving unit *Y* as an appropriate unit.

110. CAL. GOV'T CODE § 3560(e) (West Supp. 1979).

111. HEERA § 3562(f) provides in part: "'Employee' or 'higher education employee'

expressly excluded from HEERA's definition of "employee."<sup>112</sup> Supervisors are not expressly excluded from that definition, but other provisions of HEERA so limit the supervisors' participation in the bargaining process that they are virtually excluded from HEERA's coverage.<sup>113</sup> As a result of these exclusions, the outcome of a representation election in any unit may hinge on the resolution of disputes concerning the status of individuals who allegedly fall within the statutory definitions of managerial, confidential, or supervisory employees. All three classes generally are defined in HEERA on the basis of NLRB language or NLRB precedents interpreting the NLRA.

HEERA section 3562(e) defines a confidential employee as one "who is required to develop or present management positions with re-

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means any employee of the Regents of the University of California, the Directors of Hastings College of the Law, or the Board of Trustees of the California State University and Colleges, whose employment is principally within the State of California. *However, managerial, and confidential employees shall be excluded from coverage under this chapter . . .*" CAL. GOV'T CODE § 3562(f) (West Supp. 1979) (emphasis added).

112. Both EERA and SEERA achieve the same exclusionary result through slightly less direct means by providing in the definition of "employee" that managerial and confidential employees are not "employees" within the meaning of the definitions. *Id.* §§ 3540.1(j) (EERA), 3513(c) (SEERA). The NLRA similarly removes "supervisors" from its definition of "employee." 29 U.S.C. § 152(3) (1976). The exclusion of "managerial" and "confidential" employees from statutory coverage means that they are not protected by the various unfair practice provisions. Without violating HEERA, a HEERA employer could discharge or otherwise discriminate against a managerial or confidential employee because of the employee's involvement in union activity.

113. HEERA § 3580 provides: "Except as provided by this article, supervisory employees shall not have the rights, or be covered by, any provisions or definition established by this chapter." CAL. GOV'T CODE § 3580 (West Supp. 1979). However, unlike managerial and confidential employees, supervisors do have certain limited rights under HEERA which protect them from employer discrimination. *Id.* § 3581.6. Supervisors have a right to participate in union activities and to refuse to participate, as do nonsupervisors. *Id.* § 3581.1. However, they are prohibited from handling grievances for nonsupervisory employees, from participating in meet and confer sessions on behalf of nonsupervisory employees, and from voting on questions of ratification of agreements reached on behalf of nonsupervisory employees. *Id.* § 3580.5. Supervisors are effectively cut off from the bargaining process at the bargaining table. While the "scope of representation" for supervisors is the same as the scope of representation for nonsupervisors, *id.* § 3581.3, the manner in which the HEERA employer is able to respond to a supervisory union's meet and confer request severely restricts supervisors' bargaining rights. For supervisory employees, unlike nonsupervisory employees, the meet and confer definition provides: "Meet and confer means that [the HEERA employer] shall consider as fully as the employer deems reasonable such presentations as are made by the employee organization on behalf of its supervisory members prior to arriving at a determination of policy or course of action." *Id.* § 3581.4 (emphasis added). In sharp contrast to a HEERA employer's obligation to attempt in good faith to reach an agreement with an exclusive representative of nonsupervisory employees, a HEERA employer need only listen before acting unilaterally in the case of supervisory meet and confer requests.

spect to meeting and conferring or whose duties normally require access to confidential information which contributes significantly to the development of such management positions.”<sup>114</sup> The obvious purpose of the exclusion is to remove from bargaining units those employees who are so involved in the employer’s administration of the collective bargaining process that their inclusion in a unit represented by a union would raise substantial conflict of interest questions. In the clearest hypothetical case, the secretary to a HEERA employer’s director of labor relations would fall within the definition of confidential employee. Beyond such obvious cases, the difficulties in interpreting the statutory definition flow from an inability to discern from the definition when an employee has the requisite degree of accessibility to confidential employer-employee relations matters. The PERB has held that mere tangential contact with such matters is insufficient to bring an individual within the definition,<sup>115</sup> but almost any test based on the quantum of exposure would be of limited assistance as an aid in the application of the confidential employee definition. A more useful standard is one that the PERB has described in terms of the definition’s objective.

In *Sierra Sands Unified School District*,<sup>116</sup> the PERB, interpreting EERA’s confidential employee definition, stated:

The assumption is that the employer should be allowed a small nucleus of individuals who would assist the employer in the development of the employer’s positions for the purpose of employer-employee relations. It is further assumed that this nucleus of individuals would be required to keep confidential those matters that if made public prematurely might jeopardize the employer’s ability to negotiate with employees from an equal posture.<sup>117</sup>

In a subsequent EERA case,<sup>118</sup> the PERB determined that fourteen administrators’ secretaries from two separate units were confidential employees on the basis of their involvement in “employer-employee relations and grievances.”<sup>119</sup> The PERB rejected the employee organization’s argument that by designating 4.5% and 12.8% of the employees in the two units as confidential employees, the employer’s grouping violated the “small nucleus” principle. The holding

114. CAL. GOV’T CODE § 3562(e) (West Supp. 1979). See *B.F. Goodrich Co.*, 115 N.L.R.B. 722 (1956), where the NLRB held that “confidential employees” are those “who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.” *Id.* at 724.

115. *Los Rios Community College Dist.*, 1 P.E.R.C. 185, 191 (1977).

116. 1 P.E.R.C. 3 (1976).

117. *Id.* at 4.

118. *Campbell Union High School Dist.*, 2 P.E.R.C. ¶ 2166 (1978).

119. *Id.* at 469-70.

confirms that the number of employees designated by the employer as "confidential employees" under EERA, and similarly under HEERA, "may not be used as a *per se* test in resolving the confidential-status issue."<sup>120</sup>

Proper application of the confidential employee definition, however, should not result in an inordinately large percentage of persons falling within the definition because employers under California's four major collective bargaining statutes are not primarily engaged in the business of conducting employer-employee relations. Thus, in contested cases an unusually high percentage of confidential employee designations by an HEERA employer might give rise to concern about the propriety of the designations and cast doubt upon the employer's ability to apply accurately the "confidential" definition.<sup>121</sup>

HEERA's definition of "managerial employee" provides:

"Managerial employee" means any employee having significant responsibilities for formulating or administering policies and programs. No employee or group of employees shall be deemed to be managerial employees solely because the employee or group of employees participate in decisions with respect to courses, curriculum, personnel and other matters of educational policy. A department chair or head of a similar academic unit or program who performs

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120. *Id.* at 471.

121. One important question not clearly answered in the HEERA definition of "confidential employee" is whether "confidential" employees are those who have access to employee grievance information developed by the employer in response to employee grievances filed by a union. The PERB has held that "employer-employee relations," within the meaning of the confidential-employee definition in EERA, "includes, at the least, employer-employee negotiations and the processing of employee grievances." *Fremont Unified School Dist.*, 1 P.E.R.C. 21, 24 (1976). *But cf.* *B.F. Goodrich Co.*, 115 N.L.R.B. 722, 724 (1956) (NLRB refusal to classify as confidential employees secretaries who "assist and act in a confidential capacity to" persons involved in labor relations negotiations and grievance processing). The EERA definition of confidential employee might well include those who have access to grievance procedure information, since the term "employer-employee relations" at least arguably encompasses grievance procedure matters. HEERA's definition of confidential employee might well include those who have access to grievance procedure information, since the term "employer-employee relations" at least arguably encompasses grievance procedure matters. HEERA's definition of confidential employee, however, differs from the EERA definition. In the HEERA definition, the words "meeting and conferring" are used in lieu of EERA's "employer-employee relations." CAL. GOV'T CODE §§ 3562(e) (HEERA), 3540.1(c) (EERA) (West Supp. 1979). It is not clear whether "meeting and conferring," as used in the HEERA definition, includes grievance procedure matters, particularly in light of the statutory definition of "meet and confer," which does not refer to grievance matters. *Id.* § 3562(d). In any event, the rationale of avoiding a conflict of interest, as where a bargaining unit member is only privy to an employer's bargaining strategy information, rationally should apply to employees having access to information on grievance procedure tactics. In this respect, the NLRB's decision in *B.F. Goodrich Co.* does not appear to be well reasoned.

the foregoing duties primarily on behalf of the members of the academic unit or program shall not be deemed a managerial employee solely because of such duties.<sup>122</sup>

The first sentence in the definition parallels EERA's definition of "management employee,"<sup>123</sup> which in turn was derived from decisions interpreting the NLRA.<sup>124</sup> Basic differences between the administrative structure of HEERA's higher education employers and the public schools covered by EERA, however, probably will limit the usefulness of EERA "management employee" decisions as applied in HEERA cases.<sup>125</sup> Furthermore, EERA's "management employee" definition has a sharper focus than the HEERA "managerial employee" definition. The EERA definition uses the word "district" in describing the "policies and programs" over which an individual must have significant policy-formulation or administrative responsibilities to be classified as a management employee.<sup>126</sup> HEERA's definition, however, does not make clear the level—departmental, campus, or statewide—at which one must have "significant responsibilities for formulating or administering policies and programs."<sup>127</sup>

122. CAL. GOV'T CODE § 3562(*I*) (West Supp. 1979).

123. "'Management employee' means any employee in a position having significant responsibilities for formulating district policies or administering district programs. Management positions shall be designated by the public school employer subject to review by the Educational Employment Relations Board." *Id.* § 3540.1(g).

124. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), which traces the history of the NLRB's treatment of the management employee issue and approves the definition of "managerial employee" as fashioned by the NLRB. Quoting from *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946), the Court said managerial employees are those "who are in a position to formulate, determine and effectuate management policies." 416 U.S. at 276. The NLRA itself contains no definition of management employee.

125. Individual campuses within the California university and college system have a degree of autonomy that does not exist in individual schools within a public school district.

126. See note 123 *supra*.

127. CAL. GOV'T CODE § 3562(*I*) (West Supp. 1979). See text accompanying note 122 *supra*. Query, for example, whether the chancellors of the nine University of California campuses, the presidents of the California State Universities and Colleges, and the dean of the law school at the University of California, Los Angeles, are not "managerial employees" within the meaning of HEERA § 3562(*I*), on the ground that the policies they administer and formulate are not system-wide. The PERB has held that school principals under EERA are not management employees within the meaning of the EERA definition. *San Francisco Unified School Dist.*, 1 P.E.R.C. 380 (1977). Hastings College of the Law is governed by a board of directors that is independent of the Board of Regents of the University of California and the Board of Trustees of the California State University and Colleges. Accordingly, the hierarchical level at which managerial duties might bring an individual within the "managerial employee" definition should be easily identifiable at Hastings.

EERA § 3540.1(g), CAL. GOV'T CODE § 3540.1(g) (West Supp. 1979), defines "management employee." See note 123 *supra*. PERB decisions interpreting the "management employee" definition in the EERA include: *Paramount Unified School Dist.*, 1 P.E.R.C. 437 (1977) (counselors are not "management employees"); *Los Rios Community College Dist.*, 1

The second sentence of the HEERA "managerial employee" definition was enacted because of concern that all HEERA faculty members might be deemed "managerial employees" and hence excluded from HEERA's coverage on the ground that faculty members "formulate and administer" policies as members of faculty committees and policymaking groups, and as members of academic senates and academic senate committees.<sup>128</sup> The sentence clearly establishes, however, that the legislature did not intend to exclude all faculty members from HEERA's coverage. The third and last sentence in the "managerial employee" definition<sup>129</sup> appears to do no more than clarify that the

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P.E.R.C. 185 (1977) (community college financial aid coordinators are not "management employees"); Oakland Unified School Dist., 1 P.E.R.C. 137 (1977) (school psychologists are not "management employees"); Lompoc Unified School Dist., 1 P.E.R.C. 80 (1977) (subject coordinators are not "managerial employees" since their alleged policy making functions are subject to approval by higher authority in the district). Under EERA § 3540.1(g), a management employee is an employee "having significant responsibilities for formulating district policies or administering district programs." CAL. GOV'T CODE § 3540.1(g) (West Supp. 1979) (emphasis added). However, the PERB interpreted "or" to mean "and" in concurring opinions in Lompoc Unified School Dist., 1 P.E.R.C. 80, 86 (1977). The conjunctive standard was adopted by the Board in Los Rios Community College Dist., 1 P.E.R.C. 185, 190 (1977), and has never been repudiated by the PERB. The PERB construction of the statutory language, of course, limits the number of individuals who will be found to be management employees under EERA. NLRB decisions, in contrast, use a disjunctive standard. See, e.g., *Flintkote Co.*, 217 N.L.R.B. 497, 499 (1975) ("project engineers do not formulate or effectuate management policies, since their recommendations must be approved by management officials, and they do not have discretion in their job performance independent of their Employer's established policy." (emphasis added)).

Carried to its logical extreme, the PERB's conversion of the disjunctive to the conjunctive could mean that no person employed by a school district is a managerial employee. It could be argued, for example, that the superintendent of a school district is not a "managerial employee" because, although the superintendent has significant responsibilities for administering district programs, he or she does not have significant responsibilities for formulating district policies, since the latter is an exclusive function of the school board.

128. See text accompanying note 122 *supra*. Even in the absence of the second sentence in HEERA's "managerial employee" definition, a decision interpreting "managerial employee" to include all faculty members of a HEERA employer nevertheless would be inconsistent with the overall objectives of HEERA. HEERA, taken as a whole, authorizes collective bargaining for all university employees, including faculty members, except those who are confidential or managerial employees, as defined in the first sentence of the definition, or supervisors. It is less certain that Congress intended to provide NLRA coverage for faculty members in private universities and colleges. A decision involving the NLRB's exercise of jurisdiction over private universities and colleges to exclude university faculty from coverage of the NLRA is now pending review in the United States Supreme Court. See *NLRB v. Yeshiva Univ.*, 582 F.2d 686 (2d Cir. 1978), cert. granted, 440 U.S. 906 (1979). See generally Kahn, *The NLRB and Higher Education: The Failure of Policy Making Through Adjudication*, 21 U.C.L.A. L. REV. 63, 118-31 (1973). Outside of the Second Circuit, the NLRB does not follow the *Yeshiva* decision. See, e.g., *Stephens College*, 100 L.R.R.M. 1268 (1979).

129. See text accompanying note 122 *supra*.



formulation or administration of policies and programs must be on behalf of the employer to bring an individual within the definition. Even in the absence of that sentence, elementary agency concepts would embrace the requirement that an individual's managerial duties be on behalf of the employer.

HEERA also defines a supervisory employee with three sentences, the first of which defines a supervisory employee as

any individual, regardless of the job description or title, having authority, in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action if . . . the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.<sup>130</sup>

This sentence is virtually identical to the NLRA's complete definition of "supervisor,"<sup>131</sup> which EERA adopted without material change.<sup>132</sup> The second sentence of the HEERA supervisory employee definition has no NLRA counterpart. It provides that a faculty or academic employee who chairs departments or heads similar academic units or programs, "or other employee who performs the foregoing duties primarily . . . on behalf of the members of the academic department, unit or program, shall not be deemed a supervisory employee solely because of such duties."<sup>133</sup> This sentence serves the important function of expli-

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130. CAL. GOV'T CODE § 3580.3 (West Supp. 1979).

131. 29 U.S.C. § 152(11) (1976) provides: "The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

132. See CAL. GOV'T CODE § 3540.1(m) (West Supp. 1979). The EERA definition of "supervisory employee," like the HEERA definition, makes it clear that a "job description" and a job "title" are of little consequence in determining whether an individual is a "supervisor." It is what the individual actually does that is of consequence. This always has been implicit in the NLRA definition. See note 131 & accompanying text *supra*.

