PERB
California Public Employment Relations Board

Sacramento Regional Office
1031 18th Street
Sacramento, CA, 95811-4124
Telephone: (916) 324-0143

May 30, 2023

Re: *Teamsters Local 2010 v. Regents of the University of California (San Diego)*
Unfair Practice Case No. LA-CE-1365-H

Dear Parties:

Attached is the Public Employment Relations Board (PERB or Board) agent's Proposed Decision in the above-entitled matter.

Any party to the proceeding may file with the Board itself a statement of exceptions to the Proposed Decision. The statement of exceptions should be electronically filed using the "ePERB portal" accessible from PERB's website (https://eperb-portal.ecourt.com/public-portal/). (PERB Reg. 32110, subd. (a).)[1] Individuals not represented by an attorney or union representative, are encouraged to electronically file their documents using the ePERB portal; however, such individuals may submit their documents to PERB for filing via in-person delivery, US Mail, or other delivery service. (PERB Reg. 32110, subds. (a) and (b).) The Board's mailing address and contact information is as follows:

PUBLIC EMPLOYMENT RELATIONS BOARD
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
Telephone: (916) 322-8231

Pursuant to PERB Regulation 32300, the statement of exceptions must be filed with the Board itself within 20 days of service of this proposed decision. A document submitted through ePERB after 11:59 p.m. on a business day, or at any time on a non-business day, will be deemed "**filed**" the next regular PERB business day. (PERB Reg. 32110, subd. (f).) A document submitted via non-electronic means will be considered "**filed**" when the originals, including proof of service (see below), are actually received by PERB's Headquarters during a regular PERB business day. (PERB Reg. 32135, subd. (a); see also PERB Reg. 32130.)

The statement of exceptions must be a single, integrated document that may be in the form of a brief and may contain tables of contents and authorities, but may not exceed 14,000 words, including footnotes, but excluding the tables of contents and authorities. Requests to exceed the 14,000-word limit must establish good cause for exceeding

[1] PERB's regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

the limit and be filed with the Board itself and served on all parties no later than five days before the statement of exceptions is due. PERB Regulation 32300, subdivision (a), is specific as to what the statement of exceptions must contain. The statement of exceptions shall: (1) clearly and concisely state why the proposed decision is in error, (2) cite to the relevant exhibit or transcript page in the case record to support factual arguments, and (3) cite to relevant legal authority to support legal arguments. Exceptions shall cite only to evidence in the record of the case and of which administrative notice may properly be taken. (PERB Reg. 32300, subd. (c).) Non-compliance with the requirements of PERB Regulation 32300 will result in the Board not considering such filing, absent good cause. (PERB Reg. 32300, subd. (d).)

Within 20 days following the date of service of a statement of exceptions, any party may file with the Board a response to the statement of exceptions. The response shall be filed with the Board itself in the same manner set forth in this letter for the statement of exceptions (see paragraphs two and three of this letter). The response may contain a statement of any cross-exceptions the responding party wishes to take to the proposed decision. The response shall comply in form with the requirements of PERB Regulation 32300 set forth above, except that a party both responding to exceptions and filing cross-exceptions shall be permitted to submit up to 28,000 words total, including footnotes, without requesting permission. A response (with or without an inclusive statement of cross-exceptions) to such exceptions may be filed within 20 days. Such response shall comply in form with the provisions of PERB Regulation 32310.

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See PERB Regs. 32300, subd. (a) and 32093; see also PERB Reg. 32140 for the required contents.) Proof of service forms are available for download on PERB's website: www.perb.ca.gov/about/forms/. Electronic service of documents through ePERB or e-mail is authorized only when the party being served has agreed to accept electronic service in this matter. (See PERB Regs. 32140, subd. (b) and 32093.)

Any party desiring to argue orally before the Board itself regarding the exceptions to the proposed decision shall file with the statement of exceptions or the response thereto a written request stating the reasons for the request. Upon such request or its own motion the Board itself may direct oral argument. (PERB Reg. 32315.) All requests for oral argument shall be filed as a separate document.

An extension of time to file a statement of exceptions can be requested only in some cases. (PERB Reg. 32305, subds. (b) and (c).) A request for an extension of time in which to file a statement of exceptions with the Board itself must be in writing and filed with the Board at least three calendar days before the expiration of the time required to file the statement of exceptions. The request must indicate good cause and, if known, the position of each of the other parties regarding the request. The request shall be accompanied by proof of service of the request upon each party. (PERB Reg.

32132.)

Unless a party files a timely statement of exceptions to the proposed decision, the decision shall become final. (PERB Reg. 32305.)

Sincerely,

Shawn Cloughesy
Chief Administrative Law Judge

SPC

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

TEAMSTERS LOCAL 2010, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA (SAN DIEGO), Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-1365-H PROPOSED DECISION (May 30, 2023)

Appearances: Beeson, Tayer & Bodine, by Susan K. Garea, Attorney, for Teamsters Local 2010; Michelle Kellogg, Labor Relations Advocate, for Regents of the University of California (San Diego).

Before Eric J. Cu, Administrative Law Judge.

INTRODUCTION

In this case, an exclusive representative alleges that an employer violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by unilaterally changing its process for requesting equity salary reviews for employees whose classifications were accreted into a represented bargaining unit. The exclusive representative also maintains that this conduct constitutes unlawful discrimination and independently interferes with protected rights. The employer maintains that its actions were consistent with existing policies or practices and that no violations occurred. For the reasons that follow, I find violations on the unilateral change and discrimination claims, and find that the interference claim is purely derivative of the other two.

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

PROCEDURAL HISTORY

On July 31, 2021, Teamsters Local 2010 (Local 2010) filed an unfair practice charge alleging that the Regents of the University of California (University or UC), at its UC San Diego Health Sciences (UCSD Health) facilities, refused to process equity salary review requests for bargaining unit members added to the unit through an accretion.

On July 27, 2022, the PERB Office of the General Counsel (OGC) issued a complaint on Local 2010's behalf, alleging that University committed an unlawful unilateral change by refusing to process requests for equity salary increases for newly accreted classifications at UCSD Health until after the parties had completed accretion negotiations. The complaint further alleges that refusing to process the equity review requests also discriminated against represented employees and interfered with protected rights. The complaint alleges that the University's conduct was unlawful under HEERA section 3571, subdivisions (a) and (c).

On August 16, 2022, the University filed an answer to the PERB complaint denying any liability and asserting multiple affirmative defenses.

A telephonic informal settlement conference was held on August 31, 2022, but the parties did not resolve their dispute. Thereafter, the case was transferred to the Division of Administrative Law for a formal hearing. The formal hearing took place by videoconference on January 20, 2023.

The parties filed post-hearing briefs on March 20, 2023. At that point, the record was considered closed and submitted for a proposed decision.

FINDINGS OF FACT

1. The Parties and PERB's Jurisdiction

There is no dispute that the University is a higher education employer under section 3562, subdivision (g), or that UCSD Health is part of the University system. There is also no dispute that Local 2010 is an employee organization within the meaning of HEERA section 3562, subdivision (f)(1), and an exclusive representative within the meaning of section 3562, subdivision (i). The parties are accordingly subject to PERB's jurisdiction. Local 2010 represents multiple University bargaining units including the systemwide Clerical and Allied Services Unit, also referred to as the CX Unit. Employees in the CX Unit work at UCSD Health.

2. The Collective Bargaining Agreement

The University and Local 2010 were parties to a systemwide Collective Bargaining Agreement (CBA) for the CX Unit that had an effective term of April 19, 2017 to March 31, 2022. This is the primary period relevant to this case. The term of the CBA was extended multiple times while the parties negotiated over a successor agreement, but it eventually expired on September 1, 2022.

Article 45 is titled "WAGES." Section B(4) provided for "Across the Board Increases," which are wage increases for all bargaining unit members, including a 3 percent pay increase, effective July 1, 2021.

Section A(5) described the order in which to apply salary adjustments awarded on the same day. Across the Board increases are applied first, followed by individual step increases, equity increases, increases from promotions or reclassifications, and finally, pay range increases.

Section A(6), titled "Other Increases" stated, in relevant part:

> "The University may increase, during the term of this Agreement, individual wage rates (including step increases), or pay ranges for selected classes at selected locations. [. . .] At least thirty (30) days prior to implementing the increase referenced in this section, the University shall inform Teamsters Local 2010 in writing of any such increases."

The parties agree that Section A(6) allowed CX Unit members to request and receive "equity increases," which are salary increases outside of any scheduled or merit-based increases. The CBA did not describe the process for requesting or processing equity increases.

Article 7 was the parties' multi-step grievance procedure for resolving violations, misinterpretations, or misapplications of the CBA. The specifics of that procedure are not relevant to this case, except that unresolved grievances may be appealed to binding arbitration.

