In a February 2, 2010, PERB decision, the University of California (“UC”) prevailed over the Californian Nurses Association (“CNA”) in a significant case with implications for all California public agencies.1 PERB decided that: (1) UC lawfully negotiated over a nurse-staffing plan; (2) UC was excused from providing all the information requested by CNA; (3) CNA engaged in an unlawful pre-impasse strike threat; and, most surprisingly, (4) CNA was responsible for monetary damages directly resulting from CNA’s strike threat.2

**Background: Strike Threat And Refusal To Bargain Charges**

The factual background is fairly simple. After receiving UC’s last, best, and final offer (“LBFO”) on CNA’s expired contract for 9,000 nurses at UC medical centers in San Francisco, Davis, Los Angeles, Irvine, and San Diego, the union notified UC that it would conduct a 24-hour strike on the basis that UC had committed unfair labor practices by negotiating in bad faith and failing to provide requested information. To support its contention that UC’s unfair labor practice provoked CNA’s planned strike, CNA filed an unfair practice charge claiming, among other allegations, that UC refused to negotiate over nurse-to-patient staffing ratio and refused to provide the union with requested information regarding the patient identification and staffing system.

UC filed its own unfair practice charge, claiming that by threatening to strike before the parties completed the impasse procedure, CNA committed a per se violation of its duty to bargain.

PERB obtained a court order prohibiting the strike, and CNA did not strike. Eventually, after completing the HEERA impasse procedures (mediation and factfinding), UC and CNA settled their contract dispute.
In the initial consolidated hearing, the administrative law judge ("ALJ") ruled that CNA's strike threat was lawful because UC’s unfair labor practices had provoked the strike. In a 50 page decision, PERB overturned the ALJ and provided guidance on a number of legal issues at the center of many local agency negotiations. For that reason, we review PERB's decision here in more detail than we would in most of our CALPELRA Alerts.

**CNA’s Staffing Ratios Proposal Was Within The Scope Of Bargaining**

Staffing and service levels are generally management prerogatives outside the scope of bargaining. In this case, CNA’s staffing proposal incorporated the entire text of the state statute and the California Code of Regulations regarding specific nurse-to-patient staffing ratios. During negotiations, UC gave two responses to CNA’s staffing proposal: UC questioned whether the proposal was within the scope of representation and consistently stated that it would not agree to the proposal because UC did not want state law and regulations to be interpreted by an arbitrator under the grievance-arbitration mechanism.

PERB, citing its prior decisions, determined that the nurse-to-patient ratio for each shift was really a workload proposal. As such, it did not interfere with UC’s managerial prerogative to determine staffing levels at each hospital, because only the employer could determine how many patients were admitted to a particular hospital. PERB’s distinction is similar to the court of appeal decision, *City of Richmond*, ruling that the level of service to the public, i.e., firefighter staffing throughout the entire city, was a management prerogative, but the staffing of each fire vehicle might raise issues of safety and workload.

In addition, even though the proposal included the statutory provisions and California regulations verbatim, PERB decided that a party is free to make a proposal that includes verbatim statutory provisions covering a subject of bargaining. In addition, because CNA proposed to make those provisions subject to the contract’s grievance-arbitration provision, the union was lawfully proposing something more generous than the statutory floor, and therefore the proposal was within the scope of bargaining.

**UC Engaged In Lawful Hard Bargaining, Not A Refusal To Bargain**

On the other hand, when the UC negotiator refused to agree to the staffing-ration proposal, and consistently insisted in no change to the contract in this area, PERB determined that UC had engaged in lawful “hard bargaining,” not an outright refusal to bargain. PERB cited previous cases that distinguished between a refusal to bargain because the matter was outside the scope of bargaining, versus “hard bargaining” where the employer's proposal to maintain the status quo was supported by rational arguments that were communicated during bargaining. Good faith negotiations do not require yielding to positions fairly maintained.
UC Did Not Unlawfully Refuse To Provide Information Requested By CNA

CNA repeatedly requested information on how the hospitals determined their staffing ratios. Management refused to provide this information because it required the disclosure of proprietary software of third party vendors.