133. CAL. GOV'T CODE § 3580.3 (West Supp. 1979). This section also provides, however, that with respect to the University of California and Hastings College of the Law "there shall be a rebuttable presumption that such an individual appointed by the employer to an indefinite term shall be deemed to be a supervisor." *Id.* This phrase could be read to mean that any department chairperson or similar individual who has tenure is a supervisor. But if the legislature had intended "appointed to an indefinite term" to mean "tenure," it could have used that term. Further, such a broad reading of the "appointed to an indefinite term" phrase would be inconsistent with the section's earlier language which limits the circumstances under which department chairpersons and similar individuals would be found to be supervisors under HEERA. This phrase most probably means that department chairpersons and similar individuals who are appointed to an indefinite term as administrators are to be deemed supervisors without regard to whether they perform such duties primarily "on

cating that faculty members are not supervisors because of their shared governance authority—the same position adopted by the NLRB in its decisions.<sup>134</sup>

The third sentence in the definition provides: “Employees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees.”<sup>135</sup> This sentence also has no counterpart in the express terms of the NLRA definition, but was adopted from decisions of the NLRB interpreting the NLRA definition.<sup>136</sup> Following NLRB precedents interpreting the NLRA’s “supervisor” definition, the PERB, in applying EERA’s supervisory employee definition, consistently has held that the EERA definition is written in the disjunctive: an individual who exercises any one of the functions enumerated in the definition comes within the definition.<sup>137</sup> But early decisions of the PERB tended to ignore the statute’s proviso that the supervisory employee definition does not apply if the authority exercised by an individual is of a “merely routine or clerical nature” and does not “require the use of independent judgment.”<sup>138</sup> Thus, while the PERB purported to rely upon NLRB decisions interpreting the NLRA’s definition of supervisor, it did not follow the NLRB’s well-known distinction between the routine and incidental supervisory functions of a leadman and the independent supervisory authority contemplated by the NLRA’s “supervisor” definition.<sup>139</sup>

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behalf of the members of the academic unit.” Why this section applies to the University of California and the Hastings College of the Law, but not to the California State University and College system, is unclear.

134. NLRB v. Southern Bleachery & Printworks, Inc., 257 F.2d 235, 239 (4th Cir. 1958), *cert. denied*, 359 U.S. 911 (1959); Iroquois Tel. Corp., 169 N.L.R.B. 344, 345 n.6 (1968); Heck’s, Inc., 166 N.L.R.B. 674, 674 n.1 (1967); Ross Porta-Plant, Inc., 166 N.L.R.B. 494, 497 (1967).

135. CAL. GOV’T CODE § 3580.3 (West Supp. 1979).

136. Meat & Provision Drivers Union Local 626, 224 N.L.R.B. 186, 186 (1976); Laborers & Hodcarriers Local No. 341, 223 N.L.R.B. 917, 919 (1976).

137. *See, e.g.*, Carlsbad Unified School Dist., 1 P.E.R.C. 590, 590, 591 n.3 (1977); San Diego Unified School Dist., 1 P.E.R.C. 33, 35, 38 n.12 (1977); Sweetwater Union High School Dist., 1 P.E.R.C. 10, 13, 18 n.6 (1976). Each of these cases expressly follows the NLRA case, *Ohio Power & Light Co. v. NLRB*, 176 F.2d 385 (6th Cir.), *cert. denied*, 388 U.S. 899 (1979).

138. CAL. GOV’T CODE § 3540.1(m) (West Supp. 1979). *See* note 139 *infra*.

139. *See* note 131 *supra*. *See, e.g.*, NLRB v. Swift & Co., 240 F.2d 65, 66-67, (9th Cir. 1957) (holding that plant clerks who told employees where to place certain products were not supervisors, since those activities were of “a merely routine or clerical nature”). *Accord*, Meat and Provision Drivers Local 626, 224 N.L.R.B. 186 (1976); Laborers and Hod Carriers Local 341, 223 N.L.R.B. 917 (1976); NLRB v. Dunkirk Motor Inn, Inc., 524 F.2d 663 (2d Cir. 1975); NLRB v. Monroe Tube Co., 545 F.2d 1320 (2d Cir. 1976). PERB decisions under EERA which follow the rationale of Sweetwater Union High School Dist., 1 P.E.R.C. 10 (1976), on the issue of determining the scope of the definition of supervisory employee

In *Sweetwater Union High School District*,<sup>140</sup> the PERB held that head custodians employed by a public school were supervisors within the meaning of the EERA definition.<sup>141</sup> Even though these employees worked alone during most of their shift, they spent virtually all of their time doing the same kind of maintenance and repair work as those they purportedly supervised, and the effective supervisory authority was held by the school principals. The decision relied in part on purported differences between the NLRA and EERA. The PERB noted that while EERA allows supervisors to be represented in a negotiating unit separate from units of employees they supervise, the NLRA permits no such supervisory units. Based on this distinction, the PERB implicitly reasoned that EERA permits more individuals to be deemed supervisors because of the less harmful consequences of EERA supervisory status.<sup>142</sup> The notion that supervisors eventually would be represented in supervisory units has never become a reality; of 1,908 representation units formed under EERA over a period of three years, only twenty-five are supervisory units.<sup>143</sup> Further, even if the premise of equal representation opportunity for supervisory units were valid, it seems evident that the attendant conclusion in favor of supervisory status for head custodians improperly confused supervisory status conse-

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include: Sacramento City Unified School Dist., 1 P.E.R.C. 419 (1977) (skilled crafts foremen, school plant managers, and food services managers are supervisors); San Diego Unified School Dist., 1 P.E.R.C. 33 (1977) (building services supervisors and head gardeners are supervisors). *But see* San Rafael City Schools, 1 P.E.R.C. 433 (1977) (maintenance and operations field supervisor is not supervisor); New Haven Unified School Dist., 1 P.E.R.C. 121 (1977) (high school department heads are not supervisors); Foothill-De Anza Community College Dist., 1 P.E.R.C. 64 (1977) (custodial foremen are not supervisors). In *New Haven Unified School District*, the PERB for the first time discussed the leadman/supervisor distinction. The PERB stated: "[I]t is clear that department heads are primarily classroom teachers, and in their assignment as department heads function only as an experienced employee giving assistance to those less experienced or as an administrative coordinator within a department." 1 P.E.R.C. at 123. The PERB's decision in *Oakland Unified School Dist.*, 2 P.E.R.C. ¶ 2089, at 198 (1978), also relies upon the absence of the use of independent judgment in finding that "supervising" custodians were not supervisors within the meaning of the EERA definition of "supervisory employees." See note 132 *supra*.

140. 1 P.E.R.C. 10 (1976).

141. CAL. GOV'T CODE § 3540.1(m) (West Supp. 1979).

142. 1 P.E.R.C. at 13-14.

143. Telephone Interview with Charles M. Cole, Executive Director, PERB (Sept. 19, 1979). EERA § 3545(b)(2) provides in part: "A negotiating unit of supervisory employees . . . shall not be represented by the same employee organization as employees whom the supervisory employees supervise." CAL. GOV'T CODE § 3545(b)(2) (West Supp. 1979). The effect of this section of EERA is to force many unions to elect whether to represent a supervisory unit or a nonsupervisory unit. Logically, representation of the larger unit, probably the nonsupervisory unit, would be elected.

quences<sup>144</sup> and the distinct threshold question of which employees fall within the EERA supervisory definition.<sup>145</sup>

The last sentence in the HEERA "supervisory employee" definition, which provides that "[e]mployees whose duties are substantially similar to those of their subordinates shall not be considered to be supervisory employees,"<sup>146</sup> undoubtedly was enacted in response to the PERB decisions discussed above which read the "supervisory employee" definition as though the independent judgment proviso did not exist. Consideration of the explicit legislative command in the third sentence of HEERA's supervisory definition may be anticipated in appropriate HEERA cases involving academic<sup>147</sup> and nonacademic employees.

### Unfair Practices

Consistent with the NLRA,<sup>148</sup> EERA,<sup>149</sup> and SEERA,<sup>150</sup> HEERA contains definitions of unfair employer and union practices.<sup>151</sup> HEERA section 3565<sup>152</sup> is the core of the Act's unfair practice sections, providing:

Higher education employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations and for the purpose of meeting and conferring. Higher education employees shall also have the right to

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144. See notes 111-13 & accompanying text *supra*.

145. CAL. GOV'T CODE § 3540.1(m) (West Supp. 1979).

146. *Id.*

147. An instructive NLRB decision treating a wide range of classifications of academic employees whose supervisory, as well as confidential and managerial, statuses were in dispute, is *New York Univ.*, 221 N.L.R.B. 1148 (1975). The NLRB held department chairmen to be supervisors because they effectively recommended hiring, termination, salary increases, and promotion of full-time faculty and because they evaluated faculty performance and assigned faculty class schedules. On similar reasoning, program directors, the vice director of a language institute, the director of computer and mathematical sciences, and others were held to be supervisors. Academic employees with academic and administrative duties were held to be supervisors if 50% or more of their time was spent supervising non-unit employees. Principal investigators were among those found not to be supervisors within the meaning of NLRA § 2(11), 29 U.S.C. § 152(11) (1976). The *New York University* decision must be read with caution, as many of the employee classifications discussed are those having similar titles but different job functions at different colleges and universities. See, e.g., *Northeastern Univ.*, 218 N.L.R.B. 247 (1975), where principal investigators were excluded from the unit as supervisors.