3. The Equity Increase Review Process

No evidence was presented about any negotiated process for assessing or awarding equity increases for CX Unit members, but it is undisputed that individual employees may request an equity review or that a request may be made on employees' behalf by a supervisor or manager. Equity reviews are performed by the Human Resources department (HR) at the local campus level. It is generally understood that equity reviews for CX Unit members at UCSD Health adhere to Personnel Policy for Staff Members (PPSM) 30, Section III(B)(8). That section describes equity increases as follows:

> "The equity increase policy provides a mechanism for granting salary increases to non-probationary employees outside the normal merit cycle due to a variety of situations that represent salary inequity."

PPSM 30, Section III(B)(8) lists situations that might justify an equity increase including "internal inequity," "[a]ssignments of higher-level functions . . . [that are] not part of the employee's current job description," acquisition of a "certification that adds value to the position," "[e]xternal market factors, [r]etention," and "[s]alary compression" between employees and their supervisor or lead. Pursuant to CBA Section A(6), Local 2010 must be notified of approved equity increases involving CX Unit members. According to Jessica Crouch, a Lead Compensation Analyst at UCSD Health, "internal inequity" is the most common type of equity request. It refers to salary inequity between two or more employees in the same classification.

At UCSD Health, equity review requests are handled by the Compensation unit, within the HR department. Each request is recorded in HR's Case Management System (CMS) and is assigned to a Compensation Analyst, or a similar position, for review. The analyst is responsible for reviewing the request, researching whether any salary adjustment is warranted, and communicating with the requester. According to Compensation Manager Roger Wilbanks, UCSD Health receives thousands of equity review requests each year and may have a queue of 350 requests at any given time.

Neither the CBA nor PPSM 30 provides a timeline for reviewing equity increase requests. Dan Rawlins, UCSD Health's Director of Labor Relations, explained that processing time may vary depending on the size and complexity of the request. A request he submitted on behalf of employees he supervises took around two years to process. But Rawlins also testified that HR monitors the processing time for equity

reviews and prioritizes closing cases expeditiously. Requests that remain open for several months raise an "anomaly flag" in CMS, indicating an unusually long processing time.

4. The Accretion of the Administrative Officer 2 Classification Into the CX Unit

On August 8, 2018, Local 2010 petitioned to add the Administrative Officer 2 (AO-2) classification to Local 2010's systemwide CX Unit. PERB assigned the matter case number SF-UM-810-H. On September 9, 2020, PERB issued a proposed decision approving the requested modification. No exceptions were filed, and PERB issued Decision No. HO-R-199-H on October 5, 2020, rendering the proposed decision final and binding on the parties. At UCSD and UCSD Health, around 250 AO-2s were added to the CX Unit.

After accretion became final, the parties began negotiating over incorporating the AO-2s into the CX bargaining unit. Melissa Munio, Local 2010's Chief of Staff, testified that, with some exceptions, the parties agreed that the AO-2s were "immediately covered by the CX collective bargaining agreement." Rawlins testified similarly, stating that during an accretion, the University "accept[s] the application of all the existing contract terms to these parties except for either the vacation or wage scales. And that's really all that[] has to be negotiated by and large." The AO-2s received the July 1, 2021 3 percent Across the Board Increase as negotiated in CBA Article 45, Section B(4).

The accretion negotiations focused on establishing a salary scale for the AO-2 classification, the initial step placement for all incumbent AO-2s, and the conversion of Paid Time Off (PTO) into sick leave or vacation time because the CBA did not include

PTO. Few details of those negotiations were in the record. However, neither party made any proposals about processing equity reviews, and no agreements were reached on that subject. Negotiations ended in agreement on February 28, 2022.

5. AO-2 Equity Review Requests

On around May 6, 2021, an AO-2 at UCSD Health named Kathe Reisgies contacted HR about an equity review. Her communications were recorded into CMS. According to those records, Reisgies said that her manager had submitted an equity review request for both Reisgies and another AO-2 named Margaret Rattanachane. Labor Relations Specialist Debbie Hale responded to Reisgies, stating: "Hello Kathe, Currently all salary increases are in status quo until negotiations are complete."[2]

Around that time, Reisgies contacted Local 2010 Union Representative Karen Paredes-Tupper for assistance. According to Paredes-Tupper, Reisgies reported that there was a "hold up on the union side" due to the accretion negotiations and that UCSD Health was not processing equity review requests for AO-2s. Paredes-Tupper was surprised to hear that this was UCSD Health's position because Local 2010 had never consented to delaying any equity requests. She told Reisgies that Local 2010 did not object to the equity increases and offered to assist her with resolving the matter with the University.

CMS records show that Reisgies contacted Hale again, stating the Local 2010 did not object to approving the equity increases. She further stated:

> "What is the timeline for whatever these other negotiations are to be complete? Is it possible to get out of the union? My other coworkers have received their salary increases.

[2] Neither Reisgies, Rattanachane, their manager, nor Hale testified.

> It's my understanding we have no choice about whether we're in the union or not, so this delay of six months so far feels punitive and discriminatory, based on union membership, which we have no control over."

Hale responded, stating that she had no updates about the accretion negotiations and that "all increases for AO2's [sic] are on hold until negotiations are completed." CMS records show that Reisgies's request was closed on May 7, 2021.

On May 26, 2021, Paredes-Tupper contacted UCSD Labor Relations Advocate Rommel Dizon, accusing the University of discrimination and demanding that UCDS Health approve the equity increases for both Reisgies and Rattanachane retroactive to November 2020. There is no record of Dizon's response.

Both Wilbanks and Crouch testified that they received other equity review requests from AO-2s before the accretion negotiations concluded. Wilbanks instructed his staff to close those requests without processing them. None of the requests were processed before the conclusion of the accretion negotiations.

6. Local 2010's Grievance Over the Equity Increase Requests

On around June 18, 2021, Local 2010 filed a grievance over UCSD's refusal to approve equity increases for Reisgies and Rattanachane. On July 16, 2021, Dizon denied the grievance, asserting that UCSD has discretion to approve or deny equity increases and that the University "has a long-standing practice at UC locations to hold off on applying equity increases until a wage scale has been fully negotiated." The grievance was not resolved and, eventually, Local 2010 requested arbitration. There is no evidence on what became of the grievance.

7. UCSD Health's Asserted Past Practice Concerning Equity Increases

University witnesses testified that UCSD Health has a "practice" of not approving equity increase requests for employees in newly accreted classifications until after completing accretion negotiations with the representing union. Although each witness described that practice differently, all agreed on the purpose behind it. According to Rawlins, once bargaining over incorporating the accreted classification begins, the University "cannot effectively calculate an equity review because [it does not] know what the outcome [of the negotiations] is going to be." Wilbanks similarly testified that after an accretion, there are "discussions going on at the bargaining table . . . that will impact how a represented staff member is being compensated." Both Rawlins and Wilbanks explained that UCSD Health's practice avoids the problem of addressing salary concerns for accreted positions in these parallel processes. Both testified that the practice has been in place since at least 2012.

The mechanics of this asserted practice are less clear. Wilbanks testified that that once a classification is accreted into a bargaining unit, all efforts to modify the wages for employees in that classification are "basically frozen[,]" and that the requester is informed that "our practice is we don't modify or make any adjustments to classifications or compensation of an accreted title until the bargaining is completed." The matter is then closed. Wilbanks testified that he speaks regularly with HR representatives from other University campuses and that based on those conversations, he believes that all University locations follow the same practice.[3]

[3] Paredes-Tupper testified that she spoke with Local 2010 representatives from other campuses who provided her with written records, presumably showing that University HR representatives at other locations approved equity increases during

Crouch, a subordinate of Wilbanks, testified differently. She said that "we do the review process the same[,]" but that the requester is notified that "[w]e need to put this on pause until the accretion has happened."

Rawlins's own description of the practice was also somewhat different. He said that if HR receives an equity review request for an employee in an accreted position, the Compensation unit may either "run the analysis at that point in time, and then . . . wait on implementation until the accretion is done," or "simply hold off on doing that analysis because [analysts] don't want to have to repeat the analysis, [so they] wait for the accretion to conclude." Later, Rawlins testified that the "more recent practice" is to "technically close the case" in CMS for record-keeping purposes. He said that, after accretion bargaining concludes, an analyst will remind the requester to reopen the case. Rawlins said that any approved equity salary increases may be made retroactive "as appropriate," but he did not provide further details.