Because this information was “necessary and relevant” to the union’s proposal on staffing ratios, PERB determined that the requested information was presumptively relevant and UC would have to provide the information, unless UC cited “justifiable circumstances.”

PERB excused UC because the information was controlled by a third party in a business relationship with UC, and because UC made a good faith effort to obtain the information from the third party vendor who refused to supply the proprietary information.

CNA Engaged In An Unlawful Strike Threat And Is Subject To Monetary Damages

PERB’s decision finding CNA’s strike threat unlawful involved a number of distinct elements, some of which are important to other public entities contemplating unilateral adoptions during the current economic crisis.

1. CNA’s Public Health Care Strike Threat Was Not Unlawful Per Se

UC contended that any strike against a public health institution was unlawful. PERB rejected this contention, stating that HEERA does not prohibit strikes, and that PERB would decide on a case-by-case basis whether a strike against a public health care institution would pose an imminent threat to public health or safety.

2. A Strike Threat Itself Can Be An Unfair Practice

Partially following prior decisions, PERB reestablished that a strike threat itself, prior to the exhaustion of the impasse procedures, will constitute an unfair practice if the threat and preparations were intended to place pressure on the employer to make economic concessions during bargaining. Put another way, if the strike was threatened to protest unfair practices (and not to put pressure on the employer during negotiations), then the strike could be lawful.

3. CNA’s Strike Threat Was Not Provoked By UC’s Unfair Practices

Because the union could not prove that UC committed an unfair practice, it could not prove that the alleged unfair practice actually provoked the strike. Further, PERB found that the union’s strike motivation was for economic gain, not to protest unfair practices.
4. **PERB Can Award Make Whole Damages For Unlawful Strike Activity**

UC asked for damages incurred as a result of planning for the threatened strike. CNA contended that PERB did not have authority to levy damages against the union for a threatened strike. PERB determined, under the California Supreme Court and NLRA decisions, expenses necessarily incurred or economic harm suffered as a direct result of an unlawful strike activity could be assessed against a union. This does not involve punitive or emotional distress damages.

Finally, PERB provided policy justification for assessing damages against a union’s pre-impasse strike. PERB noted that employers are subject to the penalty of reinstatement of status quo with back pay for committing unfair practices during the impasse procedure. Public employers do not have defenses against union violations of the impasse procedure, and assessing damages is an attempt to balance the power during the impasse process.

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**SIGNIFICANCE AND SUMMARY**

During this economic crisis, public employers need to be reminded of the key elements of this case…

- Staffing levels are a management prerogative, but workload is a mandatory subject of bargaining;
- Neither party need make a concession – “hard bargaining,” as compared to straight refusal, falls within good faith as long as the party supports the proposal by rational positions at the table;
- Refusal to provide “relevant and necessary” information for bargaining is a per se unfair practice, and will only be excused if the employer makes a good faith effort to provide the information; and the mechanics of providing the information are also a subject of negotiations;
- Non-safety unions have a right to strike upon completion of the impasse procedures at the same time an employer has a right to unilaterally adopt its LBFO;
- Threatening strike before the completion of the established impasse procedures is an unfair practice;
- And now, unions that threaten a strike during impasse procedure may be assessed damages based on expenses resulting from the strike threat.

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2. Statewide unions closely followed this case; six different unions filed amicus curiae briefs in support of the California Nurses Association.
4. PERB citing *NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d. 229, 231.
Current Academy Schedule

March 5, 2010
Labor Relations Academy 6
Bargaining Your Way Through Economic Crisis
CALPELRA Offices (Exponent Building), Menlo Park, California

March 19, 2010
Labor Relations Academy 3
The Negotiations Process
CALPELRA Offices (Exponent Building), Menlo Park, California

April 9, 2010
NEW! Labor Relations Academy 7
Impasse And Unilateral Adoption During Economic Crisis
CarrAmerica Conference Center, Pleasanton, California

June 11, 2010
Labor Relations Academy 1
The Foundation Of Labor Relations
CarrAmerica Conference Center, Pleasanton, California

November 15, 2010
Labor Relations Academy 3
The Negotiations Process
Portola Hotel And Spa, Monterey, California

November 16, 2010
Labor Relations Academy 1
The Foundation Of Labor Relations
Portola Hotel And Spa, Monterey, California

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