148. See 29 U.S.C. § 158(a), (b) (1976).

149. See CAL. GOV'T CODE §§ 3543.5, 3543.6 (West Supp. 1979).

150. See *id.* §§ 3519, 3519.5.

151. *Id.* §§ 3571, 3571.1.

152. *Id.* § 3565.

refuse to join employee organizations or to participate in the activities of these organizations subject to the organizational security provision permissible under this chapter.<sup>153</sup>

Section 3565 thus establishes the basic right to organize for collective bargaining purposes and to engage in collective bargaining through a selected bargaining representative. In other sections HEERA makes it an unfair practice for a HEERA employer to interfere with this and other rights described in the Act<sup>154</sup> and for a union to interfere with an employee's right to refuse to participate in an employee organization.<sup>155</sup> These unfair employer practices may be divided into two main categories: (1) those that unlawfully interfere with the rights of employees to organize for collective bargaining purposes;<sup>156</sup> and (2) those that unlawfully interfere with the bargaining process itself.<sup>157</sup>

The second category may well be the most significant for employees because employer infringements on the right to organize for collective bargaining are far less frequent in the public sector than they are in the private sector.<sup>158</sup> This is because public employers generally do not resist union efforts at organization until after representation rights have been gained by a union. Thus, it may be anticipated that under HEERA, as has been the case under EERA, relatively few charges of interference with the right to organize will be filed.<sup>159</sup> Instead, charges of employer unfair practices under HEERA will consist primarily of

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153. *Id.*

154. *Id.* § 3571(a), (b). In making it an unfair practice to interfere with or deny rights guaranteed by HEERA, the Act, by reference and adoption, brings within its unfair practice provisions some statutory rights not found in the unfair practice sections themselves. For example, the released time requirements of HEERA, CAL. GOV'T CODE § 3569 (West Supp. 1979), if not met by an employer, would constitute an unfair practice under CAL. GOV'T CODE § 3571(b) (West Supp. 1979), which makes it an unfair practice to "[d]eny to employee organizations rights guaranteed to them by this chapter."

155. *Id.* §§ 3565, 3571.1(b).

156. CAL. GOV'T CODE § 3571(a) (West Supp. 1979) provides: "It shall be unlawful for the higher education employer to . . . impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed to them by this chapter." CAL. GOV'T CODE § 3571.1(a), (b) (West Supp. 1979) imposes comparable restrictions upon unions.

157. *Id.* § 3571(c).

158. Approximately 70% of the charges filed with the NLRB allege some form of interference with the right to engage in union activity. 40 NLRB ANN. REP. 215 (1975). In contrast, during the first two years of its existence, the PERB (then Educational Employment Relations Board) decided no case involving a charge of interference with the right to organize. Of the 344 representation elections conducted during that period, a majority vote for "no representation" occurred in only 7 elections, and the results of only 7 elections were challenged by objections. *See* [1977] EERA ANN. REP. 59-90.

159. *See* note 158 *supra*.

allegations of unlawful bargaining practices and closely related matters.

### Unfair Meet-and-Confer Practices

One of HEERA's most important unfair practices sections provides that "[i]t shall be unlawful for the higher education employer to . . . [r]efuse or fail to engage in meeting and conferring with an exclusive representative."<sup>160</sup> This unfair practice provision raises two separate but related questions, neither of which is apparent on the face of the provision: (1) what are the subjects which a HEERA employer becomes obligated to bargain over with an exclusive representative upon demand; and (2) once those subjects are identified, what is the extent to which an employer becomes obligated to consider and respond to an exclusive representative's demands as they relate to valid subjects of bargaining? In the lexicon of HEERA the first question is answered under the rubric of "subjects of bargaining"; known in NLRA parlance as subjects within the scope of representation. Similarly, in relation to the second issue, the obligation to bargain under the NLRA is known as the obligation to engage in "meeting and conferring" under HEERA.<sup>161</sup>

The extent of the "meet and confer" obligation under HEERA's definition is virtually identical to the NLRA definition of the extent of the bargaining obligation.<sup>162</sup> The words "meet and confer," as used in HEERA, may cause initial confusion because in other California legislation the same words have meant something less than collective bargaining in the NLRA sense.<sup>163</sup> The meaning ascribed to "meet and

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160. CAL. GOV'T CODE § 3571(c) (West Supp. 1979). Unions are similarly obligated to meet and confer with the employer. *Id.* § 3571.1(c). While silent on the subject, this section obviously presupposes that a union has exclusive representative status.

161. *Id.* § 3562(d). See text accompanying note 164 *infra*.

162. NLRA § 8(d) provides: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . ." 29 U.S.C. § 158(d) (1976).

163. See *San Juan Teachers Ass'n v. San Juan Unified School Dist.*, 44 Cal. App. 3d 232, 118 Cal. Rptr. 662 (1974), where the court of appeal described the extent of the "meet and confer" obligation under the Winton Act, CAL. EDUC. CODE §§ 13080-13088 (West Supp. 1968-69) (repealed July 1, 1976), as follows: "[T]here is no statutory requirement that the employer 'negotiate' in the sense of striving to reach a contract, bargain or agreement. Rather, the statutory obligation of the employer is expressed in the words 'meet and

confer" in other California statutory enactments, however, is irrelevant in the face of a statutory definition under HEERA that does not follow the meaning found in earlier California statutes and cases, but rather follows the NLRA's definition of the term "bargain collectively." HEERA section 3562(d) defines "meet and confer" as the mutual obligation of an employer and an exclusive representative "to meet at reasonable times and to confer in good faith with respect to matters within the scope of representation and to endeavor to reach agreement on matters within the scope of representation."<sup>164</sup> This definition differs drastically from an obligation merely to "consider" a union's proposal before acting, which was all a higher education employer was obligated to do before HEERA became effective.<sup>165</sup> The difference between a duty to "consider" and the duty to "meet and confer," as defined in HEERA section 3562(d),<sup>166</sup> can be likened to the difference between listening with no obligation to attempt to agree or make a counterproposal and listening with an obligation to attempt in good faith to reach an agreement or make a counterproposal.

More difficult questions might arise under the HEERA "meet and confer" definition, spawning complex litigation before the PERB. The obligation to meet and confer under HEERA extends only to matters "within the scope of representation,"<sup>167</sup> a phrase which HEERA defines in general terms<sup>168</sup> that are followed by several specific exceptions to the general definition.<sup>169</sup> The general definition, which is an almost

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confer." 44 Cal. App. 3d at 252, 118 Cal. Rptr. at 673 (quoting *Torrance Educ. Ass'n v. Board of Educ.*, 21 Cal. App. 3d 589, 593, 98 Cal. Rptr. 639, 642 (1971)). Ironically, the words "meet" and "confer" appear in the NLRA's definition of the term "bargain collectively." See note 162 *supra*.

164. CAL. GOV'T CODE § 3562(d) (West Supp. 1979).

165. See note 163 *supra*.

166. CAL. GOV'T CODE § 3562(d) (West Supp. 1979).

167. *Id.*

168. *Id.* § 3562(q)-(r).

169. *Id.* Section 3562(q), relating to University of California employees, and § 3562(r), relating to California State University and Colleges, provide exemptions which differ. *Id.*

The Act, however, in § 3582, CAL. GOV'T CODE § 3582 (West Supp. 1979), clearly specifies that the issue of organizational security is within the Act's scope of representation. When a union becomes the exclusive representative of an employee unit, it logically seeks to have all members of the unit join the union, arguing that such an arrangement is necessary to the union's organizational effectiveness and security. Under the National Labor Relations Act, the employer and union can agree to a contractual provision which mandates that all employees join the union after they have been on the job for thirty days. 29 U.S.C. § 158(a)(3) (1976). EERA adopts an organizational security scheme somewhat similar to that under the NLRA. CAL. GOV'T CODE §§ 3540.1(i)(2), 3546 (West Supp. 1979) (by arrangement may be made mandatory). HEERA, however, departs radically from the NLRA model. Under HEERA, joining an employee organization is *not* a requirement for contin-

exact counterpart of NLRA section 8(d),<sup>170</sup> provides: "[S]cope of representation means, and is limited to, wages, hours of employment, and other terms and conditions of employment."<sup>171</sup> Some of the exceptions that follow, such as those relating to promotion and tenure,<sup>172</sup> specifically remove several issues from the scope or representation that otherwise would be within the definition.<sup>173</sup> Other exceptions, such as the exception related to collecting student fees and establishing admission requirements,<sup>174</sup> functions unique to universities and colleges, clearly are beyond the "terms and conditions of employment" and hence would not be within the scope of representation in any event.