Rawlins also testified that UCSD Health sometimes does not follow this practice where there is an "exigency associated with need." Rawlins explained that accretions that the University happen with "semi-regularity" and that accretion negotiations typically take between three to six months from the date of PERB's approval due to the limited number of issues to resolve. He said that accretion negotiations with one union took around two years and that wages for the accreted classifications were

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accretion negotiations. Some of those records were introduced into the record. However, neither the people she spoke to, nor the authors of the records she saw, testified. Since both Wilbanks and Paredes-Tupper base their understanding of what occurs at other University locations on uncorroborated hearsay from non-witnesses, I draw no conclusions on this issue. (See PERB Regulation 32176; *Palo Verde Unified School District* (2013) PERB Decision No. 2337 (*Palo Verde USD*), pp. 24-25.)

falling behind prevailing market rates. UCSD Health was concerned about retaining incumbent employees. Rawlins stated emphatically that "they are exceptions that do not disprove the rule." He did not offer any support for that conclusion.

8. Subsequent Equity Increase Requests for Reisgies and Rattanachane

According to CMS records, on around June 8, 2022, Michele Fraser submitted an equity review request for both Reisgies and Rattanachane.[4] The matter was assigned to Crouch. Crouch testified that she had not seen any information about a prior equity review request for Reisgies or Rattanachane. Crouch further testified that she and other staff reviewed Fraser's 2022 request and found no evidence of salary inequity for either Reisgies or Rattanachane. She notified Fraser of her initial findings and asked whether Fraser had any additional information.[5] Fraser did not provide any additional information in response, and Crouch closed the matter on or around July 27, 2022.

9. Successor CBA Negotiations

In 2022, the parties were negotiating over a successor agreement to the 2017-2022 CBA. While those negotiations were underway, and pursuant to Article 45, Section 6(A), UCSD Health notified Paredes-Tupper of three approved equity increases for CX Unit members.

[4] It is unclear from the record who Fraser is, but she appears to have some supervisory role over Reisgies and Rattanachane. She did not testify.

[5] CMS records include logs of Crouch requesting this information on June 24 and June 28, 2022.

The parties reached agreement on a successor CBA on October 21, 2022.[6] The new CBA provided for salary increases for all CX Unit members. The parties also added more specific language about the equity review process to Article 45. The new language states, in pertinent part, that the University, "[a]t its sole discretion . . . may engage in equity reviews and upward adjustments of employee pay where the University determines such reviews and adjustments to be warranted[.]" Such determinations are non-grievable.

ISSUES

Did the UCSD Health's refusal to perform or approve salary equity reviews for incumbents in the AO-2 classification during accretion bargaining with Local 2010:

1. Breach the University's duty to meet and confer in good faith in violation of HEERA section 3571, subdivision (c)?

2. Discriminate against employees working in classifications that were recently accreted into a represented bargaining unit, in violation of HEERA section 3571, subdivision (a)?

3. Interfere with employees' rights to be represented by Local 2010, in violation of HEERA section 3571, subdivision (a)?

CONCLUSIONS OF LAW

The PERB complaint alleges three HEERA violations based on the University's refusal to either perform or approve equity reviews for AO-2s before the parties completed accretion negotiations.

[6] The term of the new CBA was not provided for the record.

1. The Unilateral Change Claim

The first claim in the PERB complaint is that the University unilaterally changed how it processed equity reviews for CX Unit members at UCSD Health. HEERA section 3570 obligates higher education employers to meet and confer in good faith with exclusive representatives on matters within the scope of representation. (*Regents of the University of California* (2021) PERB Decision No. 2783-H (*UC Regents*), p. 18.) Absent a valid defense, unilateral changes to policies within the scope of representation are "per se" violations of the duty to meet and confer in good faith, which violates HEERA section 3571, subdivision (c). (*Id*., citing *California State Employees Assn. v. PERB* (1996) 51 Cal.App.3d 923, 934 (*CSEA*).)

To state a prima facie case of an employer's unlawful unilateral change, the charging party must show: (1) the employer changed or deviated from the status quo; (2) the change or deviation concerned a matter within the scope of representation; (3) the change or deviation had a generalized effect or continuing impact on represented employees' terms or conditions of employment; and (4) the employer reached its decision without first providing advance notice of the proposed change to the union and bargaining in good faith over the decision, at the union's request, until the parties reached an agreement or a lawful impasse. (*UC Regents*, *supra*, PERB Decision No. 2783-H, p. 18; see also *Bellflower Unified School District* (2021) PERB Decision No. 2796, p. 9, citing *County of Merced* (2020) PERB Decision No. 2740-M, pp. 8-9.)

a. Change to the Status Quo

There are three types of actionable policy changes: (1) deviating from the status quo set forth in a written agreement or written policy; (2) changing an established past practice; and (3) creating a new policy or applying or enforcing an existing policy in a new way. (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 8, citing *County of Merced*, *supra*, PERB Decision No. 2740, p. 9 and *Pasadena Area Community College District* (2015) PERB Decision No. 2444 (*Pasadena Area CCD*), p. 12, fn. 6.)

Here, although the University maintains that UCSD Health's handling of equity review requests for AO-2s was consistent with a longstanding practice, it does not dispute that this alleged practice was different from how UCSD Health typically processed equity review requests for CX Unit members. There is, for example, no dispute that the equity review process was generally available to CX Unit members pursuant to Article 45, Section A(6) of the 2017-2022 CBA, which stated in part, "[t]he University may increase, during the term of this Agreement, individual wage rates (including step increases), or pay ranges for selected classes at selected locations." There is also no dispute that UCSD Health, at least generally, applies the terms of PPSM 30, Section III(B)(8) for equity reviews involving CX Unit members.

Neither the 2017-2022 CBA nor PPSM 30 described the process for performing equity reviews. Both parties recognize that several aspects of how USCD Health processes equity review requests have developed as unwritten practices over time. Parties may be bound to their past practices where the practice is "regular and consistent" or "historic and accepted." (*Hacienda La Puente Unified School*

District (1997) PERB Decision No. 1186 (*Hacienda La Puente USD*), adopting proposed dec., p. 13, citing *Pajaro Valley Unified School District* (1978) PERB Decision No. 51, pp. 5, 10 (*Pajaro Valley USD*).) Here, there is no dispute that equity reviews are processed according to local campus procedures and that, at UCSD Health, requests are reviewed by the Compensation unit. An analyst reviews the request and decides whether an increase is warranted. Although there is no official timeframe for completing an equity review, Rawlins explained that HR prioritizes closing matters as soon as possible and that HR's CMS tracks and flags as anomalous cases that have been open for extended periods.

There is also no dispute that UCSD Health did not follow this generally accepted process for AO-2 employees from October 5, 2020, when the AO-2 classification was accreted into the CX Unit, until February 28, 2022, when the University and Local 2010 completed accretion negotiations. Rather, on around May 6, 2021, Hale, a Labor Relations Specialist, informed Reisgies in correspondence logged into CMS that the equity review process was not available to her or other AO-2s because "all increases for AO2's are on hold until [accretion] negotiations are completed." Both Wilbanks and Crouch testified that other AO-2s requested equity reviews during this time and that the Compensation unit did not approve any of them.

I acknowledge that the University maintains that these actions were consistent with a binding practice at UCSD Health. This position appears to implicate theories of either a dynamic status quo or waiver, which have traditionally been discussed as an affirmative defenses to a unilateral change claim. (*County of Kern* (2018) PERB Decision No. 2615-M, pp. 6-9; see also *Hacienda La Puente USD*, *supra*, PERB

Decision No. 1186, adopting proposed dec. at pp. 12-13; *Pittsburg Unified School District* (2022) PERB Decision No. 2833, p. 9, fn. 5.) For purposes of establishing a prima facie case, I find that the evidence is sufficient to establish that UCSD Health's handling of AO-2s' equity reviews from October 5, 2020 to February 28, 2022 deviated from its standard method of processing equity review requests for CX Unit members.

b. Negotiability of the Equity Review Process

HEERA section 3562, subdivision (q)(1) defines the "scope of representation" as including "wages, hours of employment, and other terms and conditions of employment." The parties do not dispute that the process for receiving equity salary increases directly impacts wages, which is within the scope of representation. Furthermore, the Board has long found that salary adjustment processes are subject to negotiation. (*Trustees of the California State University (San Marcos)* (2004) PERB Decision No. 1635-H, p. 2, adopting proposed dec. at p. 10 [holding merit salary adjustment system are negotiable]; *Norris School District* (1995) PERB Decision No. 1090, adopting proposed dec. at p. 15 [holding that salary adjustments for classifications are negotiable].)

