STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

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

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

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

DECISION

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

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

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

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

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

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

BACKGROUND

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

Staffing Ratio Proposal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Request for PCS Information

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Threatened Strike

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

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

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

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

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

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

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

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

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

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

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

Unfair Practice Charges and Strike Injunction

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

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

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

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

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

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

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

Proposed Decision

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

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

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

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

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

UC's Exceptions

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

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

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

CNA's Response to Exceptions

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

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

DISCUSSION

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

1. Staffing Ratio Proposal

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

a. Scope of Representation

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

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

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

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

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

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

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

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

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

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

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

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

b. Refusal to Bargain

In determining whether an employer has violated HEERA section 3571, subdivision (c) by refusing or failing to meet and confer in good faith with an exclusive representative, PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.) An absolute refusal to meet and confer on a subject within the scope of representation is a per se violation. (*Sierra Joint Community College District* (1981) PERB Decision No. 179.) PERB has found an absolute refusal to bargain when the employer failed to provide the union with any rationale for its proposal to maintain the status quo. (*San Mateo County Community College District* (1993) PERB Decision No. 1030.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Request for PCS Information

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

a. Necessary and Relevant Information

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

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

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