### *Voluntary Subjects of Bargaining*

Under NLRA case law, any matter not within the scope of bar-

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ued employment. CAL. GOV'T CODE § 3583 (West Supp. 1979). It is completely up to the individual employee whether to join the employee organization or not. However, an employer and employee organization may agree, if they desire, to a contractual provision requiring the employer to deduct automatically from the wages of employees who do decide to join the employee organization initiation fees, dues, and the like, charged by the given organization, and to forward these monies directly to the employee organization. *Id.*

The HEERA organizational security scheme gives employees the freedom to decide whether or not to join an employee organization, as opposed to requiring employees to join as a condition of employment. This scheme, however, has a sharp element of inequity in that those who do not join the organization will benefit from the work of the organization without contributing to it. It may be that the costs in terms of reduced employee freedom of choice are more than offset by the benefits in terms of more effective representation which are gained when unit employees are required to join the employee organization which represents them. In any event, the matter is worthy of further consideration and study by the legislature.

170. The NLRA provides that the duty to bargain collectively requires the parties to "meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . . ." 29 U.S.C. § 158(d) (1976).

171. CAL. GOV'T CODE § 3562(q)-(r) (West Supp. 1979).

172. *Id.* § 3562(q) (relating to University of California). *Cf. id.* § 3562(r)(4) (exempting "criteria and standards to be used for the appointment, promotion, evaluation, and tenure of academic employees" of the California State University and Colleges).

173. *See* NLRB v. Houston Chapter Associated Gen. Contractors of America, Inc., 349 F.2d 449, 451-52 (5th Cir. 1965), *cert. denied*, 382 U.S. 1026 (1966) (tenure of employment is a mandatory subject of bargaining); E.W. Scripps Co., 94 N.L.R.B. 227, 228 (1951) (merit increases are a mandatory subject of bargaining despite the difficulty involved in setting evaluative standards).

174. CAL. GOV'T CODE § 3562(q)(2)-(3) (University of California), (r)(2)-(3) (California State University and Colleges) (West Supp. 1979). There is no "scope of representation" definition for Hastings College of the Law. A fair interpretation of the Act would include Hastings within the "scope of representation" definition for the University of California. CAL. GOV'T CODE § 3562(q)(1) (West Supp. 1979) refers to "directors," an apparent reference to the Board of Directors of Hastings College of the Law. Also, as HEERA's preamble notes, Hastings College of the Law is "an affiliate of the University of California." *Id.* § 3560(c).



gaining is either a permissive subject of bargaining, which means that an employer voluntarily may bargain over the subject upon request even though not required to do so, or an illegal subject of bargaining, over which no bargaining may take place.<sup>175</sup> HEERA, like EERA and SEERA, has a provision that fails to clarify whether the Act contains a similar mandatory-permissive-illegal trichotomy. Specifically, under HEERA it is not entirely clear whether a union's proposed subject of bargaining which is not within the scope of representation and not illegal may be the subject of voluntary bargaining by the employer.

The pertinent HEERA section on voluntary bargaining provides:

All matters not within the scope of representation are reserved to the employer and may not be subject to meeting and conferring, provided that nothing herein may be construed to limit the right of the employer to consult with any employees or employee organization on any matter outside the scope of representation.<sup>176</sup>

This section appears to depart from private sector case law recognition of permissive subjects of bargaining. As used in HEERA, the words "may not" might well be construed to mean that subjects not within the scope of representation "shall not" be subject to meeting and conferring; further, the remainder of the section, consistent with such an interpretation, might well be construed to mean that an employer shall do no more than consult with the exclusive representative. Under that reading, the University of California, for example, could not bargain and enter into an agreement with a union on the subject of arbitration procedures for promotion and tenure of faculty members, even if the University thought that such action might enhance good employer-employee relations.<sup>177</sup> Any ambiguity in the provision, however, might be resolved in favor of permitting a HEERA employer voluntarily to include in a bargaining agreement a matter not within the scope of representation, provided that such agreement is not illegal. The words "may not be subject to meeting and conferring" could be read as permissive and not mandatory language. Arguably, the legislature could have used the mandatory "shall" had it intended to preclude an employer from voluntarily reaching an agreement with a union on a legal subject that is not within the scope of representation. Further, it is difficult to perceive what harm might result to a HEERA employer or the public under an interpretation that permits an employer voluntarily to bargain

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175. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342 (1958).

176. CAL. GOV'T CODE § 3562(q) (West Supp. 1979).

177. A grievance-arbitration procedure for promotion and tenure of faculty members is expressly removed from the "scope of representation." *Id.* § 3562(q)(4) (University of California), (r)(4) (California State University and Colleges).

over matters not within the "scope of representation." Not only is a HEERA employer free to refuse to bargain over matters not within the scope of representation, but a union's insistence that an employer negotiate over a matter that is not within the scope of representation is itself an unlawful refusal to negotiate under settled case law.<sup>178</sup> Accordingly, an employer may resist bargaining over such matters, thus preserving the voluntary character of any bargaining over matters outside the scope of representation.

### *Surface Bargaining*

Apart from a flat refusal to meet and confer on the ground that a proposed subject of bargaining is outside the scope of representation, other classes of disputes could arise under HEERA's meet and confer section. An unfair labor practice under section 8(a)(5) of the NLRA is committed when an employer goes through the motions of bargaining without intending to reach an agreement<sup>179</sup> or when an employer unilaterally changes conditions of employment that are within the scope of negotiations.<sup>180</sup> In the former instance, potential difficulties of proof are obvious. To establish a violation the union must prove a state of mind and, in the absence of an admission of an intention not to reach an agreement, the union must offer objective proof to establish the subjective element of bad faith.

In an important decision interpreting EERA, the PERB followed federal case law in looking "to the entire course of negotiations to determine whether the employer . . . negotiated with the requisite subjective intention of reaching an agreement."<sup>181</sup> Presumably, the PERB also will follow federal precedents establishing that unacceptable proposals must be met with counter-proposals,<sup>182</sup> that an employer must make "every reasonable effort to reach an agreement,"<sup>183</sup> that the obligation to bargain does not "encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position,"<sup>184</sup> and that unilateral changes in working conditions, short of impasse and without notice to a union, constitute unlawful re-

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178. See *Allied Chemical and Alkali Workers Local 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

179. See generally *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 401-03 (1952).

180. *NLRB v. Katz*, 369 U.S. 736 (1962). *Katz* was relied on by the PERB in *Pajaro Valley Unified School Dist.*, 2 P.E.R.C. ¶ 2107 (1978).

181. *Pajaro Unified School Dist.*, 2 P.E.R.C. ¶ 2107, at 253 (1978).

182. *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 402 (1952).

183. *Id.*

184. *Id.* at 404.

fusals to negotiate.<sup>185</sup>

### *Released Time*

HEERA's released time provision attempts to reconcile the interests of the employer in maintaining employees on the job and the interests of the union in having employees from the represented unit on the union's negotiating team. Under a deliberately vague standard of reasonableness, a number of employees are entitled to paid time off to serve for reasonable periods of time as members of their union's negotiating team:

A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released or reassigned time without loss of compensation when engaged in meeting and conferring and for the processing of grievances prior to the adoption of the initial memorandum of understanding. When a memorandum of understanding is in effect, released or reassigned time shall be in accordance with the memorandum.<sup>186</sup>

The "released time" provision in HEERA is roughly analogous to that found in EERA, although the language of the two provisions differs in certain significant ways.<sup>187</sup> Further, both the EERA and the HEERA released time provisions depart considerably from the private sector model, which contains no statutory released time requirement, but allows parties to agree to include reasonable released time clauses in collective bargaining agreements.<sup>188</sup>

HEERA's released time provision has two components. First, before any memorandum of understanding has been adopted, the employer is required to afford employee organization representatives "rea-

185. *Id.* at 399, 409. See PERB's decision in Muroc Unified School Dist., 3 P.E.R.C. ¶ 10,004 (1978) (no surface bargaining violation).