c. Notice and the Opportunity for Bargaining Over UCSD Health's Practice

The University also does not dispute Local 2010's contention that it had no prior notice of UCSD Health's practice of handling equity requests differently for employees in newly accreted classifications. Paredes-Tupper testified that she was surprised to see that Hale, from UCSD Health Labor Relations, informed Reisgies that equity reviews for AO-2s would not be approved until after the University and Local 2010 completed accretion negotiations. The University maintains that UCSD Health's

practice has existed since at least 2012, but it produced no evidence that it ever informed anyone at Local 2010 before Reisgies contacted Paredes-Tupper. Even assuming that Local 2010 has some notion of UCSD Health handled the equity review process differently following an accretion, because the specifics of this asserted practice were not clearly defined or applied, it would still be insufficient to constitute notice of how UCSD Health would respond to the AO-2s' equity review requests. Therefore, I conclude that Local 2010 did not have notice or the opportunity to request bargaining before UCSD Health adopted and implemented this practice.

d. The Continuing Impact of UCSD Health's Practice

Finally, there is no dispute that the change here has a continuing impact on the terms and conditions of represented employees. The Board has found that "changes have a generalized effect or continuing impact on employees' terms and conditions of employment based on the [employer's] continued assertion of a contractual or other legal right to unilaterally implement these changes." (*County of Orange* (2018) PERB Decision No. 2611-M, pp. 10-11, citing *County of Santa Clara* (2015) PERB Decision No. 2431-M, p. 19.) The University maintains that UCSD Health is authorized to continue its asserted practice of not processing or approving equity review requests for employees in accreted classifications until completing bargaining over the accretion. These facts show that UCSD Health's handling of the AO-2 equity reviews were more than isolated breaches of the status quo.

Accordingly, I find that Local 2010 has established all elements of its prima facie case for an unlawful unilateral change. The University's asserted justification for its unilateral conduct will be addressed below.

e. The University's Waiver, Past Practice, and Dynamic Status Quo Claims

The University maintains that there was no violation of the duty to meet and confer in good faith because UCSD Health was authorized to delay or deny equity review requests under the CBA or under a binding past practice. Although the University raised these issues in the context of Local 2010's prima facie case for a unilateral change, the Board has found that is more appropriate to address both arguments as affirmative defenses. In *City of Culver City* (2020) PERB Decision No. 2731-M, the Board rejected the employer's claim that the charging party had the burden to prove that alleged changes were not permitted under the terms of the parties' contract. The Board instead framed that argument as a possible contractual waiver, that the employer had the burden to plead and prove as an affirmative defense. (*Id*. at pp. 17-18; see also *County of Kern*, *supra*, PERB Decision No. 2615-M, pp. 6-9 and *County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 18.)

Likewise, in *County of Riverside* (2018) PERB Decision No. 2573-M, the Board found that an "employer may . . . rely on a past practice as a defense to a unilateral change allegation." (*Id*. at pp. 23-24, citing *Salinas Valley Memorial Health Care System* (2017) PERB Decision No. 2524-M, p. 20 and *Temple City Unified School District* (1989) PERB Decision No. 782, p. 14.) Where an employer asserts that a past practice justifies a unilateral policy change on a negotiable matter, the employer retains the burden of proving the existence of that practice. (*Hacienda La Puente USD*, *supra*, PERB Decision No. 1186, adopting proposed dec. at pp. 12-13; see also *County of Kern*, *supra*, PERB Decision No. 2615-M, p. 6.)

i. The Alleged Contractual Waiver Defense

Turning first to the University's claim that the CBA gives UCSD Health broad discretion over whether to approve or even review equity review requests. Where the employer asserts that contract language authorizes it to act unilaterally on a matter within the scope of representation, it has the burden of proving that the contract includes a "clear and unmistakable" waiver of the right to bargain over that subject. (*City of Culver City*, *supra*, PERB Decision No. 2731-M, p. 13, citing *Modoc County Office of Education* (2019) PERB Decision No. 2684, p. 11, other citation omitted.) In other words, the contract language must "indicate an intentional relinquishment of the right to bargain." (*Rio Hondo Community College District* (2013) PERB Decision No. 2313, p. 5 (*Rio Hondo CCD*), [emphasis in original], citing *CSEA*, *supra*, 51 Cal.App.4th 923, 937-938 and *Amador Valley Joint Union High School District* (1978) PERB Decision No. 74.)

In this case, the University asserts that equity reviews for CX Unit members were authorized under Article 45, Section A(6) of the 2017-2022 CBA. The University points out that this section used the permissive term "may" to describe the University's obligations to increase CX Unit member salaries. According to the University, this gave the University broad discretion over how to address the equity review process for CX Unit members. Applying traditional rules of contract interpretation, I generally agree that "the term 'may' is ordinarily construed as permissive." (*County of Monterey* (2018) PERB Decision No. 2579-M, p. 19, citing *Santa Clara County Correctional Peace Officers' Assn., Inc. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1036 and *County of Tulare* (2015) PERB Decision No. 2414-M,

pp. 20-21.) Even so, the University's argument misses the larger point that the 2017-2022 CBA said nothing about how the University performs equity reviews. As such, there is no basis for concluding that the contract language constituted a clear and unmistakable waiver of Local 2010's right to bargain over that process. Nor did the University produce any extrinsic evidence on this subject demonstrating that the parties understood Section A(6) as including a waiver of Local 2010's right to bargain over how equity reviews are performed. Accordingly, the University's arguments that the UCSD Health's conduct was authorized by the CBA are unpersuasive.

ii. The Alleged Past Practice Defense

The University additionally argues that UCSD Health has a long-standing past practice of delaying or denying equity review requests for employees in classifications that have been accreted recently into a represented bargaining unit until after completing any negotiations over the accretion. In disputed cases, the party asserting the existence of a binding past practice has the burden of proving that it is "'unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.'" (*City of Santa Maria* (2020) PERB Decision No. 2736-M, p. 18, quoting *County of Orange*, *supra*, PERB Decision No. 2611-M, pp. 10-11, fn. 7; see also *County of Riverside* (2013) PERB Decision No. 2307, p. 20.) The University has the burden of proving that its alleged practice satisfies this test. (See *Hacienda La Puente USD*, *supra*, PERB Decision No. 1186, adopting proposed dec., p. 13, citing *Pajaro Valley USD*, *supra*, PERB Decision No. 51.)

For several reasons, the University has not met its burden of proof. Most prominent of these reasons is that the University put forward no evidence that it ever informed or otherwise notified Local 2010 of UCSD Health's practice of handling equity review requests differently for employees recently accreted classifications. As stated above, nothing in the record disputes or discredits Parades-Tupper's testimony that she had no knowledge of this asserted practice before Reisgies inquired about an equity review in May 2021. I cannot conclude that Local 2010 has accepted or acquiesced to a practice that it knew nothing of. (See *County of San Joaquin* (2016) PERB Decision No. 2490-M, pp. 3-6.)

In addition, the University failed to articulate a consistent description of UCSD Health's practice. UCSD Health Compensation Manager Wilbanks testified the requestor is informed that equity reviews are not performed for accreted employees until accretion negotiations are completed. The case is then closed. Lead Compensation Analyst Crouch testified differently, stating that she performs the equity review even if the employee works in an accreted classification, but delays implementing any salary increases until after the accretion negotiations.

Rawlins acknowledged that UCSD Health does not always apply this practice in the same way. He testified that the Compensation unit may either perform the equity review and then wait until after the accretion negotiations to apply the results or delay the review until after negotiations. In contrast with Wilbanks' testimony, the request remains open with the Compensation unit until after the accretion negotiations are finished. Rawlins later testified that "more recently," the Compensation unit closes the

request for record-keeping purposes and reminds the requestor to reopen it when the accretion negotiations are completed.

These inconsistent descriptions do not strike me as a clearly enunciated, readily ascertainable practice. Rawlins's admission that UCSD Health' practice has changed recently further undermines any claim that the practice was applied consistently over a reasonable period. I also do not find these variations to be insignificant. In Wilbanks's description, because the request is closed immediately, it is incumbent on the requester to determine when the accretion negotiations conclude and then submit a new request. Under Crouch's description, the requestor has no such responsibility since the request remains open and will be finalized after the negotiations end. The same is true under Rawlins's initial description of the practice, but in his explanation of the "more recent" iteration, once again the requestor must take affirmative action to reopen the request.

Additionally, the University admits that UCSD Health has exceptions to its asserted practice. Rawlins testified that UCSD Health has approved equity increases for employees in accreted classifications but before completing accretion bargaining where there was "exigency associated with need." He did not provide the specific requirements for applying this exception, instead describing the exception using an example involving a different union. He explained that accretion negotiations with that union took around two years or more and that UCSD Health had concerns that incumbents in the accreted classifications were receiving outside job offers. However, the University produced no evidence of its alleged practice or the exception to that alleged practice ever applying to the CX Unit. (Cf. *Salinas Valley Memorial Healthcare*

System (2017) PERB Decision No. 2524-M, pp. 21-23 [holding that past practices that applied to one union are not binding on a different union].)

These limited details leave me unable to determine when this exception applies. For instance, in this case the AO-2 accretion was finalized on October 5, 2020. Accretion negotiations did not end until February 28, 2022, far longer than Rawlins's three to six month estimate for typical accretion negotiations. According to CMS records, there were other concerns over that request. Reisgies reported in her communications with HR that her coworker in an unrepresented classification had already received an equity increase several months before. Fraser, who held some sort of supervisor or managerial position over Reisgies, later commented similarly. It is unclear why UCSD Health did not apply its exception here. The University's admission that UCSD Health sometimes applies exceptions to its asserted practice based on poorly defined criteria also undermines its position that its practice was unequivocal, easily understood, and consistently acted upon.

To the extent that the University maintains that it was never required to provide notice and the opportunity for bargaining over the asserted practice at UCSD Health, I reject that argument. Generally speaking, the duty to bargain in good faith generally precludes parties from unilaterally altering the status quo. However, in some situations, the status quo is dynamic and must take into account the regular and consistent past patterns of change. (*Pajaro Valley USD*, *supra*, PERB Decision No. 51, citing *Stratford Industries, Inc.* (1974) 215 NLRB 682.) Under the "dynamic status quo" principle, which permits an employer to make changes to terms and conditions of employment, without notice and an opportunity to bargain, if the changes

follow a consistent pattern of past changes that is formulaic or otherwise not influenced by employer discretion. (*County of Kern*, *supra*, PERB Decision No. 2615-M, pp. 6-9, citing *Regents of the University of California* (2004) PERB Decision No. 1689-H, adopting proposed dec. at pp. 30-31.) The key point of distinction is whether the changes at issue follow a non-discretionary pattern or whether the changes are the product of the employer's discretion. In the latter scenario, "it is impossible for the exclusive representative to know whether or not there has been a substantial departure from past practice" and accordingly, the exclusive representative is entitled notice and the opportunity to bargain over the change. (*Regents of the University of California* (1983) PERB Decision No. 356-H, pp. 16-17; see also *NLRB v. Katz* (1962) 369 U.S. 736, 746-747.)

Here, for the reasons already stated, the University has not established that UCSD Health's refusal to process or approve AO-2 equity requests during accretion negotiations was consistent with a dynamic status quo. The University was unable to provide a consistent description of UCSD's asserted practice, which suggests that the Compensation unit appears to have a considerable amount of discretion over whether to refuse to process the request, delay processing the request, or require the requester to resubmit the request later. Similarly, the University admits that the asserted practice allows UCSD Health to decide whether exigent circumstances warrant applying an exception to the practice. Because of these significant measures of management discretion, the dynamic status quo doctrine does not excuse the University's unilateral action here.

For all of these reasons, I hold that the University failed to meet its burden of establishing that it had a mutually recognized binding past practice of delaying or closing equity review requests for employees in classifications that have been accreted into a represented bargaining unit. Nor has it shown that the dynamic status quo excused UCSD Health's unilateral application of the practice. Therefore, since Local 2010 has proven all the elements of a unilateral change and the University has not met its burden of proving any affirmative defenses to that claim, I hold that the University's conduct violated its duty to meet and confer in good faith under HEERA section 3570, which is unlawful under HEERA section 3571, subdivision (c). By the same conduct, I furthermore hold that the University derivatively interfered with employee rights under HEERA section 3565, which is unlawful under HEERA section 3571, subdivision (a). (See *Regents of the University of California* (2023) PERB Decision No. 2852-H, pp. 20-21.)

2. The Discrimination Claim

The PERB complaint also alleges that UCSD Health's refusal to approve or process equity review requests for AO-2s amounted to unlawful retaliation or discrimination. PERB addresses claims of unlawful retaliation or discrimination under two lines of cases, depending on the proof offered to show that a respondent's conduct was unlawfully motivated. (*Regents of the University of California (Berkeley)* (2018) PERB Decision No. 2610-H, p. 74 (*UC Berkeley*).) In one approach, based on *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato USD*), a charging party may prove through direct or circumstantial evidence that a respondent's facially valid employment action was a pretext for animus towards

protected activity. (*UC Berkeley*, pp. 76-77, citing *Novato USD*, p. 6 (other citations omitted.) The alternative approach is based on *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*City of Campbell*). Earlier PERB decisions referred to this theory as "group discrimination," (see e.g., *State of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S, pp. 17-18 (*DPA*), but later decisions have criticized that description as too narrow. (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C (*LA Superior Court*), pp. 14-15.) Instead, the Board has described this standard more recently as "inherent discrimination" or "discrimination in its simplest form," where a respondent's conduct is facially or inherently discriminatory. (*UC Berkeley*, pp. 76-77, citing *City of Campbell*, *supra*, 131 Cal.App.3d 416, at p. 423; *LA Superior Court*, pp. 14-15.) This standard applies where the charging party maintains that the respondent's discriminatory intent is apparent on its face and no further evidence of motive is required to establish a prima facie case. (*UC Berkeley*, p. 75, citing *LA Superior Court*, p. 14.)

Here, I consider Local 2010's claim under the discrimination theory set forth in *City of Campbell*, because Local 2010 does not claim that UCSD Health's facially neutral practice was actually pretext for animus towards protected activity. Rather, Local 2010 contends that UCSD Health's practice for handing equity review requests following an accretion was outwardly discriminatory because it treats employees in newly accreted classifications fundamentally differently from other employees.

a. The Prima Facie Case for Discrimination

In a *City of Campbell* discrimination claim, "employer conduct that is directly and unambiguously discriminatory on the basis of union or other protected activity supplies its own evidence of unlawful motive, intent or purpose for establishing a prima facie case of reprisal or discrimination." (*UC Berkeley*, *supra*, PERB Decision No. 2610-H, p. 74, citing *City of Campbell*, *supra*, 131 Cal.App.3d at pp. 423-424 and *NLRB v. Great Dane Trailers, Inc.* (1967) 388 U.S. 26, 32 (*Great Dane*).) This standard may be applied "where an employer provides pay or benefits or other working conditions based on union membership or other protected activity." (*LA Superior Court*, *supra*, PERB Decision No. 2566-C, p. 14, citing *NLRB v. Erie Resistor Corp*. (1963) 373 U.S. 221.)

i. The Discriminatory Nature of UCSD Health's Practice

In *City of Campbell*, *supra*, 131 Cal.App.3d 416, the defendant employer was engaged in contract negotiations with several unions, including the plaintiff. The plaintiff was the only union that utilized the employer's impasse procedures. (*Id*. at pp. 419-420.) At the end of the process, the employer adopted all of the parties' tentative agreements, except for one. Instead of adhering to the retroactivity date for salary increases and benefits that the employer had tentatively agreed to with the plaintiff and other unions, the employer imposed a less favorable retroactivity date on the plaintiff. (*Id*. at p. 420.) The employer essentially admitted that the different retroactivity date was imposed because the plaintiff had invoked the impasse process. (*Id*. at pp. 422, 424.) The court held that the employer's conduct discriminated against the plaintiff union for asserting its statutory right to participate in the employer's

impasse process. (*Id*. at p. 424; see also *DPA*, *supra*, PERB Decision No. 2106a-S, pp. 17-18 [finding unlawful discrimination where the employer provided different dental benefit plans to employees based on their status as union members]; *Great Dane*, *supra*, 388 U.S. 26, p. 32 [finding unlawful discrimination where the employer provided special benefits solely to employees who refrained from participating in a strike].)

In *LA Superior Court*, *supra*, PERB Decision No. 2566-C, a union petitioned to add previously unrepresented law clerks to its bargaining unit. (*Id*. at p. 4.) Around eight years later, the employer reduced the scale of its operations and laid off all the incumbents in that type of clerk position. (*Id*. at p. 6.) The Board rejected the charging parties' facial or inherent discrimination claims, concluding that a majority of the clerk employees at issue lacked the skills needed to continue working after the court reduced the scope of its operations. (*Id*. at p. 15.) According to the Board, "[t]here is nothing inherently discriminatory about laying off employees who perform work the employer has chosen to discontinue." (*Id*. at p. 16.)