186. CAL. GOV'T CODE § 3569 (West Supp. 1979).

187. The EERA states: "A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances." *Id.* § 3543.1(c).

188. Payment of employee organization representatives for time spent in the processing of grievances has long been a common industrial practice in the private sector. See *Basic Patterns in Labor Arbitration Agreements*, 34 Lab. Arb. Disp. Settl. 931, 935 (1960) (estimating, in 1960, that over half of the private collective bargaining contracts in the nation contained provisions providing pay for time spent by employees processing grievances). Over time, these provisions were broadened to include payment for time spent negotiating. See, e.g., *American Sterilizer Co.*, 47 Lab. Arb. & Disp. Settl. 203 (1966) (Dworkin, Arb.). Such payments, if reasonable, have been held not to constitute a violation of § 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2) (1976). See *Employees' Independent Union v. Wyman-Gordon Co.*, 314 F. Supp. 458 (N.D. Ill. 1970); *Atlantic Richfield Co.*, [1976-1977] NLRB Dec. (CCH) ¶ 20,092 (1977) (Advice Memo).

sonable" released time for purposes of meeting and conferring with the employer; refusal by the employer to provide "reasonable" released time is an unfair practice under section 3571(b) of HEERA.<sup>189</sup> In determining what constitutes "reasonable" released time for purposes of initial meet and confer sessions, parties have the guidance of PERB decisions construing what in this respect is virtually identical language in EERA.<sup>190</sup>

In *Magnolia School District*,<sup>191</sup> a school district had restricted released time to the one-half hour period between 3:00 p.m. and 3:30 p.m., which was noninstructional teacher time. The PERB held that per se rules barring release from instructional periods are inappropriate and that, at least in some cases, teacher negotiators must be given released time during the normal teaching day. The Board also implicitly held that the reasonable released time provision applies to meeting and conferring during mediation and other impasse procedures and noted that employers must be willing to assume a flexible posture with respect to released time procedures.<sup>192</sup>

In *Burbank Unified School District*,<sup>193</sup> however, the PERB outlined the limits of the EERA released time provision. PERB found that the legislature's intent was to "ensure effective representation for employees in negotiations and grievance processing . . . [by lessening] the burden on employee representatives whose effectiveness may otherwise be limited by time restraints."<sup>194</sup> The PERB held that such "effective representation" was not meaningfully impaired by the school district's refusal to grant employee organization negotiators recuperative released time the morning after a late-night negotiating session.

The second component of the HEERA released time provision, however, does not have an EERA counterpart. The basic released time right under HEERA section 3569 applies "prior to the adoption of the initial memorandum of understanding."<sup>195</sup> Once a memorandum of understanding is in effect, section 3569 requires that "released or re-assigned time shall be in accordance with the memorandum."<sup>196</sup> If, in a memorandum of understanding, the parties agree on a released time clause, or if they agree that the employee representatives of an em-

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189. CAL. GOV'T CODE § 3571(b) (West Supp. 1979).

190. *Id.* § 3543.1(c).

191. 1 P.E.R.C. 258 (1977).

192. *Id.* at 259.

193. 2 P.E.R.C. ¶ 2173 (1978).

194. *Id.* at 473.

195. CAL. GOV'T CODE § 3569 (West Supp. 1979).

196. *Id.*

ployee organization will forego their released time rights, the memorandum of understanding provision should govern. A problem might arise, however, if the memorandum were silent on the released time issue. A literal reading of the statutory language might support an argument that silence operates as an implicit waiver of the released time right. Such a reading places the burden on the employee organization to raise the released time issue during negotiations and successfully negotiate contract language on the subject. This reading poses two problems. First, implied waivers of statutory rights are generally avoided.<sup>197</sup> Second, that reading in some instances would require a union to raise the subject of released time as a bargaining proposal, not because the union wanted a released time clause that was more favorable than the statutory released time provision, but solely to avoid an implicit waiver of a statutory right.

### Public Notice

Certain tensions are inherent in any bargaining process, but there are some sources of tension that are unique in the context of public sector collective bargaining. One source of tension is the competing demands of those who view collective bargaining in public employment as part of the open political process and those who view labor negotiations as benefitting most from the privacy of the bargaining table. Most states yield to the latter view and make no provision for bargaining in public. A small number of states, on the other hand, require so-called "bargaining in the sunshine."<sup>198</sup> In each of its three public employment collective bargaining statutes—EERA,<sup>199</sup> SEERA,<sup>200</sup> and HEERA<sup>201</sup>—California has taken a stance that is a compromise between these two polar positions. Within HEERA, sections 3595,<sup>202</sup> the Act's public notice provision, and 3596,<sup>203</sup> concerning open meeting exemptions, effect this compromise.

Section 3596, although not part of HEERA's article on public notice, has a direct impact on the public visibility of collective bargaining under HEERA. Section 3596 specifically exempts higher education employers and employee organizations from the general "open meet-

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197. *Cf.* *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974) (no prospective waiver of employee rights under Title VII).

198. *See, e.g.*, MINN. STAT. ANN. § 179.69(2) (West Supp. 1979) (public access required except when director of mediation services specifies otherwise).

199. CAL. GOV'T CODE § 3547 (West Supp. 1979).

200. *Id.* § 3523.

201. *Id.* § 3595.

202. *Id.*

203. *Id.* § 3596.

ing” requirements that govern legislative bodies at the state and local level.<sup>204</sup> The public thus has no right to view or take an active role in negotiations. However, HEERA’s article on public notice, section 3595, has provisions that ensure that interested members of the public are apprised of initial subjects offered for negotiation by either the HEERA employer or its employees’ exclusive representatives. Section 3595(a) provides that “[a]ll initial proposals of exclusive representatives and of higher education employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the higher education employer and thereafter shall be public records.”<sup>205</sup> Section 3595 further provides: (1) that members of the public shall have an opportunity to express their views regarding the proposals before negotiations begin;<sup>206</sup> (2) that subsequently the higher education employer must adopt its initial proposal, including any changes deemed appropriate based on public comments, at a public meeting;<sup>207</sup> and (3) that “[n]ew subjects of meeting and conferring arising after the presentation of initial proposals shall made public within 24 hours.”<sup>208</sup>

The publication requirements of section 3595(a) appear to require no more than ministerial acts by both parties. Section 3595(a) may be satisfied by both exclusive representatives and employers by simply informing the public that an initial proposal has been filed and will be made available for inspection at a public meeting of the employer. In the case of an employer, section 3595(b) assures that the public will be heard before the employer adopts a firm initial proposal. The union’s initial proposal, however, need only be filed and made available for public inspection at a public meeting. “New subjects of meeting and conferring” within the meaning of section 3595(d) apparently refers only to subjects not included in the initial proposal and not to specific proposals. For example, in the case of change of a party’s position from wage proposal *X* to wage proposal *Y*, wage proposal *Y* would not be a new subject and thus would not have to be made public.

The public notice provision as a whole appears to provide a useful compromise between public and private bargaining. Its objective is properly limited to keeping interested members of the public informed

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204. *Id.* The PERB has set up an elaborate but seldom used complaint procedure designed to implement the public notice provisions of EERA. 8 CAL. ADMIN. CODE §§ 37,000-37,100 (1977-1978). SEERA and HEERA rules and regulations contain no such procedures.

205. CAL. GOV’T CODE § 3595(a) (West Supp. 1979).

206. *Id.* § 3595(b).

207. *Id.* § 3595(c).

208. *Id.* § 3595(d).

on the identity of subjects being negotiated. The public has no right to take part in the negotiations and no right to be informed when, as is inevitable in collective bargaining, initial subjects of bargaining are modified in the course of the bargaining process. Full-scale open bargaining laws are not in the best interests of effective bargaining, nor are they fully capable of achieving the goals of their proponents.<sup>209</sup> Collective bargaining agreements are in the main insufferably dull and highly complex documents. Full-scale public participation in the bargaining process, given the separate caucuses, the long and late-hour sessions, the arcane language, and the bluffing and posturing that typify many bargaining sessions, would be of little value to the public as the actual accomplishments of the parties would be largely, if not completely, obscured. In addition, no statute validly could provide the public with access to knowledge of a union's strategy. Lack of understanding of the strategy being employed, and how and when the strategy might shift during bargaining, adds to the difficulty of making the process understandable and hence a meaningful experience for a public observer.