In this case, the record clearly shows that UCSD Health's practice treated AO-2 employees differently immediately following the accretion. UCSD Health declined to either process or approve equity review requests for those employees until Local 2010 and the University completed accretion bargaining. Their inclusion in one of Local 2010's bargaining units was the explicit basis for this differential treatment. I find that this practice is both facially and inherently discriminatory towards employees who recently became part of a represented bargaining unit through an accretion.

ii. The Level of Harm to Protected Rights

Since I have found that UCSD Health's practice is inherently discriminatory towards employees whose classifications were recently accreted into a represented bargaining unit, the next issue is the degree to which the discriminatory conduct has impacted protected employee rights. According to the court in *City of Campbell*, *supra*, 131 Cal.App.3d 416:

> "If an employer's discriminatory conduct is inherently destructive of important employee rights, no proof of antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. . . .[¶] . . . If the adverse effect of the discriminatory conduct on employee rights is comparatively slight, an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct."

(*Id*. at pp. 423-424, citations and internal quotation marks omitted.)

Under this standard, not all "inherently discriminatory" conduct is also "inherently destructive" of employee rights. (*UC Berkeley*, *supra*, PERB Decision No. 2610-H, p. 86.) When assessing whether the harm is "inherently destructive" or "comparative slight," one factor to consider is the duration of the harm to protected rights. (*Ibid*.) Effects that are permanent and ongoing are generally considered more harmful than merely temporary impacts. (*Id*., citing *Int'l Paper Co*. (1995) 319 NLRB 1253, p. 1274.) Similarly, actions that present conspicuous obstacles to the future exercise of protected rights are more likely to be considered "inherently destructive" conduct. (*Id*., citing *Esmark Inc. v. NLRB* (7th Cir. 1989) 887 F.2d 739, 748 (*Esmark Inc*.), other citations omitted.) On the other hand, employer conduct that is temporary

and with little discernable impact on the future exercise of protected rights is less likely to be considered unlawful without proof that the employer acted with an unlawful purpose. (*Id*. at p. 88, citing *Esmark, Inc.*, at p. 748.)

In this case, I find that UCSD Health's decision to not process equity review requests for employees in newly accreted classifications until after completing accretion negotiations is inherently destructive of employee rights under HEERA section 3565 to form, join, and participate in the activities of their chose employee organization. The implications of the practice are self-evident; upon becoming part of a represented bargaining unit, accreted employees lose access to a previously available tool for requesting salary increases. This has a clearly deleterious impact on employee sentiment towards their new bargaining representative.

Although employees regain access to the equity review process after the accretion negotiations, I nonetheless find that UCSD Health's practice continually impedes statutorily protected rights. The record shows that accretion negotiations may take more than a year, if not longer. Coupling the restoration of employees' right to seek equity reviews with the completion of accretion negotiations also places undue pressure on the exclusive representative to complete bargaining to restore access to the previously available equity review process. Moreover, UCSD Health asserts that it will continue this discriminatory practice in future accretions. These facts present a significant and ongoing obstacle to the future exercise of protected rights, which is a hallmark attribute of "inherently destructive" conduct. (*UC Berkeley*, *supra*, PERB Decision No. 2610-H, p. 86.)

The University maintains that no employees were harmed by UCSD's practice. Before addressing the specifics of these arguments, I note that the University appears to presume that the discrimination claims in the complaint pertain only to Reisgies and Rattanachane. This is simply not the case. The complaint alleges adverse impacts on all employees in the AO-2 classification, without any specific reference to either Reisgies or Rattanachane.

Turning to the University's specific arguments, it contends that Local 2010 failed to prove that Reisgies or Rattanachane actually submitted equity review requests during the AO-2 accretion negotiations. According to the University, the record, at best, shows that Reisgies inquired about receiving an equity increase. I disagree that no employees were harmed here for at least two reasons. First, irrespective of whether UCSD Health actually denied equity review requests for Reisgies or Rattanachane, it is undisputed that Hale informed Reisgies that the equity review process was unavailable to AO-2s until after Local 2010 and the University completed accretion bargaining. The harm inflicted here is refusing to perform or approve equity review requests for Reisgies and other AO-2s purely because their job classification was added to the CX Unit. (See *Contra Costa Fire Protection District* (2019) PERB Decision No. 2632-M, pp. 41-42 [holding that providing different benefit depending on employees' represented status was discriminatory].)

Second, Wilbanks and Crouch both testified that other AO-2s submitted equity review requests after the accretion and that the Compensation unit either refused to process or approve those requests while accretion negotiations were still ongoing. Thus, even if Reisgies and Rattanachane never submitted an equity review request,

the undisputed evidence shows that UCSD Health denied or otherwise declined to process requests for other AO-2s.

The University also contends that UCSD Health's practice actually *prevents* unequal treatment because otherwise some AO-2s might receive the benefit of both an equity increase and any salary increases through accretion negotiations. Once again, the discriminatory act here is denying all AO-2s access to the equity review process because their classification was accreted recently. Had UCSD Health not adopted a discriminatory practice, all employees would have had an equal opportunity to seek equity reviews. It goes without saying that employees who request equity reviews may receive salary increases, and that those who have made no request will not. This fact alone does not mean that access to the equity review process unfairly advantages some employees. Therefore, I reject the University's arguments that no harm resulted from UCSD's discriminatory practice.[7]

Accordingly, I hold that UCSD Health's conduct was inherently destructive of statutory rights under HEERA. Thus, no additional evidence of a discriminatory motive is needed, and the University has the burden of demonstrating a "legitimate

[7] During the hearing, UCSD Health representatives suggested that any harm resulting from its discriminatory practice could be addressed by later approved, retroactive salary increases. This claim was not repeated in the University's post-hearing brief, and thus I consider the issue abandoned. However even if this issue were considered, I would be unpersuaded. Only vague evidence was produced about how and when UCSD Health makes equity increases retroactive. For instance, it is unclear whether a request must satisfy certain conditions to qualify for a retroactive application or if retroactivity is applied as a matter of course. Nor is it clear what retroactivity date UCSD Health would select. Finally, retroactive payments would provide no redress for employees who left UCSD Health after having been denied access to the equity review process for a significant period.

and substantial business justifications for the conduct." (*City of Campbell*, *supra*, 131 Cal.App.3d 416, at p. 423-424; *UC Berkeley*, *supra*, PERB Decision No. 2610-H, p. 90.) Under some descriptions of this burden, the employer must establish that its conduct was prompted by circumstances beyond its control and that it had no alternative course of action available. (*UC Berkeley*, p. 91, citing *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad USD*), pp. 10-11.) Other cases have stated that a discrimination violation will not be found if the employer demonstrates that its asserted justification outweighs the harm to protected rights. (*UC Berkeley*, p. 91, citing *Laidlaw Corp*. (1968) 171 NLRB 1366, 1369, fn. 15, other citations omitted.) The Board has not addressed which of these two standards should apply to assess the employer's burden of proof in *City of Campbell* discrimination cases. I decline to do so as well because either standard yields the same result.

b. The University's Asserted Justification for UCSD Health's Practice

The University maintains that UCSD Health's unilaterally adopted practice concerning equity reviews for newly accreted positions is necessary to assess fairly the salaries of those employees. It reasons that because accretion negotiations commonly include the initial wage placement for the accreted classifications, the Compensation unit cannot determine whether a salary adjustment is needed until after negotiations are complete. The University furthermore contends that allowing the accretion negotiations and equity review process to run concurrently creates the possibility that some employees would unfairly receive multiple salary increases. I find this argument unpersuasive for at least three reasons.

First, the University has not explained why it would be impossible or impractical for accretion negotiations and the equity review process to occur simultaneously. Article 45, Section A(5) of the 2017-2022 CBA even described how to implement equity increases along with other salary increases simultaneously. Even if not simultaneous, if the equity review was completed before negotiations over salary for the accreted positions was completed, any adjustment could be incorporated into the salary placement for that employee during negotiations. Conversely, if the negotiations conclude before finishing the equity review, then the subject employee's new salary could be considered as part of that review.

Second, I am skeptical that the University's asserted concerns are the actual reason behind UCSD's practice. Those same concerns would appear to exist anytime the University and an exclusive representative negotiate over wages. For example, there is no dispute that, in 2022, the parties negotiated wage increases in the successor agreement to the 2017-2022 CBA. Even though the parties had been discussing salary changes during successor negotiations, UCSD Health did not limit equity reviews for CX Unit members during that time. In fact, Local 2010 presented records that UCSD Health processed and approved equity increase requests for unit members shortly before successor negotiations concluded. These facts cast doubt on the legitimacy of the University's claim that it is unable to perform equity reviews during negotiations due to the possibility that employees' salaries may fluctuate.

Third, even assuming that the University's concerns are valid, I fail to understand why the University needed to act on these concerns unilaterally and without notice to Local 2010. Since the University and Local 2010 were already

engaged in accretion bargaining over the AO-2s, those negotiations presented an obvious opportunity to address bilaterally any concerns about how the equity review process might impact those negotiations. By electing instead to proceed unilaterally, the University failed to address any reasonable concerns it had in a legitimate manner.

In conclusion, I am unconvinced that UCSD Health's practice was based on legitimate interests. To the extent those interests were legitimate, I find that UCSD Health had obvious alternatives to unilaterally adopting a practice that discriminates against employees in newly accreted classifications. These conclusions undermine the University's claim that its interests outweigh the harm to statutorily protected rights. Therefore, I hold that the University failed to meet its burden of proving that its unilaterally adopted and inherently discriminatory practice was justified under the circumstances. Accordingly, the University's discriminatory conduct interfered with protected rights under HEERA section 3565, which is unlawful under HEERA section 3571, subdivision (a).

3. The Interference Claim

The PERB complaint also alleges that UCSD Health's adopted practice of delaying or denying equity review requests for employees in accreted classifications until after completing accretion negotiations interfered with protected rights. HEERA section 3571, subdivision (a) makes it unlawful for an employer to interfere with statutorily protected rights. (*Regents of the University of California* (2020) PERB Decision No. 2699-H, p. 5.) In general, to state a prima facie case for interference with rights under HEERA section 3565, the charging party must demonstrate that the employer's conduct tends to or does result in harm to employee rights. (*Trustees of*

the California State University (2017) PERB Decision No. 2522-H, p. 19-20, citing *Carlsbad USD*, *supra*, PERB Decision No. 89, p. 10, other citations omitted.) This does not require showing that the employer intended to interfere with protected rights or otherwise harbored an unlawful motive or purpose. (*County of Sacramento* (2014) PERB Decision No. 2393-M, p. 33; *Carlsbad USD*, p. 10)

If a prima facie case is established, PERB balances the degree of harm to protected rights against any legitimate business interest asserted by the employer. (*San Diego Unified School District* (2019) PERB Decision No. 2634, p. 17, citing *Carlsbad USD*, *supra*, PERB Decision No. 89, pp. 10-11.) Where the harm is comparatively slight, PERB will entertain a defense of operational necessity and then balance the parties' competing interests. On the other hand, where the harm is inherently destructive of protected rights, the employer must show the interference was caused by circumstances beyond its control and no reasonable alternative course of action was available. (*Ibid.*)

In this case, Local 2010 argues that UCSD Health's discriminatory practice regarding equity review requests for accreted positions also interfered with the incumbent AO-2s' exercise of protected rights. PERB is not precluded from finding multiple types of violations from the same essential fact pattern. (See e.g., *UC Berkeley*, *supra*, PERB Decision No. 2610, pp. 72, 93.) That said, where "a charge or complaint alleges unlawful interference based on the same conduct giving rise to another claim," that interference allegation may be considered "independent" from, or "derivative" of the other claim. (*State of California (State Water Resources Control Board)* (2022) PERB Decision No. 2830-S, p. 10, fn. 10.) An interference claim is

considered "independent" if "it can be established without the other claim being established." (*Id*., citing *County of San Joaquin* (2021) PERB Decision No. 2761-M, p. 18.) Conversely, if "it is impossible to establish interference without establishing the other claims, then the interference claim is a derivative one." (*Id*., citing *County of Santa Clara* (2021) PERB Order No. Ad-485-M, p. 9.)

Here, Local 2010 addressed the alleged interference violation in its post-hearing brief as though it were an independent claim. It articulated its interference theory as follows: "immediately upon gaining representation by a Union, UCSD [Health] interfered with [protected] rights by imposing a reprisal – the freezing of equity reviews and equity increases." Local 2010 furthermore argued that the "financial harm" from losing access to the equity review process tended to discourage incumbent AO-2s from supporting Local 2010 immediately after the accretion. Finally, Local 2010 argued that PERB should reject the University's asserted justifications because UCSD Health's practice was unilaterally adopted and discriminatory.

These assertions demonstrate that Local 2010's interference theory is wholly dependent on the previously-addressed unilateral change and discrimination claims.[8] Since the alleged harm to the AO-2 employees' rights hinges upon finding that UCSD Health imposed harmful working conditions for discriminatory reasons, Local 2010's interference theory cannot be proven absent a finding that the AO-2s were

[8] I acknowledge that because UCSD Health maintains the right to continue its discriminatory practice into the future, there is a colorable claim that the practice harms the rights of employees in other unrepresented classifications that might be subject to a future accretion. However, since that theory was not advanced by Local 2010 in this case, I decline to address it on the merits.

discriminated against in the first place.[9] Likewise, evaluating Local 2010's counter-arguments to UCSD Health's asserted justifications for its practice rely solely on the conclusion that UCSD Health enacted a unilateral and discriminatory practice. Therefore, I find that this interference claim is derivative of the already-addressed discrimination and unilateral change claims. As already stated, I have found violations under HEERA section 3571, subdivision (a) for both of those other claims. It is not necessary to find an additional interference violation.

REMEDY

PERB has broad remedial powers to effectuate the purposes of HEERA. HEERA section 3563.3 states, in relevant part:

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

(See also HEERA, § 3563.)

Ordinary remedies in unilateral change and discrimination cases include an order to cease and desist from unlawful conduct and to rescind any unlawfully adopted policy changes. (*UC Berkeley*, *supra*, PERB Decision No. 2610-H, p. 94; see also *Pasadena Area CCD*, *supra*, PERB Decision No. 2444, p. 24.) PERB also typically orders "make whole relief," designed to compensate employees for financial losses

[9] Generally speaking, interference claims focus on the likelihood of harm to statutory rights whereas discrimination claims focus on the imposition of adverse working conditions because of protected activity or status in a protected group. (See *UC Berkeley*, *supra*, PERB Decision No. 2610-H, pp. 56, 75-76.)

incurred because of the employer's unlawful conduct. Such remedies also serve as a financial disincentive and deterrent against future violation. (*UC Berkeley*, pp. 94-95, citing *City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13.)

These remedies are warranted here. Therefore, the University is ordered to cease and desist from unilaterally changing terms and conditions of employment, engaging in prohibited discrimination, and interfering with employees' rights.

I also order the University to rescind the unilaterally adopted and discriminatory practice at UCSD Health of not delaying or denying equity review requests for employees in accreted classifications until after completing accretion negotiations. PERB may decline to order rescission of a unilaterally adopted policy where the parties have subsequently agreed to a contract that authorizes the employer to make the policy change in question. (See *City of Culver City*, *supra*, PERB Decision No. 2731-M, pp. 26-27; but see *County of Santa Clara*, *supra*, PERB Decision No. 2321-M, p. 24 [holding that restoring the status quo after a unilateral change is essential for bargaining to proceed on a level-playing field]; cf. *City of San Diego* (2022) PERB Decision No. 2747-M, p. 24.) Here, the parties negotiated a successor CBA after the violations in this case. Under the new CBA, the University "[a]t its sole discretion . . . may engage in equity reviews . . . where the University determines such reviews and adjustments [are] warranted[.]" This language arguably gives the University broad discretion over whether to consider CX Unit members' equity review requests. However, I need not decide the meaning of that language to address the remedy in this case. Even if the new contract language authorizes UCSD

Health to refuse to process equity review requests, it would still be unlawful for UCSD Health to exercise its authority in a discriminatory manner. (*City of Culver City*, p. 20.)

I also order the University to make whole any employees who were adversely impacted by the unilateral change and unlawful discrimination to ensure they receive the difference between what they actually earned and what they would have earned but for the employer's unlawful conduct. (*Regents of the University of California* (1997) PERB Decision No. 1188-H, p. 33.) I accordingly order UCSD Health to process equity reviews in good faith for any employee in the AO-2 classification who was denied the opportunity to participate in that process from October 5, 2020 to February 28, 2022. This includes processing equity reviews for AO-2 employees whose requests were denied, rejected, or delayed pursuant to UCSD Health's unlawful practice. It also includes processing requests that may not have been submitted because an employee or a supervisor/manager was improperly informed that the equity review process was not available for AO-2s between October 5, 2020 and February 28, 2022. The University must take reasonable steps, including but not limited to, searching CMS and other communication records to determine which employees were denied access to the equity review process. Local 2010 and PERB's assigned compliance officer must be kept abreast of the University's efforts in this regard.

For AO-2s who either submitted an equity review request or had a request submitted on their behalf between October 5, 2020 and February 28, 2022, UCSD Health should process the request according to the employee's working conditions at the time of the request. Any increases approved through the equity review process

should be made retroactive to the date of the request and any retroactive payments should be augmented by interest at a rate of 7 percent per annum.[10]

For AO-2 employees or supervisors/managers who were informed that equity review requests could not be submitted between October 5, 2020 and February 28, 2022, the equity review should be processed as of the date, or nearest approximate date, that they were so informed. This will approximate the date that an equity request would have been submitted for those employees. (See *Bellflower Unified School District* (2022) PERB Decision No. 2544a (*Bellflower USD*), p. 26.) Any increases approved through the equity review process should be made retroactive to the approximate request date and all monetary amounts, including any retroactive payments made, should be augmented by interest at a rate of 7 percent per annum.