Moreover, the public has a limited interest in the outcome of bargaining under a statute like HEERA. HEERA's scope of representation section closely limits bargaining to terms and conditions of employment,<sup>210</sup> and thus many subjects of public interest,<sup>211</sup> such as school curriculum, are not within the scope of negotiations.<sup>212</sup> Even with a direct and tangible interest in the outcome of bargaining, the argument in favor of full-scale open collective bargaining sessions would be weak. The problem with public participation in the bargaining process stems from its potential for disrupting a highly complex and finely tuned process;<sup>213</sup> bargaining is difficult enough for those party participants who understand their own tactics and strategy and who

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209. For an argument in favor of citizen involvement in collective bargaining for teachers, see Cheng, Hamer & Barron, *A Framework for Citizen Involvement in Teacher Negotiations*, in *EDUCATION AND URBAN SOCIETY* 219 (1979).

210. See CAL. GOV'T CODE § 3562(q) (West Supp. 1979).

211. See Cheng, Hamer & Barron, *A Framework for Citizen Involvement in Teacher Negotiations*, in *EDUCATION AND URBAN SOCIETY* 220 (1979). The authors argue that bargain-ers "do not necessarily place high priority on matters directly affecting children. . . . Generally, this means that when the teacher's union is forced to choose between salary, fringe benefits, and educational matters, the union will generally opt for bread and butter." The argument fails to note that most "educational matters" are not within the scope of bargaining. See, e.g., CAL. GOV'T CODE § 3543.2 (West Supp. 1979), which makes all matters of educational policy (except class size) outside the scope of representation.

212. CAL. GOV'T CODE § 3562(q).

213. See Statement of Mr. Harold R. Newman, Chairman, New York PERB, in *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* 70-71 (A. Knapp ed. 1977).

know when they are bluffing, when they are serious, when they will shift tactics, and when to take the opposition seriously. The addition of public participants inevitably would hamper the interpersonal reactions necessary to foster compromise and settlement.

## **Bargaining Impasse and Grievance Dispute Resolution**

### **Impasse Procedures**

As defined by statute, bargaining parties are at impasse when they "have reached a point in meeting and conferring at which their differences in positions are such that further meetings would be futile."<sup>214</sup> Because California law does not permit public employee strikes,<sup>215</sup> HEERA employees, unlike their private sector counterparts, are provided with statutory impasse procedures which are designed to serve as substitutes for strikes. These procedures are set forth in HEERA sections 3590 to 3594,<sup>216</sup> which contain two impasse procedure steps—mediation and fact finding.

Mediation is the first impasse procedure step and is triggered when either party declares that an impasse has been reached with respect to matters within HEERA's scope of representation.<sup>217</sup> The mediator attempts to assist the parties in reaching an agreement. Mediation thus serves as a salutary adjunct of, and complement to, the meet and confer

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214. CAL. GOV'T CODE § 3562(k) (West Supp. 1979).

215. See note 89 *supra*. However, the California Supreme Court in the recent case of *San Diego Teachers Ass'n v. Superior Court*, 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979), ruled that public employers must, in the event of an employee strike, pursue unfair practice remedies before the PERB rather than seek an injunction in the courts. The strike could be read as an unfair practice because the party would be neither meeting and conferring in good faith nor participating in the statutorily mandated impasse procedure. *Id.* at 7-8, 593 P.2d at 842-43, 154 Cal. Rptr. at 897-98. The PERB, however, would have discretion to decide whether or not to seek a strike injunction. The PERB would be free to conclude that an injunction or restraining order would not hasten the end of a strike and thus not seek such action. *Id.* at 12-13, 593 P.2d at 846, 154 Cal. Rptr. at 901.

Since PERB may decide not to pursue an injunction, the *San Diego* decision represents a significant victory for public employees and public employee organizations, who now stand a better chance of escaping strike injunctions and the contempt citations which follow when such injunctions are not obeyed. The major problem with the decision, however, is that it assumes a prosecutorial role for the PERB which undoubtedly was not contemplated by the legislature. The court mistakenly seized on EERA language concerning the PERB's power regarding "issuance of complaints," CAL. GOV'T CODE § 3541.3(j) (West Supp. 1979), language which was taken in a boilerplate fashion from an NLRA provision on the statute of limitations, 29 U.S.C. § 160(b) (1976), and from an NLRB decision on deferral to arbitration. See *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971); *Fresno Unified School Dist.*, 1 P.E.R.C. 264 (1977).

216. CAL. GOV'T CODE §§ 3590-3594 (West Supp. 1979).

217. *Id.* § 3590.



process.<sup>218</sup>

Mediation contrasts markedly with fact finding, the second impasse procedure step. Fact finding may be instituted under HEERA at the request of either party if the mediator has been unable to settle the controversy within fifteen days and the mediator declares that fact finding is appropriate to the resolution of the impasse.<sup>219</sup> A fact-finding panel then is chosen, with each bargaining party selecting one member of the panel and the PERB choosing the panel's chairperson.<sup>220</sup> The panel is charged with the responsibility of meeting with the parties and considering and investigating their positions.<sup>221</sup> If the dispute has not been settled within thirty days of the panel's appointment, or within a longer period to which both parties consent, the panel must make an advisory finding of fact and recommendation of settlement.<sup>222</sup>

If, however, the fact-finding procedure often reduces to nothing more than a mediatory process serving a mediatory purpose,<sup>223</sup> there may be considerable merit in eliminating the fact-finding alternative procedure and using mediation as the exclusive impasse resolution procedure. Experience has shown the ineffectiveness of fact finding as a viable alternative to bargaining. When fact finding is invoked in a bargaining dispute, both parties tend to perceive that the fact finder will examine the last position of each party, determine the quantitative difference between the two, roughly divide that difference by two and award each side its portion of the divided sum. Perceiving that the fact finder will operate in that manner, both parties will tend to ensure that their positions at the bargaining table are adjusted accordingly. Thus, the union's bargaining position will tend to be artificially high, and the employer's artificially low. The elements of artificiality on either or both sides combined may be sufficient to prevent the parties from reaching an agreement that might have been reached, absent the availability of fact finding. Further, the advisory nature of a fact finder's decision leaves either party free to reject the fact-finding decision.

The second ramification of fact finding militating against maintaining the procedure as an adjunct to the bargaining process derives from the purported authority of the fact finder. Traditionally, a fact

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218. *Id.*

219. *Id.* § 3591.

220. *Id.*

221. *Id.* § 3592.

222. *Id.* § 3593.

223. See generally Bierman, *Factfinding: Finding the Public Interest*, 9 RUT.-CAM. L.J. 667, 668 (1978).

finder has been regarded as having more "clout" than a pure mediator because of the fact finder's ability to issue a public fact-finding report which could publicly expose an unreasonable position taken by a party. This presumed "clout" has not materialized, and likely will not, because to date the press largely has ignored fact-finding reports as dull reading. Even if fact-finding reports were published, there is little chance that the public could perceive which party's position might be unreasonable and why. Thus, the fact finder is left with no more actual "clout" than the pure mediator.

### Grievance Arbitration

More than ninety percent of all collective bargaining agreements negotiated in the private sector contain clauses requiring the arbitration of disputes concerning the meaning of collective bargaining agreements if arbitration is requested.<sup>224</sup> Although grievance arbitration is still relatively new in the public sector, its acceptance is growing.<sup>225</sup> HEERA authorizes grievance arbitration for nonacademic employees by not expressly excluding arbitration from the scope of representation<sup>226</sup> for such employees and by expressly permitting it in HEERA section 3589.<sup>227</sup> Section 3589 authorizes arbitration clauses and makes them as binding and enforceable in judicial proceedings as are such arbitration clauses in private sector contracts. Grievance arbitration clauses under HEERA can be either advisory in nature, permitting either party to reject the arbitrator's decision, or binding, making the arbitrator's decision final.

In public sector collective bargaining, the kind of arbitration clause ultimately negotiated often is the product of a trade-off involving issues unrelated to impasse resolution. A union, for example, may change a demand for binding grievance arbitration to a demand merely for advisory grievance arbitration to induce an employer to increase its economic package. This use of a grievance arbitration clause as a

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224. See THE LABOR LAW GROUP, 1 LABOR RELATIONS AND SOCIAL PROBLEMS (BNA) 160 (3d ed. 1975) (citing reports of the United States Bureau of Labor Statistics). While the total number of arbitrations held annually is not precisely known, it has been estimated that approximately 50,000 labor arbitration proceedings are held in the United States each year. This approximate figure is derived from annual reports of the Federal Mediation & Conciliation Service (FMCS), which reports on FMCS arbitration data only, reports of the American Arbitration Association, and a rough guess concerning the number of arbitrations held under other auspices.