[10] I acknowledge that processing equity reviews according to the original request date may result in some AO-2s receiving equity salary increases on top of salary increases received during the accretion negotiations. This was the very outcome UCSD Health sought to avoid. Nevertheless, I am not persuaded to alter this remedy. The University presented no evidence that the salary increases from the accretion negotiations were designed to, or resulted in, alleviating any salary inequity for the AO-2s. For example, if the accretion negotiations resulted in all AO-2s receiving a similar salary increase, then this would not necessarily address any internal inequity, i.e., salary disparities between two or more AO-2s. Crouch testified that internal inequity is the most common type of request. In addition, because the University acted unlawfully and without notice to Local 2010, we can no longer know how processing AO-2s' equity requests properly and on time would have impacted the accretion salary negotiations. Because these circumstances were created by University's unlawful conduct, I construe any uncertainty in assessing the appropriate remedy against the University. (See *Bellflower USD*, *supra*, PERB Decision No. 2544a, p. 26, citing *City of Culver City*, *supra*, PERB Decision No. 2731-M, p. 26 and *City of Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 27.)

Local 2010 argues that PERB should also order the University to approve equity-based salary increases for both Reisgies and Rattanachane, retroactive to 2021 when Reisgies inquired about having an equity review. I find that this remedy is premature under the facts of this case. The violations here were based on UCSD Health denying AO-2s' access to the equity review process based on a unilaterally adopted and discriminatory practice. There was no evidence that either Reisgies or Rattanachane would have received an equity salary increase had their requests been processed. Therefore, the more appropriate remedy is to direct UCSD Health to process requests for those employees in good faith, and consistent with the above directives.

Finally, I also find it appropriate to order the University to post a notice of the violation and the ordered remedies in this case. (See *UC Berkeley*, *supra*, PERB Decision No. 2610-H, p. 95, citing *City of Sacramento*, *supra*, PERB Decision No. 2351-M, pp. 44-45 and *Regents of the University of California* (1998) PERB Decision No. 1263-H, adopting proposed dec. at p. 72.) The notice posting requirement serves the important function of ensuring that employees affected by the Board's decision and order are informed of their rights and of the University's willingness to comply with the law. (*Ibid*.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that REGENTS OF THE UNIVERSITY OF CALIFORNIA (SAN DIEGO) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571, subdivisions (a) and (c) at its University of

California, San Diego Health Sciences (UCSD Health) facilities. The University violated HEERA by unilaterally changing how it processed salary equity review requests during an accretion. This practice also discriminated against newly accreted employees and derivatively interfered with employee rights.

Pursuant to HEERA sections 3563, subdivision (h), and 3563.3, it hereby is ORDERED that the University, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally changing its policies or practices for processing and approving salary equity review requests.

2. Discriminating against employees whose job classifications were accreted into a bargaining unit represented by Teamsters Local 2010 (Local 2010).

3. Interfering with employees' right to be represented by Local 2010.

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

1. Consistent with the directions in this proposed decision, process in good faith equity review requests for any Administrative Officer 2 at UCSD Health who was denied the opportunity to participate in the equity review request process from October 5, 2020 to February 28, 2022.

2. Within 10 workdays of the service of a final decision in this matter, post at all UCSD Health work locations where notices to employees in the CX Unit customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the University, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of

30 consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the University to communicate with CX Unit employees at UCSD Health. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.[11]

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Local 2010.

RIGHT OF APPEAL

A party may appeal this proposed decision by filing with the Board itself a statement of exceptions within 20 days after the proposed decision is served. (PERB Reg. 32300.) If a timely statement of exceptions is not filed, the proposed decision will become final. (PERB Reg. 32305, subd. (a).)

The statement of exceptions must be a single, integrated document that may be in the form of a brief and may contain tables of contents and authorities, but may not exceed 14,000 words, excluding tables of contents and authorities. Requests to exceed the 14,000-word limit must establish good cause for exceeding the limit and be

[11] Either party may ask PERB's OGC to alter or extend the posting period, require further notice methods, or otherwise supplement or adjust this Order to ensure adequate notice. Upon receipt of such a request, OGC shall solicit input from all parties and, if warranted, provide amended instructions to ensure adequate notice. (*City and County of San Francisco* (2023) PERB Decision No. 2858-M, p. 19.)

filed with the Board itself and served on all parties no later than five days before the statement of exceptions is due. PERB Regulation 32300, subdivision (a), is specific as to what the statement of exceptions must contain. Non-compliance with the requirements of PERB Regulation 32300 will result in the Board not considering such filing, absent good cause. (PERB Reg. 32300, subd. (d).)

The text of PERB's regulations may be found at PERB's website: www.perb.ca.gov/laws-and-regulations/.

A. Electronic Filing Requirements

Unless otherwise specified, electronic filings are mandatory when filing appeal documents with PERB. (PERB Reg. 32110, subd. (a).) Appeal documents may be electronically filed by registering with and uploading documents to the "ePERB Portal" that is found on PERB's website: https://eperb-portal.ecourt.com/public-portal/. To the extent possible, all documents that are electronically filed must be in a PDF format and text searchable. (PERB Reg. 32110, subd. (d).) A filing party must adhere to electronic service requirements described below.

B. Filing Requirements for Unrepresented Individuals

Individuals not represented by an attorney or union representative, are encouraged to electronically file their documents as specified above; however, such individuals may also submit their documents to PERB for filing via in-person delivery, US Mail, or other delivery service. (PERB Reg. 32110, subds. (a) and (b).) All paper documents are considered "filed" when the originals, including proof of service (see below), are actually received by PERB's Headquarters during a regular PERB

business day. (PERB Reg. 32135, subd. (a).) Documents may be double-sided, but must not be stapled or otherwise bound. (PERB Reg. 32135, subd. (b).)

The Board's mailing address and contact information is as follows:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street, Suite 200
Sacramento, CA 95811-4124
Telephone: (916) 322-8231

C. Service and Proof of Service

Concurrent service of documents on the other party and proof of service are required. (PERB Regs. 32300, subd. (a), 32140, subd. (c), and 32093.) A proof of service form is located on PERB's website: www.perb.ca.gov/about/forms/. Electronic service of documents through ePERB or e-mail is authorized only when the party being served has agreed to accept electronic service in this matter. (See PERB Regs. 32140, subd. (b), and 32093.)

D. Extension of Time

An extension of time to file a statement of exceptions can be requested only in some cases. (PERB Reg. 32305, subds. (b) and (c).) A request for an extension of time in which to file a statement of exceptions with the Board itself must be in writing and filed with the Board at least three calendar days before the expiration of the time required to file the statement of exceptions. The request must indicate good cause and, if known, the position of each of the other parties regarding the request. The request shall be accompanied by proof of service of the request upon each party. (PERB Reg. 32132.)

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-1365-H, *Teamsters Local 2010 v. Regents of the University of California (San Diego)*, in which all parties had the right to participate, it has been found that the Regents of the University of California violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571, subdivisions (a) and (c) at its University of California, San Diego Health Sciences facilities (UCSD Health). The University violated HEERA by unilaterally changing how it processed equity salary review requests during an accretion. This practice also discriminated against newly accreted employees.

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

A. CEASE AND DESIST FROM:

1. Unilaterally changing its policies or practices for processing and approving salary equity review requests.

2. Discriminating against employees whose job classifications were accreted into a bargaining unit represented by Teamsters Local 2010 (Local 2010).

3. Interfering with employees' right to be represented by Local 2010.

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

Consistent with the directions in this proposed decision, process in good faith equity review requests for any Administrative Officer 2 at UCSD Health who was denied the opportunity to participate in the equity review request process from October 5, 2020 to February 28, 2022.

Dated: _____ Regents of the University of California

By: _____
Authorized Agent

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

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, Sacramento Regional Office, 1031 18th Street, Sacramento, CA, 95811-4124.

On May 30, 2023, I served the Cover Letter and Proposed Decision regarding Case No. LA-CE-1365-H on the parties listed below by

____ I am personally and readily familiar with the business practice of the Public Employment Relations Board for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Sacramento, California.
____Personal delivery.
_X_Electronic service (e-mail).

Susan Garea, Attorney
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Jennifer Achtert, Principal Counsel
University of California
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Oakland, CA 94607
Email: jennifer.achtert@ucop.edu

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on May 30, 2023, at Sacramento, California.

Maryna Maltseva
(Type or print name)

Maltseva M.
(Signature)