225. See J. GRODIN, JUDICIAL RESPONSE TO PUBLIC-SECTOR ARBITRATION 224 (1978).

226. CAL. GOV'T CODE § 3562(q) (West Supp. 1979).

227. *Id.* § 3589.

source of negotiation strategy is unique to public sector collective bargaining. In the private sector, binding grievance arbitration clauses have long been regarded as the *quid pro quo* for a no-strike clause<sup>228</sup> and both clauses are routinely negotiated.<sup>229</sup>

Even though public employee strikes are generally illegal,<sup>230</sup> thus negating—at least theoretically—the need for a no-strike clause in a public sector agreement, the use of advisory grievance arbitration is an unfortunate development which reflects the unease and uncertainty with which public employers tend to view the advent of collective bargaining. The apparently equal ability of either party to reject the arbitrator's award in reality offers only the employer that option. For example, if the arbitrator in an advisory decision decides that a grieving employee was discharged, not promoted, or not paid sick leave in violation of the agreement, the employer may reject the award and maintain the status quo. Although the union may accept such an award, the advisory opinion provides the union no power to do anything about the employer's rejection. If, on the other hand, the arbitrator finds in favor of the employer, the union may "reject" the advisory award but still is unable to do anything about the employer maintaining the status quo. Thus, advisory grievance arbitration does not effect a compromise between the employer and the employee. In contrast, under HEERA, a final and binding arbitrator's award generally is enforceable in a judicial proceeding.<sup>231</sup>

#### Administration by PERB

The PERB's role in grievance arbitration is a limited one. Under HEERA, as under private sector legislation, arbitration is regarded as a private remedy. The PERB may not become involved in the substantive determination of how agreements between unions and employers should be interpreted.<sup>232</sup> The sole administrative function of the PERB

228. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 n.4 (1960); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957).

229. See note 224 & accompanying text *supra*.

230. See note 89 *supra*.

231. CAL. GOV'T CODE § 3589(c) (West Supp. 1979) provides: "An arbitration award made pursuant to this section shall be final and binding upon the parties and may be enforced by a court . . . ."

232. Under HEERA, PERB has no express or implied authority to interpret or enforce collective bargaining agreements; under EERA, PERB is expressly prohibited from enforcing "agreements between the parties." CAL. GOV'T CODE § 3541.5(b) (West Supp. 1979). Cf. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967) (NLRB had power to construe collective bargaining agreement only to extent necessary to enforce a statutory right).

in grievance arbitration matters is described in HEERA section 3589(d),<sup>233</sup> which requires the PERB to submit a list of names of arbitrators to unions and employers and to designate an arbitrator to hear and decide a case, if mutually requested to do so. Such lists are seldom used, however; parties under PERB's jurisdiction who seek the services of an arbitrator generally select arbitrators from among the many agencies and organizations which for years have maintained lists of arbitrators for that purpose.<sup>234</sup>

## Conclusion

Major amendments to the NLRA have been made on only two occasions, once in 1947<sup>235</sup> and once in 1959.<sup>236</sup> Perhaps the remarkable stability of this controversial and litigation-spawning statute is attributable to the realization by the powerful and competing institutions regulated by the NLRA that any attempt by employers or unions to amend the NLRA would open the amendment process to the competing side. A natural inclination of employer and union interests to move cautiously in attempting to shift statutory power allocations in their favor may best explain why so much of HEERA was copied from EERA and SEERA. It may likewise explain why so much of EERA and SEERA are identical or substantially similar to the NLRA and the language in the thousands of administrative and judicial cases that have interpreted that legislation.

In reading HEERA, attorneys and labor students will have no difficulty in discerning which lobbying group, either the higher education employers or the concerned unions, influenced specific incremental changes in the developing law as traced from its NLRA origins. Some of those incremental changes, certain of which have been noted in this Article, will complicate PERB's role as the primary interpreter of HEERA. Changes like the addition of the "performing similar work" sentence to the "supervisory employee" definition<sup>237</sup> were made to

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233. CAL. GOV'T CODE § 3589(d) (West Supp. 1979).

234. Arbitration lists are maintained nationally by the American Arbitration Association, a private organization, and by the Federal Mediation and Conciliation Service. In California, arbitration lists also are maintained by the California State Conciliation Service.

235. The Labor Management Relations Act of 1947, Pub. L. No. 101, 61 Stat. 136 (1947), added the Taft-Hartley amendments to the NLRA. For the legislative history and purpose of these amendments, see H.R. REP. NO. 510, 80th Cong., 1st Sess. 1 (1947), *reprinted in* [1947] U.S. CODE CONG. & AD. NEWS 1135.

236. The Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519, 541 (1959), added the Landrum-Griffin amendments to the NLRA.

237. See note 135 & accompanying text *supra*.

have the law unmistakably read as it was intended that it should read. Other changes, like the removal of issues involving promotion, tenure, evaluation, and grievance processing from the scope of representation—matters ordinarily within the scope of negotiations<sup>238</sup>—reflect the results of a successful employer effort to influence a sharp departure from earlier collective bargaining models.<sup>239</sup>

The existence of widely differing public employment collective bargaining interests, operating at different levels of government in a state as large and politically complex as California, may well assure that a single, comprehensive collective bargaining statute for all California public employees will not be enacted for a very long time. The piecemeal approach of EERA, SEERA, and HEERA may prove counterproductive, particularly for unions. Moreover, each new departure from earlier collective bargaining enactments may produce litigation which will further complicate the tasks of the PERB.

For those whose interests lie in promoting the proper administration of HEERA, potentially grave hidden problems may surface. In the main, these problems will have their foundation not in the results reached by the PERB in disputed cases, but rather in the amount of time it takes the PERB to decide a disputed case. The multiplicity of statutes administered by the PERB contributes to this delay.<sup>240</sup>

The most valuable work performed by the PERB is the effort made by its hearing officer to obtain complete or partial settlements of disputed cases before they are litigated. The success of the administration of HEERA will depend in large part on the ability of HEERA employers and employees to carefully consider a tentative decision to

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238. See notes 167-74 & accompanying text *supra*.

239. HEERA's language mandating a separate unit for craft employees, on the other hand, reflects a successful union lobbying effort. See CAL. GOV'T CODE § 3579(d) (West Supp. 1979). Cf. *Mallinckrodt Chemical Works*, 162 N.L.R.B. 387 (1966) (placing limits on a craft union's ability to obtain a separate unit through a severance petition).

240. Exemplifying one extreme, on August 1, 1979, the PERB decided *Simi Valley Unified School Dist.*, consolidated with *Richmond Unified School Dist.*, 3 P.E.R.C. ¶ 10,105 (1979), an unfair practice case in which the Simi Educators Association charged the School District with unlawfully refusing to distribute an "organizational document on binding arbitration." The charge was filed on December 9, 1976, was heard by a hearing officer on March 2, 1977, decided by him on August 26, 1977, and reached the appealed-case docket of the PERB on September 2, 1977.

At the other extreme, most cases filed with the PERB are quickly settled before they reach the hearing stage. Of the remaining cases heard by hearing officers, roughly half never reach the PERB. This data is based on the author's study of PERB and hearing officer decisions. The drop off in number of issues following an appeal is particularly acute in unit determination cases.

pursue a contested case to the PERB<sup>241</sup> and beyond.<sup>242</sup>

The resolution of questions concerning the administration of HEERA ultimately must await the Act's implementation through further administrative rulings and administrative and judicial decisions. HEERA's operations then might be analyzed with an effort that results in more than a mere outline of its main features, which is all that this Article can provide at this juncture.

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241. See generally Alleyne, *A Symposium Introduction: The Special Value of Settlements in Educational Employment Relations Act Proceedings*, 18 SANTA CLARA L. REV. 853 (1978).

242. PERB decisions now are reviewable in the courts of appeal. See CAL. GOV'T CODE § 3564(c). See also Cal. Stats. ch. 7072, § 49.7 (1979). Appeals from PERB decisions formerly were taken to the superior courts. See CAL. GOV'T CODE § 3564(a) (West Supp. 1979).